[2016] UKFTT 746 (TC)

TC05473

Appeal number: TC/2015/06833

CORPORATION TAX – research & development relief – R&D tax credit – Part 13 CTA 2009 - subcontractor expenditure – deferred payments to subcontractor – whether valid claim made – whether claim capable of amendment – whether subsequent payments eligible

FIRST-TIER TRIBUNAL
TAX CHAMBER

GAS RECOVERY AND RECYCLE LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: Judge Peter Kempster
Mr David Batten

Sitting in public at The Royal Courts of Justice, Strand, London on 1 September 2016

Mr Simon Warne (Crowe Clark Whitehill LLP) for the Appellant

Ms Jane Hodge (HMRC Appeals Unit) for the Respondents

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DECISION

1. The Appellant appeals against a closure notice issued by the Respondents ("HMRC") on 16 June 2015, upheld by an internal review dated 22 October 2015, whereby the Appellant's corporation tax return for the accounting period ended 31 March 2013 was adjusted so as to reduce the amount claimed for research and development ("R&D") relief.

Law

2. The code governing R&D relief is contained in Part 13 Corporation Tax Act 2009. It was considered (in its previous manifestation as sch 20 Finance Act 2000) by the High Court in *Gripple Ltd v RCC* [2010] STC 2283 where Henderson J stated (at [12]): "… the provisions form a detailed and meticulously drafted code, with a series of defined terms and composite expressions, and a large number of carefully delineated conditions, all of which have to be satisfied if the relief is to be available."

3. For present purposes much of the legislative detail may be summarised, as there is no dispute as to most of the applicable law.

4. Chapter 2 of Part 13 concentrates on small or medium-sized enterprises ("SMEs"). It is agreed that the Appellant is an SME.

5. An SME is entitled to a special corporation tax ("CT") relief as a deduction from its trading profits ("the Additional Deduction") for an accounting period if: it is trading and is a going concern (which here are agreed); it makes a claim (discussed later); and "the company has qualifying Chapter 2 expenditure which is allowable as a deduction in calculating for corporation tax purposes the profits of the trade for the period." (s 1044(5)). For the relevant tax year the amount of the Additional Deduction was 125% of the qualifying Chapter 2 expenditure.

6. The Additional Deduction is (as its name implies) over and above the normal CT deduction available to a trading company for its business expenditure – what we shall call "the normal deduction". Applicable accounting practice (it was agreed) is for the R&D expenditure (even if it is not of a capital nature) to be provided in the balance sheet and then amortised to the profit and loss account on a basis permitted by that accounting practice. A normal deduction is available for the amortised amounts as they are released to the profit and loss account on general principles (ss 46 & 87), but the tax legislation goes further than this and allows a company to choose to take a normal deduction for the unamortised balance (s 1308). Thus a normal deduction is available (at the company's choice) even for the unamortised amount remaining in the balance sheet. There is provision to prevent a double deduction (ie a taxpayer taking the s 1308 deduction cannot then take a further deduction for amounts subsequently amortised).

7. R&D relief extends to contracted out R&D as well as in-house R&D (s 1039(3)(a)). For SMEs who contract out the R&D, s 1051 defines a company's

"qualifying Chapter 2 expenditure" as being "its qualifying expenditure on contracted out research and development (see section 1053)". Section 1053 provides:

5 10 15 20 25 30 35 40

"**Qualifying expenditure on contracted out R&D**

(1) A company's "qualifying expenditure on contracted out research and development" means expenditure—

(*a*) which is incurred by it in making the qualifying element of a sub-contractor payment (see sections 1134 to 1136), and

(*b*) in relation to which each of conditions A, C and D is met.

(2) Condition A is that the expenditure is attributable to relevant research and development undertaken on behalf of the company.

(3) …

(4) Condition C is that the expenditure is not incurred by the company in carrying on activities which are contracted out to the company by any person.

(5) Condition D is that the expenditure is not subsidised (see section 1138).

(6) See sections 1124, 1126 to 1126B and 1132 for provision about when particular kinds of expenditure are attributable to relevant research and development."

8. It is agreed that all the three conditions A, C & D are satisfied. In relation to s 1053(1)(a), it is agreed that the relevant provision is s 1136 which provides:

"**Qualifying element of sub-contractor payment: other cases**

(1) This section applies if—
(*a*) a company makes a sub-contractor payment,
(*b*) the company and the sub-contractor are not connected persons, and
(*c*) no election is made under section 1135 [connected persons].

(2) The qualifying element of the sub-contractor payment is 65% of the sub-contractor payment."

9. It is agreed that the Appellant is not connected with the sub-contractor. As to "sub-contractor payment", s 1133 provides:

"**Sub-contractor" and "sub-contractor payment"**

(1) In this Part a "sub-contractor payment" means a payment made by a company to another person ("the sub-contractor") in respect of research and development contracted out by the company to that person.

(2) Sections 1134 to 1136 apply if a company makes a sub-contractor payment.

(3) They apply for the purpose of determining the qualifying element of the payment for the purposes of section 1053(1)(a), …"

10. An important further incentive is offered by way of an "R&D Tax Credit": ss 1054-1062. In outline, if a company qualifies for an Additional Deduction and has unrelieved CT losses then - subject to conditions which (save for the point in dispute) it is agreed are met here – that loss can (on a claim by the company) be "surrendered" to HMRC in return for a cash payment equal to (in the relevant period) 11% of that loss. In effect, the SME can choose that rather than wait to use the loss against future CT profits, it can monetise or "cash-in" the relief at the 11% conversion rate.

11. As noted above, both the Additional Deduction and the R&D Tax Credit must be *claimed* by the company (ss 1044(6) & 1054(2)). Part IXA sch 18 FA 1998 contains the relevant provisions:

> **"83A Introduction**
>
> This Part of this Schedule applies to—
>
> …
>
> (*b*) claims for R&D tax relief under Part 13 [CTA 2009].
>
> **83B Claim to be included in company tax return**
>
> (1) A claim to which this Part of this Schedule applies must be made by being included in the claimant company's company tax return for the accounting period for which the claim is made.
>
> (2) It may be included in the return originally made or by amendment.
>
> **83C Content of claim**
>
> A claim to which this Part of this Schedule applies must specify the amount of the credit or relief claimed, which must be an amount quantified at the time the claim is made.
>
> **83D Amendment or withdrawal of claim**
>
> A claim to which this Part of this Schedule applies may be amended or withdrawn by the claimant company only by amending its company tax return.
>
> **83E Time limit for claims**
>
> (1) A claim to which this Part of this Schedule applies may be made, amended or withdrawn at any time up to the first anniversary of the filing date for the company tax return of the claimant company for the accounting period for which the claim is made.
>
> (2) The claim may be made, amended or withdrawn at a later date if an officer of Revenue and Customs allows it."

12. The "filing date for the company tax return of the claimant company for the accounting period for which the claim is made" is generally twelve months after the end of the accounting period: para 14 sch 18 FA 1998.

Facts

13. In 2009 the Appellant contracted with an unconnected third party (Microgas Systems Limited - "the Subcontractor") in relation to certain R&D activities.

14. In the Appellant's accounts for the year ended 31 March 2013 it recorded (in Note 3) intangible fixed asset additions of £1,262,434, of which £1,112,434 related to the Subcontractor contract. No amortisation was deducted. The Appellant recorded a loss for the year.

15. The Appellant filed its corporation tax return for the accounting period ended 31 March 2013 on 12 March 2014. In the computation (in Note C1) it took (what we have referred to as) a normal CT deduction for capitalised revenue expenditure – ie a s 1308 deduction – of £723,082. It also claimed an Additional Deduction of £903,852, being 125% of the s 1308 deduction. (There was also £68,099 Additional Deduction claimed in relation to other expenditure which is not in dispute.) It then surrendered those losses (£723,082 plus £903,852) and claimed (in Note B1) an R&D Tax Credit at the statutory rate of 11% (being £178,963). (Again, the total R&D Tax Credit claimed was a larger amount, the extra part not being in dispute.)

16. Of the £1,112,434 Subcontractor contract amount, none was paid by the Appellant to the Subcontractor by 31 March 2013. £20,833 was paid on 9 February 2015 ("the First Payment"). £104,000 was paid on 30 March 2016 ("the Second Payment"). £80,000 was paid in June 2016.

17. As stated above, no amortisation of the intangible fixed assets was deducted in the accounts for the year ended 31 March 2013. No amortisation was deducted in the accounts for the year ended 31 March 2014; £42,081 amortisation was deducted in the accounts for the year ended 31 March 2015.

Respondents' case

18. Ms Hodge for HMRC submitted as follows.

19. In *Gripple* Henderson J stated (at [12]):

> "… I would, however, make the general point that the provisions form a detailed and meticulously drafted code, with a series of defined terms and composite expressions, and a large number of carefully delineated conditions, all of which have to be satisfied if the relief is to be available. The schedule runs to 26 paragraphs, and occupies ten pages in Tolley's Yellow Tax Handbook for 2005–06. I emphasise this point because one of Mr Gordon's submissions for Gripple is that the schedule evinces a general intention to provide enhanced relief for expenditure on R & D, and that a generous construction should where possible be adopted in order to further that general aim. I am unable to accept this submission. It seems to me, on the contrary, that a detailed and prescriptive code of this nature leaves little room for a purposive construction, and there is no substitute for going through the detailed conditions, one by one, to see if, on a fair reading, they are satisfied. It also needs to be remembered, in this context, that the relief is a generous one, which grants a deduction for notional

> expenditure which has not actually been incurred. Even if the relief is not available, there will be nothing to prevent the company from deducting its actual R & D expenditure in full in the computation of its trading profits, provided only that the normal 'wholly and exclusively' test is satisfied."

5 20. Here, the Appellant sought to claim relief on subcontracted R&D where no payment had been made to the Subcontractor in the accounting period ended 31 March 2013. HMRC did not challenge the normal CT deduction in the amount chosen by the taxpayer pursuant to s 1308. However, HMRC did challenge the Additional Deduction claimed. That challenge was on three grounds:

10 (1) The Appellant must have made payment to the Subcontractor in order to obtain relief for the Additional Deduction.

(2) The Appellant is out of time to make a valid claim in respect of its 2013 CT return for the payments it has made (the First Payment and the Second Payment), and any future payment it makes to the Subcontractor.

15 (3) The appeal should not be left open to allow relief for later payment to the Subcontractor.

Ground 1 – No payment

21. The legislation was unambiguous. Simply, and on the Appellant's own admission, there was no "payment made by a company to another person" in the 20 accounting period ended 31 March 2013, and so there was no "sub-contractor payment" within s 1133. Accordingly, there was no "qualifying element" within s 1136, and thus no "qualifying expenditure" within s 1053. No Additional Deduction was available under s 1044. Further, no R&D Tax Credit was available by reference to the non-existent Additional Deduction.

25 22. In fact, on 14 September 2015 HMRC paid R&D Tax Credit of £3,351.56 to the Appellant in respect of the First Payment. However, HMRC submit that this was a mistake and HMRC's position is that the whole claim in relation to the Subcontractor expenditure should have been disallowed. HMRC have apologised to the Appellant for this mistake and explained that HMRC will not (if the Tribunal accepts HMRC's 30 arguments) claw back the £3,351.56 R&D tax credit.

23. The First Payment and Second Payment passed the payment test in s 1133 on 9 February 2015 and 30 March 2016 respectively. Any relief which flows from those payments will be available in later accounting periods.

Ground 2 – Out of time

35 24. The claims made in the CT return for the accounting period ended 31 March 2013 for Additional Deduction and R&D Tax Credit were invalid because neither relief was available (Ground 1 above).

25. A claim (or revised claim) could be made by an amendment to that return, as permitted by para 83B(2) sch 18 FA 1998. The deadline for such an amendment was

the first anniversary of the return filing date: para 83E(1). Here, the deadline was 31 March 2015.

26. On 10 July 2015 the Appellant informed HMRC that it had made the First Payment on 9 February 2015. Despite the fact that the First Payment was made before 31 March 2015, when the time limit for making a claim for this accounting period expired, this was the first notification from the Appellant that part of the Subcontractor fees had been paid. By then it was too late for the Appellant to make a claim (outside of the late claim procedure in para 83E(2), which is not in point in this appeal). As already explained, HMRC should not have accepted this as a valid claim but will not claw back the R&D tax credit they paid.

27. On 7 April 2016 the Appellant informed HMRC that it had made the Second Payment on 30 March 2016. On 7 April 2016 the Appellant was out of time to make claims for R&D relief and R&D tax credit for the accounting period ended 31 March 2013 and to amend its 2013 CT return.

28. Whilst no claim has been received at this stage, there is scope for the Appellant to make a claim (as long as it is received by HMRC by 31 March 2017) in respect of the First and Second Payments for a later accounting period.

29. The Appellant seems to suggest that it can make a placeholder or contingent claim for the accounting period ended 31 March 2013 and wait for a specific condition to be satisfied so that the claim will, at an indeterminate later date, become a claim made within the 2013 return and within the time limit allowed for such a claim to be made. There is no statutory authority for contingent claims for R&D tax relief. R&D claims must be quantified (para 83C), can only be made when the conditions for the claim to be valid have been met, and must be made within the clear time limits. There is no evidence that the Appellant's claim was made on 12 March 2014 (when the CT return was filed) with the intention of putting the Appellant in a position to claim R&D relief and R&D Tax Credit at an unspecified later date or dates. The claim was quantified and included a request for payment of an amount which includes all of the R&D Tax Credit relating to the Subcontractor expenditure. Statutory interest would run on the full amount of the claim from the filing date for the 2013 return (s 826(1)(d) and (3A) ICTA 1988) in the event of any delay in payment by HMRC of the R&D Tax Credit.

30. HMRC believe all the above is fully in accordance with their published guidance on R&D tax relief matters.

Ground 3 – Not to keep open

31. HMRC do not agree with the Appellant's contention that the enquiry into the return for the accounting period ended 31 March 2013 should have been left open. HMRC issued the closure notice in accordance with their view of the legislation and this has enabled the Appellant to resolve the dispute by notifying its appeal against the closure notice to the Tribunal. Leaving the enquiry open would not have changed the time limits for the Appellant to make a valid claim.

32. The Tribunal has all the information it needs to determine the appeal. The CT self-assessment regime is intended to give finality to both parties once an enquiry has been closed. Keeping the appeal (or the enquiry) open for an indefinite period to accommodate any possible future payments the Appellant may make to the Subcontractor would give the Appellant, who made an incorrect claim, an advantage over other companies who made a correct claim but have not had an enquiry into their returns.

Appellant's case

33. Mr Warne for the Appellant submitted as follows.

34. The R&D activity undertaken by the Appellant related to the recovery and recycling of gases (particularly argon) used in the manufacture of solar panels. It was exactly the sort of innovation that was encouraged by the R&D tax relief system and, despite many difficulties, the Appellant expects to be able to bring the developed technology to the market. HMRC had agreed that all conditions for the relief were met, save that relating to payment of the relevant expense. The reason why the Subcontractor expenditure had not been paid was simply lack of cash at the relevant time.

35. The Appellant did not dispute that there was a payment requirement for contracted out R&D. However, it was disputed that amounts paid after the statutory time limit for a claim do not qualify for the relief. It was incorrect that the payment condition must be met when the claim is made. A claim could be made for expenditure for which the payment condition is subsequently met, and the claim becomes good once payment is made. There was no statutory basis for limiting relief to expenditure paid by the deadline for claiming the relief.

36. HMRC's published view (CIRD 82100) was (emphasis added):

> "Where the underlying legislation requires not only that there be expenditure, but also payment, this means that the amount must actually be paid. While the payment in these circumstances need not have been made by the end of the accounting period in which the expenditure is shown, it must have been made before the claim to R&D tax relief can be valid. This approach does not alter the time limits for making a claim, but it does mean that *the claim cannot be accepted before payment is made*."

37. Thus HMRC had acknowledged that whilst a claim cannot be accepted before payment has been made, a claim made before payment may be accepted once the payment condition is satisfied. There was no indication that the relief only applies to payments made within the time limit for making the claim, and there was nothing in the legislation to support that notion. HMRC can accept or deny a claim made late. There was no tax policy reason why the accounting measure of when expenditure was incurred should act to deny relief for expenditure that was paid. The relief was generous, so it was understandable that the legislation required the expense to be both incurred and paid. However, HMRC had read into the two requirements a restriction that simply did not exist, which was an aggressive stance. Payments after 31 March

2015 are valid and should be relieved; there was no suggestion of trying to claim double relief.

38. *Gripple* was an unusual case, involving payments of staffing costs.

39. It would have been open to HMRC to have allowed their enquiry into the 2013 return to have remained open to allow time for the payment issue to be resolved, rather than issue the closure notice in June 2015. An equitable solution would be to delay determination of the appeal until payment had been made, or it is reasonably clear that payment would not occur on an agreed future date.

Consideration and Conclusions

40. Our decision is that the Appellant is not entitled to the R&D relief claimed in its corporation tax return for the accounting period ended 31 March 2013, and thus its appeal must be dismissed. In coming to that conclusion we have adopted a view of the relevant legislation which is different from that taken by HMRC and stated in their published manuals. Therefore we have set out our views in detail below, and (in case we are wrong in our interpretation) have also stated our conclusions on the alternative basis that HMRC's interpretation is correct – even on that alternative basis we would dismiss the appeal, for the reasons given below.

41. We start with the observations of Henderson J in *Gripple* (at [12]). The Judge rejected the contention that Part 13 should be given a "generous construction", and stated:

> "… a detailed and prescriptive code of this nature leaves little room for a purposive construction, and there is no substitute for going through the detailed conditions, one by one, to see if, on a fair reading, they are satisfied. It also needs to be remembered, in this context, that the relief is a generous one, which grants a deduction for notional expenditure which has not actually been incurred. Even if the relief is not available, there will be nothing to prevent the company from deducting its actual R & D expenditure in full in the computation of its trading profits, provided only that the normal 'wholly and exclusively' test is satisfied."

42. The rules for qualification by SMEs for the Additional Deduction are set out in s 1044:

> "**Additional deduction in calculating profits of trade**
> (1) A company is entitled to corporation tax relief for an accounting period if it meets each of conditions A to D.
> (2) Condition A is that the company is a small or medium-sized enterprise in the period.
> *(3)* …
> (4) Condition C is that the company carries on a trade in the period.
> (5) Condition D is that the company has qualifying Chapter 2 expenditure which is allowable as a deduction in calculating for corporation tax purposes the profits of the trade for the period.

> (6) For the company to obtain the relief it must make a claim. See section 1046 (which prevents a company from making a claim if it is not a going concern).
> (7) The relief is an additional deduction in calculating the profits of the trade for the period.
> (8) The amount of the additional deduction is 125% of the qualifying Chapter 2 expenditure.
> (9) …
> (10) For the meaning of "qualifying Chapter 2 expenditure" see section 1051."

43. It is agreed that the Appellant is an SME (Condition A) and is a trader (Condition C) and is a going concern (s 1044(6)). We are satisfied that the entry in Note C1 to the Appellants CT computation accompanying its CT return for the accounting period ended 31 March 2013 was a claim for the Additional Deduction relief (s 1044(6)); that claim – so far as it relates to the disputed item - was in the amount of £903,852 (being 125% of £723,082). As mentioned above, there was other expenditure in the period which is not contentious and, to avoid confusion, we do not refer further to the undisputed items, only the item in dispute. The dispute is whether the £723,082 constitutes "qualifying Chapter 2 expenditure" (Condition D), and s 1044(10) takes us to s 1051.

44. The code grants relief for contracted out R&D as well as in-house R&D (s 1039(3)(a) and s 1043(1)). That is accommodated within s 1051, where different tests are adopted for the two types in quantifying the qualifying Chapter 2 expenditure:

> "**Qualifying Chapter 2 expenditure**
> For the purposes of this Part a company's "qualifying Chapter 2 expenditure" means—
> (*a*) its qualifying expenditure on in-house direct research and development (see section 1052), and
> (*b*) its qualifying expenditure on contracted out research and development (see section 1053)."

45. Both the definition adopted in s 1052 for in-house R&D definition adopted in s 1053 for contracted out R&D contain a number of conditions. One condition in s 1053 is that the expenditure "is incurred by it in making the qualifying element of a sub-contractor payment (see sections 1134 to 1136)". "Sub-contractor payment" is defined by s 1133 (emphasis added):

> "**Sub-contractor" and "sub-contractor payment"**
>
> (1) In this Part a "sub-contractor payment" means *a payment made by a company* to another person ("the sub-contractor") in respect of research and development contracted out by the company to that person.
>
> (2) Sections 1134 to 1136 apply *if a company makes a sub-contractor payment*.
>
> (3) They apply for the purpose of determining the qualifying element of the payment for the purposes of section 1053(1)(a), …"

46. The stipulation for a payment to be made is repeated in s 1136 which sets the qualifying element of the payment (on sub-contracted R&D) as being 65% of the payment (again, emphasis added):

> "**Qualifying element of sub-contractor payment: other cases**
>
> (1) This section applies if—
>
> (*a*) *a company makes a sub-contractor payment*,
>
> (*b*) the company and the sub-contractor are not connected persons, and
>
> (*c*) no election is made under section 1135 [connected persons].
>
> (2) The qualifying element of the sub-contractor payment is 65% of the sub-contractor payment."

47. The parties agreed, and we concur, that "payment" should be given its ordinary meaning. The Appellant has made three sub-contractor payments: (i) £20,833 was paid on 9 February 2015 ("the First Payment"); (ii) £104,000 was paid on 30 March 2016 ("the Second Payment"); and (iii) £80,000 was paid in June 2016. Importantly, no sub-contractor payment was made by 31 March 2013.

48. This is where we part company from HMRC in their interpretation of the legislation. HMRC's view (which they have followed consistently throughout their enquiry and conclusions, and also in these appeal proceedings) is stated in their published R&D Manual, at CIRD 82100:

> "Where the underlying legislation requires not only that there be expenditure, but also payment, this means that the amount must actually be paid. While the payment in these circumstances need not have been made by the end of the accounting period in which the expenditure is shown, it must have been made before the claim to R&D tax relief can be valid. This approach does not alter the time limits for making a claim, but it does mean that the claim cannot be accepted before payment is made."

49. We do not agree that "the payment … need not have been made by the end of the accounting period in which the expenditure is shown". The Additional Deduction is given "*for an accounting period* if it meets each of conditions A to D": s 1044(1) (emphasis added). Condition D requires qualifying Chapter 2 expenditure deductible "in calculating for corporation tax purposes the profits of the trade *for the period*". That leads onto the requirement in s 1133 for "*a payment made* by a company to another person" (already examined above). We conclude that those provisions taken together, and in the context of the rest of Part 13, give a legislative requirement for a payment to be made in the accounting period for which relief is claimed. We find nothing in Part 13 to suggest that relief should be granted for payments made after the end of the relevant accounting period – whether within the period allowed for amendment of a claim (as contended by HMRC) or indefinitely (as contended by the Appellant). If that was the intention of the legislation then it would have been so provided in the "detailed and prescriptive code". We consider that is (using the terminology adopted in *Gripple*) the fair reading of the detailed conditions.

50. HMRC's interpretation appears to be influenced by the ability of a taxpayer to amend a claim within the time limit given by para 83E sch 18 FA 1998. We do not think that affects the interpretation we have adopted. The claim for the Additional Deduction (and the R&D Tax Credit) must be "quantified at the time the claim is made" (para 83C). The ability to amend a claim subsequently (within the permitted time period) is to facilitate the substitution of a different figure which could have been made in the original claim. It does not, in our view, permit the substitution of a figure which could not have been quantified at the time the original claim was made – for example, because payments were made only after that time.

51. We conclude that the claim made in Note C1 to the Appellant's CT computation accompanying its CT return for the accounting period ended 31 March 2013 – so far as it relates to the disputed item - was incorrect. That claim was for an Additional Deduction of £903,852, which could only be made if there had been a "qualifying element of a sub-contractor payment" of £723,082 made by 31 March 2013. In fact, no payments were made by 31 March 2013.

52. We asked Mr Warne for the Appellant how the s 1308 deduction (ie the normal deduction) had been quantified at £723,082, given that the amount incurred in the period (Note 3 to the accounts for the year ended 31 March 2013) was – in relation to the disputed item - £1,112,434, and no amortisation had been made. He explained that £723,082 was claimed as being 65% of the expenditure incurred of £1,112,434 – ie the maximum that could be eligible as the "qualifying element of the sub-contractor payment" pursuant to s 1136. We understand the explanation, however the 65% restriction in s 1136 is not 65% of expenditure incurred, but 65% of sub-contractor payments. To arrive at an Additional Deduction of £903,852 would require a "qualifying element" of £723,082 and thus sub-contractor payments of £1,112,434. In any event, we find that the amount of sub-contractor payments in the accounting period ended 31 March 2013 was Nil; thus the qualifying element was also Nil, and no Additional Deduction was available.

53. The Appellant went on to purport to surrender the loss created by the Additional Deduction and the normal deduction by claiming (in Note B1 to the computation) an R&D Tax Credit of £178,963 (being 11% of the aggregate of £903,852 plus £723,082). The R&D Tax Credit is governed by ss 1054 and 1055, which provide (so far as relevant to the current case):

> "**s 1054 Entitlement to and payment of tax credit**
> (1) A company is entitled to an R&D tax credit for an accounting period if it has a Chapter 2 surrenderable loss in the period (see section 1055).
> (2) For the company to obtain an R&D tax credit in respect of all or part of the Chapter 2 surrenderable loss it must make a claim.
> …
>
> **s 1055 Meaning of "Chapter 2 surrenderable loss"**
> (1) For the purposes of this Chapter a company has a "Chapter 2 surrenderable loss" if in an accounting period—
> (*a*) it obtains an additional deduction under section 1044 in calculating the profits of a trade and it makes a trading loss in that period in the trade, …"

54. It follows from our earlier conclusion that no Additional Deduction was available, that the condition in s 1055(1)(a) was not satisfied and, therefore, the Appellant did not have a "Chapter 2 surrenderable loss" - so far as relates to the disputed item – in the period. Accordingly, there was no entitlement to an R&D tax credit under s 1054.

55. From those conclusions it follows that we need not address the Appellant's submissions concerning whether the enquiry should not have been closed, or that this appeal should somehow be left in abeyance, pending future payments to the subcontractor.

56. For the above reasons we dismiss the appeal. HMRC invited us to determine the appeal in specific figures. However, we consider that it is difficult for us to confirm exact amounts because (i) the 2013 CT computations included claims in relation to items that are not in dispute as well as those that are the subject of this appeal (see [15] above); (ii) the closure notice states its conclusion by referring to amounts not challenged rather than quantifying the adjustment being made; and (iii) HMRC accept they made a payment in error which they do not intend to correct (see [22] above). Accordingly, we give this decision as a decision in principle, but (we hope) in sufficient detail to enable the parties to agree figures. We grant leave to the parties to apply for a further determination if they are unable to agree figures.

Comments on the appeal if HMRC's interpretation were to be adopted

57. As HMRC based their case on a different interpretation of the legislation and that interpretation is contained in their published guidance, we now consider the case on the basis of HMRC's interpretation. That may be helpful if this case goes further. We emphasise that these comments are *obiter* to our conclusion above that the appeal fails.

58. As already noted, both the Additional Deduction and the R&D Tax Credit must be claimed (ss 1044(6) and 1054(2)), and paras 83A to 83E sch 18 FA 1998 govern the claims:

> (1) The claim must be "included in the claimant company's company tax return for the accounting period for which the claim is made", either originally or by amendment;
>
> (2) It "must specify the amount of the credit or relief claimed, which must be an amount quantified at the time the claim is made".
>
> (3) It can be amended only by amendment of the CT return;
>
> (4) The deadline for making or amending the claim is the first anniversary of the filing date for the CT return; and
>
> (5) HMRC may allow a late claim or amendment.

59. HMRC's interpretation is (as per CIRD 82100): "While the payment in these circumstances need not have been made by the end of the accounting period in which the expenditure is shown, it must have been made before the claim to R&D tax relief

can be valid. This approach does not alter the time limits for making a claim, but it does mean that the claim cannot be accepted before payment is made."

60. On the facts of this case HMRC submitted:

> (1) The claim made in the CT return for the accounting period ended 31 March 2013 for Additional Deduction and R&D Tax Credit was incorrect because no subcontractor payment had been made by 31 March 2013.
>
> (2) However, the claim could be revised by an amendment to the CT return. The deadline for such an amendment was 31 March 2015 – being the first anniversary of the return filing date.
>
> (3) The First Payment was made on 9 February 2015 – ie before the deadline for amendment of the claim. But it was only notified to HMRC on 10 July 2015 – by which date the deadline had expired. The Second Payment was made on 30 March 2016 and notified to HMRC on 7 April 2016 – both dates being after expiry of the deadline for amendment of the claim.
>
> (4) So there was no valid amendment of the claim before the statutory deadline and thus the original claim – which was itself invalid – is unamended and thus fails.

61. The Appellant's position is that the claims made in its 2013 CT return stand good in the amounts claimed, and subsequent payments made simply confirm the reliefs already claimed. A claim could be made for expenditure for which the payment condition is subsequently met, and the claim becomes good once payment is made.

62. We do not accept the Appellant's interpretation of the legislation. We asked Mr Warne for the Appellant what had been expected to happen after the 2013 CT return and computation had been filed on 12 March 2014. He stated that, in his firm's experience, R&D claims were usually subjected to scrutiny by HMRC and so an enquiry into the return was likely – as had happened. We noted, and Mr Warne agreed, that if the CT return had been processed without enquiry then an R&D Tax Credit payment of £178,963 would have been paid by HMRC to the Appellant and, as explained by Ms Hodge, statutory interest would have run on that amount (from the filing date for the 2013 return) in the event of any delay in payment by HMRC of the amount. Thus the Appellant had created a situation where it stood to receive £178,963 even though it knew that at the filing date no subcontractor payments had been made. We consider that cannot have been the legislative intention – that a significant sum could be paid by HM Treasury upfront in the expectation that the taxpayer would make subcontractor payments at some unspecified future dates which would eventually total the original claim. Accordingly, we reject the Appellant's arguments on this point.

63. Hypothetically accepting HMRC's CIRD 82100 interpretation, we agree with the analysis at [60] above and so the Appellant's appeal would fail for those reasons. On that interpretation, payments notified to HMRC by 31 March 2015 would constitute a valid amendment to the R&D claim in the 2013 CT return and thus produce a valid

amended claim; there was no notification by that deadline, so the claim was not validly amended and thus fails.

64. The only other point we would add is that para 83E(2) sch 18 FA 1998 grants a discretion to HMRC to admit a late claim for R&D relief. We asked Ms Hodge about this and she replied that, in accordance with their published policy in Statement of Practice 5 (2001), HMRC would not be minded to exercise that discretion in the circumstances of the current case.

Decision

65. The appeal is DISMISSED.

66. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 7 NOVEMBER 2016