Neutral Citation: [2024] UKFTT 00996 (TC)

Case Number: TC09344

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard remotely

Appeal reference: TC/2023/08841

Coronavirus Job Retention Scheme – whether eligibility requirements are strict – yes – whether HMRC webchat Q & A gave rise to legitimate expectation – no – whether Tribunal has jurisdiction in this appeal to consider that issue in any event – no – appeal dismissed

Heard on: 2 July 2024
Written Submissions: 30 July 2024
22 August 2024
Judgment date: 31 October 2024

Before

TRIBUNAL JUDGE RUDOLF KC
SHAMEEM AKHTAR

Between

EURO LONDON APPPOINTMENTS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Wendy Nauzeer, Accounts Manager, Euro London Appointments Ltd

For the Respondents: Ms Nina Stewart and Ms Agate Lines, litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellants are Euro London Appointments Limited ('Euro'). The Respondents are the Commissioners of His Majesty's Revenue and Customs ('HMRC').

2. This is an appeal to the First-tier Tribunal (Tax Chamber) ('the Tribunal') against a notice of assessment in the (varied) sum of £19,249.12 under paragraph 9 of Schedule 16 of the Finance Act 2020 ('FA'). That notice of assessment arose out of receipt by Euro of coronavirus support payments for three employees under the Coronavirus Job Retention Scheme ('CJRS') which it was said the employees were not eligible for ('the disputed payments').

3. The appeal is brought under the provisions of the Taxes Management Act 1970 ('TMA') which is the mechanism for appealing an assessment such as this that has been incorporated into the FA.

4. HMRC accept, irrespective of the merits of Euro's appeal, the assessed sum should be further varied by the Tribunal to £16,743.42 because of a further review in relation to one employee (who since the assessment has been found to be eligible). They then submit the Tribunal should otherwise dismiss the appeal on the basis that (a) the remaining employees did meet the strict eligibility criteria for the disputed payments over which there is no flexibility and (b) the Tribunal has no jurisdiction to consider 'public law' arguments such as legitimate expectation in the context of the relevant taxing statute(s) (and in any event no such legitimate expectation arises).

5. Euro submit (a) the staff were eligible under the criteria as they were guided by HMRC that they could make the claim and further, or alternatively, (b) they had a legitimate expectation created by HMRC that they could receive the disputed payments and, as a result, it would be unfair for them to be required to pay them back.

6. No suggestion of dishonesty is made against Euro or any of its staff, and we confirm that there can be, and is, none. HMRC assert there was simply a misunderstanding about the requirements of the eligibility criteria in relation to two employees.

PREAMBLE

7. We received a 665-page bundle of documents, legislation and authorities. That bundle included the Notice of Appeal, HMRC's Statement of Case, and a witness statement of Officer Hawes as well as many documents and pieces of correspondence. Additionally, without objection, we allowed HMRC to adduce a supplementary bundle containing HMRC's response to a complaint made by Euro and a transcript of a telephone call dated 1 May 2020 between Wendy Nauzeer and a representative of HMRC.

8. We also received helpful skeleton arguments on both sides.

9. At the conclusion of the hearing on 2 July 2020, which was conducted remotely in the interests of justice, appearing in the lists in the normal way and open to the public, the Tribunal requested further written submissions on the issue of 'public law' arguments and whether this was something that fell within the Tribunal's jurisdiction to consider in this case if we found, as a fact, that a legitimate expectation had in fact been created by HMRC.

10. We were provided with helpful and detailed written submissions from HMRC together with a 257-page bundle, followed by a crisp response by Euro.

11. We are very grateful for the measured and helpful way Ms Nauzeer for Euro; and Ms Stuart and Ms Lines for HMRC who presented their respective cases in writing and orally respectively.

THE FACTS

12. These are our necessary findings of fact for our decision. We have not mentioned everything but we have taken it all into account.

13. Officer Hawes gave evidence adopting her witness statement and providing some further detail. She was cross examined briefly on the general assistance given by Euro over the course of the enquiries being carried out but there was no substantive challenge to her evidence. Officer Hawes was an honest witness who assisted the Tribunal.

14. She outlined her enquiry into claims made regarding three employees which eventually led to her conclusion that the claims should not have been made as the employees were all ineligible meaning Euro should not have been given the CJRS payments. On later review the third employee was in fact eligible due to a transposition error of her first and last names. However, Officer Hawes maintained that the claims for the first ('first') and second ('second') employees, were not ones that should have been made as they did not meet the eligibility criteria.

15. We will continue to use 'first' and 'second' to describe the relevant employees.

16. Wendy Nauzeer for Euro also gave evidence. She was also an honest witness who was did her best to assist the Tribunal. She was cross examined and made concessions as appropriate, whilst standing her ground in relation to other matters. She maintained that she had read the guidance and was familiar with it. Whilst accepting the employer's responsibility to make eligible claims, she told us that a chat with HMRC where she sought to clarify such eligibility meant she believed Euro could so make them.

17. Euro are and have been conscientious employers for several years. They are a recruitment company with permanent and temporary employees. They have all the relevant systems in place. They use the Real Time Information ('RTI') system to inform HMRC about payments made to staff involving PAYE.

18. Euro had a unique identifying number on RTI. As individuals' records can be searched on RTI this allows the viewer to see whom that individual was working for by reference to any individual submission to HMRC.

19. HMRC have another system called Employer Business Service ('EBS'). This date stamps when a RTI submission is made by an employer.

20. On 16 March 2020 Euro started the employment of both first and second, although HMRC have recorded that first had started his employment on 22 March 2020.

21. On 26 March 2020 the government published 'Claim for wage costs through the Coronavirus Job Retention Scheme' ('the guidance') which stated that the CJRS would be open to employers who had registered and started a PAYE payroll scheme prior to 19 March 2020. Euro was such an employer.

22. However, the guidance also stated:

> ***Employees you can claim for***
>
> *<u>Furloughed employees must have been on your PAYE payroll on 28 February 2020</u>, and can be on any type of contract, including:*
>
> - *full-time employees*
> - *part-time employees*
> - *employees on agency contracts*
> - *employees on flexible or zero-hour contracts*

…

Employees hired after 28 February 2020 cannot be furloughed or claimed for in accordance with this scheme. (emphasis added)

23. On, and not before, 26 March (or 30 March 2020 – it simply is not clear which) Euro submitted via RTI first's initial PAYE details for pay date 30 March 2020.

24. On 31 March 2020 Euro submitted via RTI second's initial PAYE details for pay date 31 March 2020.

25. On 15 April 2020 the CJRS was established by the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme Direction) ('the Direction') issued by HM Treasury. This allowed employers (who had a PAYE payroll scheme by 19 March 2020 – as Euro had) to make certain claims consequential upon the effects of the pandemic provided, inter alia, the costs are qualifying costs, and the appropriate information has been given to HMRC in a timely way. The guidance was updated on the same date. It now stated (in relevant part):

Employees you can claim for

You can only claim for furloughed employees that were on your PAYE payroll on or before 19 March 2020 and which were notified to HMRC on an RTI submission on or before 19 March 2020. This means an RTI submission notifying payment in respect of that employee to HMRC must have been made on or before 19 March 2020. Employees that were employed as of 28 February 2020 and on payroll (i.e. notified to HMRC on an RTI submission on or before 28 February) and were made redundant or stopped working for the employer after that and prior to 19 March 2020, can also qualify for the scheme if the employer re-employs them and puts them on furlough. (emphasis added)

26. That scheme through the online portal, known as 'Classic', went live on 20 April 2020 allowing eligible claims for furloughed staff up to 30 June 2020.

27. On 1 July 2020 Classic was extended by the 'Flexible' scheme with the same eligibility until 31 October 2020. On 1 November 2020 the scheme was extended again, becoming known as 'Extension' scheme.

28. Up to 31 August 2021 Euro were paid 19 CJRS claims for between 3 and 42 employees including those for first and second. No questions have been raised or remain about any of the others.

29. Ms Nauzeer had read all the guidance in full (on each occasion) and understood nearly all of it. It was Euro's responsibility to understand the criteria and make eligible claims. Ms Nauzeer was responsible for permanent employee claims; another member of staff at Euro dealt with temporary employees. They discussed the guidance together and employed HMRC tools to calculate the relevant amounts.

30. However, as per the guidance, if there were any queries they could be directed to HMRC's webchat.

31. On 22 April 2020 Ms Nauzeer did precisely that. We must set out the terms of that chat (in largest, pertinent part):

Wendy: 4:38PM

I have an employee that started on the 16th of March, she was furloughed on the 01/04/20. Is she eligible for the furlough funds

Joao: 4:38PM

Welcome to HMRC Webchat. You're speaking with Joao.

> *Wendy: 4:39PM*
>
> *Hi Joao. … . I have already asked the question above, can you follow pls*

Joao: 4:40PM

Hi Wendy, yes you can claim.

> *Wendy: 4:40PM*
>
> *excellent thank you Joao. Appreciated*

(emphasis added)

32. That was the extent of the query. No further details were supplied by Euro in the chat regarding the RTI return timing in the case of second. HMRC's reply was correct as far as it went but on the limited scenario painted to it. Euro did not ask HMRC about the RTI requirement and HMRC's representative did not clarify anything beyond the query.

33. This did not, and could not, replace the guidance Ms Nauzeer had read. It was Euro's responsibility, if there was an aspect of the guidance that was not understood, to clarify this with HMRC specifically and put all its cards on the table about the position. The webchat, unfortunately for all, did not do that. HMRC cannot be criticised for failing to ask on the webchat for more detail; the responsibility was Euro's to be clearer.

34. In cross-examination Ms Nauzeer told us (in relation to second, whom this query was about):

> *I knew I'd RTI'd her on 30 March when she had her first salary. On RTI it shows she was there on 19 March. If asked I would have given the details.*

35. Thereafter Euro made claims.

36. On 23 April 2020 Ms Nauzeer, we accept under very great pressure and *panicking* (as per the chat) as many were at this point and doing her best, engaged HMRC again in webchat. On this occasion she told HMRC she had made an error in the April CJRS claim and asked for assistance in correcting it as it had been underclaimed. HMRC told her it required a higher-level response which could not be resolved on webchat. No further assistance was sought.

37. On 1 May 2020 Ms Nauzeer chased HMRC regarding the payment.

38. On 7 May 2020 HMRC called Euro and spoke to Ms Nauzeer to deal with amending the payment. On that day, within the call, the following exchange took place:

> *Advisor:* *'Coronavirus Job Retention Scheme reimburses employers for costs of furloughed employees rising from health, social, and economic emergency resulting from Coronavirus, HMRC will check your claim and may refuse or recover payment if your claim is not in accordance with HMRC's published guidance, contains or is based on inaccurate information, is paid in error, is fraudulent and not made for the purposes described above', are you alright with that?*
>
> *Ms Nauzeer:* *That's fine, that's perfect.*

39. Ms Nauzeer also confirmed, when asked, that the claim was in accordance with the published guidance and the information provided was correct to the best of her knowledge.

40. On 8 June 2020 there was a call from HMRC to Ms Nauzeer asking how she had found the claims process. Ms Nauzeer confirmed that she believed eligibility was met in relation to all claims. Amongst further topics discussed, HMRC advised her to keep all of her records and calculations in case a check was made.

41. Ms Nauzeer did that and over the course of 16 months, as Officer Hawes accepted, Euro were able to provide all the information needed.

42. On 23 October 2020 Officer Hawes began a compliance check into Euro's claims under CJRS. Over 16 months correspondence was exchanged. Euro, through Ms Nauzeer, cooperated at the maximum level and provided everything asked for by HMRC.

43. On 1 December 2022 a Pre-assessment Letter was sent to Euro confirming the eligibility criteria as per the published guidance and stating, inter alia, that the three employees were not eligible as they had not been reported to HMRC on an RTI return on or before 19 March 2020.

44. On 3 February 2023 the agents appointed by Euro accepted, and we agree, that the RTI return in relation to first and second was after 19 March 2020. It was asserted that as their pay date was 31 March 2020, the RTI return by that date was sufficient to make the claims eligible.

45. On 20 February 2023 HMRC raised assessments for nine claims totalling £14,059.86. That was an error. The sum, on the calculations of HMRC, should have been higher. That was well within four years of the claims under the CJRS which were the subject of the assessment. The assessment was raised as Officer Hawes had formed the view that a taxpayer had received an amount that was not due, and which ought to be recovered by way of chargeability to tax. By law, that chargeability is to income tax, and in Euro's case it is not permitted to be deducted when its corporation tax is being calculated.

46. That view was held by Officer Hawes and was one, given the notification to HMRC on RTI after 19 March 2020 for first and second which it was reasonable for her to hold.

47. On 8 March 2023 Euro replied pointing out that as far as they were concerned HMRC through the webchat on 22 April 2020 (see [31] above) had approved their claims, which would not have been made otherwise.

48. On 17 March 2023 HMRC issued their view of the matter that there was no eligibility for the three employees and offering an independent review. Euro requested that review.

49. On 2 June 2023 HMRC's independent review upheld the view of the matter but corrected the mathematical error so the total of the assessment was £19,249.12. However, that review did not consider the webchat relied upon by Euro as it considered Euro's reliance upon it outside the scope of the review and suggested a complaint be made instead. That complaint was made, which, in the fullness of time, was not upheld by HMRC.

50. Euro remained aggrieved by the outcome of the independent review and on 5 July 2023 submitted an appeal to the Tribunal.

51. On 7 March 2024, having re-reviewed their records, HMRC accepted that the third employee for whom a claim was made was eligible (there had been a transpositional error on the names). HMRC invite the Tribunal to vary the assessment to £16,743.42.

THE LAW

52. We consider the position in relation to eligibility, appeals and legitimate expectation. We remind ourselves that it is for HMRC to show, on the balance of probabilities, the assessment was properly raised. It is then for Euro to show, again on the balance of probabilities, that it is excessive and should be reduced.

53. If legitimate expectation as a stand-alone ground of appeal is to be demonstrated (if the Tribunal has jurisdiction to consider the same) it is for Euro, on the balance of probabilities, to do so.

Eligibility

54. Section 71 and 76 of the Coronavirus Act 2020 ('CA') are in the following terms:

71 Signatures of Treasury Commissioners

> *(1) Section 1 of the Treasury Instruments (Signature) Act 1849 (instruments etc required to be signed by the Commissioners of the Treasury) has effect as if the reference to two or more of the Commissioners of Her Majesty's Treasury were to one or more of the Commissioners.*
>
> *(2) For the purposes of that reference, a Minister of the Crown in the Treasury who is not a Commissioner of Her Majesty's Treasury is to be treated as if the Minister were a Commissioner of Her Majesty's Treasury.*

76 HMRC functions

Her Majesty's Revenue and Customs are to have such functions as the Treasury may direct in relation to coronavirus or coronavirus disease".

55. Pursuant to those, on 15 April 2020 the Direction was made by HM Treasury. Attached to it was a Schedule ('the Schedule') with 15 consecutively numbered paragraphs (with sub paragraphs). The following are relevant to this appeal:

Qualifying employers

3.1 An employer may make a claim for a payment under CJRS if the following condition is met.

3.2 The employer must have a pay as you earn ("PAYE") scheme registered on HMRC's real time information system for PAYE on 19 March 2020 ("a qualifying PAYE scheme").

…

Qualifying costs

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

> *(a) relate to an employee-*
>
> > *(i) to whom the employer made a payment of earnings in the tax year 2019-20 which is shown in a return under Schedule A1 to the PAYE Regulations that is made on or before a day that is a relevant CJRS day,*
> >
> > *(ii) in relation to whom the employer has not reported a date of cessation of employment on or before that date, and*
> >
> > *(iii) who is a furloughed employee (see paragraph 6), and*
>
> *(b) meet the relevant conditions in paragraphs 7.1 to 7.15 in relation to the furloughed employee.*

(emphasis added)

56. A 'relevant CJRS day' is specifically defined by paragraph 13.1 (a) as either 28 February 2020 or 19 March 2020. Schedule A1 to the PAYE Regulations requires real time returns including payments made to employees.

57. A 'qualifying cost' is defined in paragraph 7 of the Schedule and includes employee salary (including the differences between a 'fixed rate' employee and others). The detail of that does not need setting out.

58. Schedule 16 of the FA is headed *Taxation of Coronavirus Support Payments*. Paragraph 8 states (in relevant part):

> *Charge if person not entitled to coronavirus support payment*
>
> *(1) A recipient of an amount of a coronavirus support payment is liable to income tax under this paragraph if the recipient is not entitled to the amount in accordance with the scheme under which the payment was made.*
>
> ...
>
> *(4) Income tax becomes chargeable under this paragraph—*
>
> *(a) ...*
>
> *(b) ... at the time the coronavirus support payment is received.*
>
> *(5) The amount of income tax chargeable under this paragraph is the amount equal to so much of the coronavirus support payment—*
>
> *(a) as the recipient is not entitled to, and*
>
> *(b) as has not been repaid to the person who made the coronavirus support payment.*
>
> ...
>
> *(8) In calculating profits or losses for the purposes of corporation tax, no deduction is allowed in respect of the payment of income tax charged under this paragraph.*

59. Paragraph 9 states (in relevant part):

> *Assessments of income tax chargeable under paragraph 8*
>
> *(1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8.*
>
> *(2) An assessment under sub-paragraph (1) may be made at any time, but this is subject to sections 34 and 36 of TMA 1970.*
>
> *(3) Parts 4 to 6 of TMA 1970 contain other provisions that are relevant to an assessment under sub-paragraph (1) (for example, section 31 makes provision about appeals and section 59B (6) makes provision about the time to pay income tax payable by virtue of an assessment).*

60. Paragraph 11 sets out how in the case a company chargeable to corporation tax, the calculation of what can be recovered is made. Again, the detail of that does not need setting out.

61. Section 34 of the TMA provides that assessments shall not be made beyond four years after the tax was, in this case, received by Euro. Section 36, which is not relevant here, provides for extended periods of six and 20 years for careless and deliberate behaviour of the taxpayer respectively).

62. Drawing the threads together, as relevant to this case, eligibility to make a CJRS claim will exist where:

(1) An employer operated a registered PAYE scheme on or before 19 March 2020

(2) A salary payment has been made to an employee on or before 19 March 2020 and that has been communicated to HMRC by RTI on or before 19 March 2020.

63. These requirements of the Schedule to the Direction are absolute. Eligibility is determined by whether, as a matter of fact, they have been met. If they have been (subject to other matters irrelevant to this appeal) then eligibility will exist. If not, it will not. There is no middle ground. Nor is there any form of 'reasonable excuse' for a failure to meet any deadline imposed whether by mistake, misunderstanding or any other reason.

64. Although not binding, we agree with that principled interpretation of the Schedule to the Direction in *Carlick Contract Furniture v HMRC* [2022] UKFTT 00220 (TC) ('Carlick') at [37], *Oral Health Care Limited v HMRC* [2023] UKFTT 00357 (TC) ('Oral') at [50] to [52] and *Raystra Healthcare Limited v HMRC* [2023] UKFTT 496 (TC) ('Raystra') at [21].

Appeals

65. As we have said appeals to the Tribunal are brought under the provisions of the TMA by virtue of the FA. Section 31 TMA is headed **Appeals: right of appeal**. That states (in relevant part:

31 (1) *An appeal may be brought against–*

(a) – (c) ...

(d) any assessment to tax which is not a self-assessment.

66. Section 50 TMA 1970 provides the power of the Tribunal in such an appeal. It is important to note the limitations of the language used meaning what it says by reference to the decision making involving the question of whether an assessment is excessive. It states:

50 Procedure

(1) - (5) . . .

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

(a) – (b) ...

(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.

Legitimate expectation

67. Given the language of section 50 TMA, we asked for, and received, submissions on whether the Tribunal had jurisdiction to consider allowing the appeal based upon the public law concept of legitimate expectation.

68. This is a difficult area of law which may be seen as developing incrementally for example in the recent case of *Treasures of Brazil Limited v HMRC* [2024] UKFTT 00929 (TC) ('Brazil') deciding an aspect of VAT where the Tribunal held it did have jurisdiction to consider that issue.

69. At [47] and [48] the Tribunal said on legitimate expectation itself (as opposed to the Tribunal's jurisdiction):

The principles the Tribunal should apply in determining whether the Appellant had the required legitimate expectation are those set out by the High Court in R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Limited [1990] 1 WLR 1545 at [1569]:

(1) The first requirement is that the taxpayer should put all their cards face upwards on the table.

(2) The second requirement is that "the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification".

In addition, the Appellant can only rely on legitimate expectation if HMRC's conduct is "conspicuously" unfair or "so outrageously unfair that it should not be allowed to stand" (see R v Inland Revenue Commissioners ex parte Unilever Plc [1996] STC 681 at [697]).

70. We respectfully agree that this is the approach.

71. In terms of jurisdiction, in the context of direct taxation, the views of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) at [54 – 58]; *Abdul Noor v HMRC* [2013] UKUT 71 (TCC) at [95] were endorsed by the Court of Appeal in *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 ('BT') at [142] and [143]. There the Court of Appeal said:

[142] The statutory jurisdiction conferred upon the FtT by s 3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Sch 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.

[143] We therefore consider that the reasoning of Sales J in Oxfam v HMRC has no application to the statutory jurisdiction under s 3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s 231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s 15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT.

72. Consistent with that on the question of the Tribunal's jurisdiction to consider public law arguments in *Caerdav Limited v HMRC* [2023] UKUT 00179 (TC) the Upper Tribunal said at [152] and [153]:

152. The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.

153. Thus, the statutory context is key …"

73. In terms of the statutory context the provisions relating to CJRS and the direction made are found within and by the FA. That statute then directs the taxpayer and HMRC to the TMA for the purposes of any appeals.

74. Insofar as the CA and the Direction is concerned, we can do no better than Judge Poole in *Carlick* at [39] where he said:

> *As to the Appellant's argument that the claims were in line with the "spirit" of the CJRS, and it would be unreasonable to exclude them on a technicality such as this, it is clear that this Tribunal has no jurisdiction to entertain such an argument. Its role is to adjudicate on the law and whilst there is some debate about the extent to which "public law" arguments on reasonableness and fairness can properly form part of the Tribunal's decision-making process in some circumstances, there does not seem to me to be any scope for such argument here, when the Directions draw such a clear bright line to determine eligibility for the scheme.*

75. Although not binding upon us we respectfully agree with that view.

76. Insofar as the TMA is concerned in *Aspin v Estill (H.M. Inspector of Taxes)* [1987] BTC 553, the appeal was brought under the TMA and section 50 applied. The facts are similar in that Mr Aspin asserted that he had been misled by a predecessor to HMRC about the taxable status of a United States pension in the UK. In law the pension was taxable.

77. Nicholls LJ said (agreeing with Sir John Donaldson MR) (at 787):

> *The substantial complaint made by Mr. Aspin in this case is founded on the wrong advice it is said was given to him by the inspector. Under this head Mr. Aspin is saying that an assessment ought not to have been made. In saying that, he is not, under this head, 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. That is a matter in respect of which, if the facts are as alleged by Mr. Aspin, the remedy provided is by way of judicial review. This would be in accordance with the reasoning of Lord Scarman in the passage [1985] A.C. 835, at p. 852; [1985] BTC 208, at pp. 223-224 which has already been read by Sir John Donaldson M.R. from the case of R. v. I.R. Commrs., ex parte Preston.*

78. In our judgment, that, together with *BT* binds us, in the context of this appeal.

79. It is also consistent with other decisions of this Tribunal that have considered coronavirus payments of one sort or another (again not binding but with which we respectfully agree) (see *Carlick*; *Thomas Merlin Ash v HMRC* [2023] UKFTT 00272 (TC); *Oral;* and *Pipsquid Limited v HMRC* [2024] UKFTT 00546 (TC)).

80. Even assuming the taxpayer could establish a legitimate expectation we would not have jurisdiction to allow an appeal on that basis.

DISCUSSION AND ANALYSIS

81. We have set out the facts and the law at some length. This enables us to be relatively brief in setting out our conclusions. We have taken into all account the arguments of both the parties. We have a great deal of sympathy with Euro and Ms Nauzeer operating, as they were, in a time of great difficulty and uncertainty. However that can form no part of our conclusions.

82. On the facts as we have found the RTI PAYE returns for first and second were not provided to HMRC by 19 March 2020. Given the eligibility criteria set out in paragraph 5 of

the Schedule (see [55] above) and their absolute nature that is sufficient to make the claims that relate to first and second ineligible for CJRS purposes.

83. Officer Hawes' assessment was in time having been raised well within the four-year period provided for by section 34 TMA. She held the reasonable (and in this correct) view that there had been a payment under the CJRS to which Euro was not entitled and that this should be recovered by way of chargeability to tax.

84. As a result, HMRC have demonstrated that the assessment was validly raised. However, on their concession that the third employee's claim should not be included, Euro have demonstrated that the assessment is excessive in amount and should be varied to £16,743.42.

85. As we have decided we do not have jurisdiction to consider whether a legitimate expectation was raised by HMRC upon which Euro relied upon, our findings above are sufficient to dispose of the appeal.

86. However, if we were wrong about jurisdiction and out of deference to the arguments raised, we go on to consider that issue, albeit more briefly than we otherwise would.

87. We would not, on the facts of this case, have found such a legitimate expectation had been raised. We make it clear we do not criticise Ms Nauzeer who we entirely accept, as HMRC do, was acting in good faith. But, in our judgment, it was incumbent upon Euro – who accept the responsibility for adhering to the guidance is theirs – to properly query that which they do not understand. Unfortunately, the enquiry on 22 April 2020 as set out in the chat came nowhere near that. On the limited material put before HMRC it is no surprise that they said a claim could be made. No suggestion of there being an issue with the RTI return date was ever referred to. HMRC cannot be criticised for, in the circumstances that arose, failing to interrogate Euro to ensure everything else was in place.

88. The guidance was clear on this. Ms Nauzeer was right to query HMRC through the webchat if there was something that she did not understand but if that related to the RTI returns dates then it needed to be part of the query. Reflecting the cases cited in *Brazil* (see [69] above) Euro did not *put all their cards face upwards on the table.* The case for a legitimate expectation therefore fails at the first hurdle. We do not need to and do not consider questions about the nature of the statement and unfairness.

CONCLUSION

89. For those reasons we reduce the assessment to the sum of £16,743.42 on the concession of HMRC, but otherwise dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

NATHANIEL RUDOLF KC
TRIBUNAL JUDGE

Release date: 31st OCTOBER 2024