



Neutral Citation: [2022] UKFTT 304 (TC)

Case Number: TC08576

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video hearing]

Appeal reference: TC/2021/03171

SELF-EMPLOYMENT INCOME SUPPORT SCHEME (“SEISS”) – was the appellant self-employed? – no – was he eligible for a support payment? – no – can HMRC recover the grants paid? – yes – paragraph 9 Schedule 16 Finance Act 2020 – appeal dismissed

Heard on: 17 August 2022

Judgment date: 24 August 2022

Before

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER: PATRICIA GORDON**

Between

JOSHUA PETER TAYLOR

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Dr Robert Milton of Milton & Co

For the Respondents: Paul Davison, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against an assessment issued on 19 March 2021 in terms of paragraph 9 Schedule 16 Finance Act 2020 in the sum of £4,549 for the 2020/21 tax year. It relates to a payment under the Self-Employment Income Support Scheme (“SEISS”) in respect of the Coronavirus Support Payment (“the Support Payment”).
2. With the consent of the parties the form of the hearing was video attended by both parties using the Tribunal video hearing system. A face-to-face hearing was not held for the convenience of all parties.
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. The documents before the Tribunal were contained in a Bundle extending to 192 pages. We had Skeleton Arguments for both parties. We heard evidence from the appellant and Officer Sole.

The facts

5. The appellant’s Self-Assessment Tax Return (“SATR”) for the 2018-19 tax year was filed online by Milton & Co on 18 September 2019. That return disclosed that the appellant had ceased self-employment as a fitness trainer on 31 July 2018 and that he had been employed thereafter by his company, Coach JT Limited.
6. The appellant had been appointed as a director of that company on 13 July 2018, the company having been incorporated on that date.
7. On 14 May 2020, the appellant applied online for the Support Payment through SEISS. On 20 May 2020, HMRC emailed him stating that “We have checked your claim and can confirm that we are now processing your grant payment.”
8. In fact a payment of £2,426 was made on 18 May 2020. Hereinafter that claim is referred to as SEISS 1.
9. On 20 August 2020, the appellant made a second online application for a support payment through SEISS and a payment of £2,123 was made on 24 August 2020. Hereinafter that claim is referred to as SEISS 2.
10. On 14 October 2020, HMRC sent an email to the appellant as part of a SEISS post-payment compliance check. That indicated that because he had not been self-employed he was not eligible to receive a SEISS grant and he would need to repay the money he had claimed incorrectly. In the absence of a response a further letter was sent to him in November 2020. There was no response.
11. On 16 December 2020, Officer Sole wrote to the appellant pointing out that he had not responded to their earlier letters, so HMRC were opening a formal check into his claims and sought further information.
12. On 30 December 2020, Officer Sole spoke with the appellant who confirmed that he had ceased self-employment on 31 July 2018 and that he had been a director of his limited company. The officer advised the appellant that he was not eligible to claim under SEISS.
13. On 31 December 2020, Officer Sole wrote to the appellant referencing the telephone call and requesting repayment. He warned the appellant that he would be considering penalties.

14. On 9 February 2021, Officer Sole spoke with the appellant on the telephone and the appellant indicated that he had not seen any of the SEISS eligibility criteria when he completed the online application. He had thought that the only criteria was that he had traded as a self-employed individual in the years 2016/17 to 2018/19. The officer explained that those were the years upon which the grant was calculated and confirmed that the screens in the application showed the eligibility criteria. He agreed to send a copy of the screenshots via email which he did that day.

15. The “Disclaimer Page” screenshots for both claims are clearly headed “Self-Employment Income Support Scheme”. They are very similar and both make it explicit that the screenshot should be read before making a claim and that:-

(a) The first paragraph reads: “After checking the details of your previously submitted Self Assessment tax returns, you are eligible for this grant”.

(b) The grant does not need to be repaid but must be reported on the SATRs as “... it is subject to Income Tax and self-employed National Insurance contributions”.

(c) Before continuing, the applicant needs to confirm that s(he) traded in 2019/20, intended to continue to trade in 2020/21 and the business had been adversely affected by Coronavirus.

(d) Under the heading “After you claim” it points out that HMRC will check the claim and may withhold or recover payment if the claim is not made in accordance with HMRC’s published guidance, contains or is based on inaccurate information, is paid in error or is fraudulent or abusive or not made for, what is described for SEISS 1 as “the purpose described above” and for SEISS 2 as “the purpose of the Self-Employment Income Support Scheme”.

(e) In SEISS 2 there is then a paragraph that reads:

“By continuing into the claim service, you are confirming that you have read the relevant guidance and you meet the requirements specific to your circumstances”.

(f) At the bottom of the page there is a box requiring the taxpayer to click on it to “Accept and Continue”.

16. The “Declaration Page” screenshots are identical for SEISS 1 and 2 and are also clearly headed “Self-Employment Income Support Scheme”. They state amongst other things:-

“By submitting this claim you are confirming the following...

- your claim is in accordance with HMRC’s published guidance....”

At the bottom of the page there is a box requiring the taxpayer to click on it to “Accept and submit”.

17. There is also a page entitled “Confirmation Page”. That states the amount of the grant and gives the “SES” reference number. It states that HMRC will check the claim and make payment within 6 working days. It reiterates that HMRC may withhold or recover payment if the claim is not made in accordance with HMRC’s published guidance.

18. HMRC have produced data records disclosing the timing of the appellant’s access to the Disclaimer and Declaration Pages on each occasion, the issue of the “SES” reference number and the timing of submission of the claim.

19. On 10 February 2021, Dr Milton wrote to Officer Sole arguing that:-

(a) HMRC had full access to the appellant’s SATRs and therefore could or should have checked that information before making the grants.

(b) The screenshots did not appear on the screen when the appellant made the claim and he would not have made the claim had it been there.

(c) HMRC were required to prove that the screenshots explaining the conditions had been part of the appellant's claim process.

(d) In the absence of that, the claim had been validly made, and HMRC having had access to all relevant information had accepted that it was valid.

(e) Accordingly, HMRC could not now seek repayment.

20. On 12 February 2021, Officer Sole responded pointing out that the screenshots would inevitably have been displayed when the claim was made. He confirmed that as the appellant did not meet the eligibility criteria, HMRC would be raising an assessment to recover the grants. He would also consider penalties. He asked for an explanation as to why the appellant had considered that he was eligible for a grant that was available only to the self-employed when he was in employment as a director.

21. On 13 February 2021, Dr Milton responded reiterating the reasons why he disagreed with HMRC, stating that an appeal would follow once the assessments were issued and he would refer the matter to the appellant's MP.

22. On 19 March 2021, HMRC issued the assessment under paragraph 9 Schedule 16 Finance Act 2020 in the sum of £4,549.

23. On 29 March 2021, Dr Milton appealed via email requesting an independent review and reiterating the same Grounds of Appeal. He also argued that the assessment was invalid because it did not specify why the appellant was not eligible for SEISS.

24. On 22 April 2021, the appellant's MP submitted an email complaint to HMRC on behalf of the appellant. That was not in the Bundle but we observe that paragraph 17 of HMRC's Statement of Case reads in that regard:

“As part of the grounds to the complaint, the Appellant stated that when he applied the only requirements on the application were that he had 3 years accounts ending 2018/19 and that the requirement to be trading in 2019/20 and the intention to trade into 2020/21 were introduced after he made his claim.”

25. On 13 May and 7 June 2021, HMRC responded to the MP. A further email was received from the MP on 14 May 2021 and HMRC responded on 7 June 2021 confirming that they could not consider appealable matters via the complaints process. That letter also explained that the published SEISS guidance explained that SEISS could not be claimed if a trader was a limited company.

26. On 12 August 2021, HMRC issued the Review Conclusion Letter upholding the assessment. In that letter HMRC referred to Digital Service Audit Data including audit logs for both SEISS 1 and 2 showing that the appellant had viewed the Disclaimer and Declaration claims on both occasions. Confirmation had also been received that no technical issues arose on the SEISS system at the time of each claim.

27. On 24 August 2021, the appellant lodged his Notice of Appeal with the Tribunal.

The background and legislation relating to SEISS

28. In March 2020, the Chancellor announced SEISS.

29. On 26 March 2020, the government published guidance entitled “Check if you can claim a grant through the Self-Employment Income Support Scheme”.

30. Sections 71 and 76 of the Coronavirus Act 2020 provide the Treasury with the power to direct HMRC's functions in relation to coronavirus.

31. On 30 April 2020, the government published the first Treasury Direction to HMRC and the statutory rules enabling HMRC to administer SEISS.

32. The Schedule attached to the first Direction setting the parameters for SEISS is detailed.

33. At paragraph 3.1 it stipulates that a claim must be made "in such form and manner and contain such information as HMRC may require at any time ... to establish entitlement to payment under SEISS."

34. Paragraph 3.2 stipulates that a claim must be made by a "qualifying person".

35. Paragraph 4 defines a qualifying person and the relevant conditions in this instance are:-

"4.2 The person must –

(a) Carry on a trade the business of which has been adversely affected by reason of circumstances arising as a result of coronavirus or coronavirus disease,

(b) have delivered a tax return for a relevant tax year on or before 23 April 2020,

(c) have carried on a trade in the tax years 2018-19 and 2019-20,

(d) intend to carry on a trade in the tax year 2020-21

...

(a) be an individual, and"

36. Paragraph 13 is the Interpretation paragraph and "trade" is defined as follows:-

"'trade' means a trade, profession or vocation the profits of which are chargeable to income tax under Part 2 of ITTOIA 2005 (trading income) and in this definition 'trade' has the same meaning as in section 989 of ITA 2007"

37. A second Direction was issued on 1 July 2020 (and a number of further Directions were also issued during the pandemic).

38. The second Direction extended and modified SEISS. The Schedule to it is also detailed.

39. Paragraph 3 states that all of the provisions of SEISS being the first Direction and Schedule continue to apply except where the context otherwise provides.

40. Paragraph 2 of the Schedule to the first SEISS Direction dated 30 April 2020 reads:-

"The purpose of SEISS is to provide for payments to be made to persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."

41. The Schedule to the second Direction modified and extended that paragraph 2 and the relevant provisions read as follows:-

"...

(b) Provide for payments to be made to relevant persons carrying on a trade the business of which has been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease but who would not otherwise qualify for a payment under SEISS..."

Schedule 16 Finance Act 2020

42. Paragraph 8 of Schedule 16 makes a recipient of Support Payments under SEISS liable to income tax where they are not entitled to it in terms of SEISS. Paragraph 8(4) details when income tax becomes chargeable which is when the Support Payments were received if there was no eligibility.

43. Insofar as relevant, paragraph 9 Schedule 16 Finance Act 2020 reads:-

“Assessments of income tax chargeable under paragraph 8

9

(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 provisions about appeals and section 59B(6) makes provision about the time to pay income tax payable by virtue of an assessment). ...”.

Discussion

44. The oral evidence from both Officer Sole and the appellant was almost exclusively focussed on whether or not the screenshots to which we refer above were seen by the appellant. Obviously, the officer could not confirm the position, as Dr Milton requested “categorically”, and the appellant adhered to his evidence whereby he said that he had never seen them.

45. Were we called upon to decide whether the screenshots would have formed part of the claim process we would have decided that they did. Dr Milton argues that HMRC have produced no evidence to establish that.

46. It would have been helpful if HMRC had provided more detail or explanation but they did not.

47. Of course, Officer Sole could not speak to the audit logs. However, although Mr Davison did not refer us to the case, we are bound by the Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) where at paragraph 50 *et seq* the Tribunal approved the principle that “documents on their own without a supporting witness statement may be sufficient to prove relevant facts”.

48. We can see from the audit logs that the “SES” reference number is identified and the claim submitted when the appellant was on the Declaration pages. That is consistent with the information held elsewhere and which has not been challenged such as the two documents headed “Check claim status”. On the balance of probability, the screenshots must have been part of the claim process since the claim had to be submitted online. We accept the assertion in the review conclusion letter that there had been no technical issues at the time the claims were made. It is difficult to see how the claims could have been made without being on the Declaration page since the virtual “button” to submit is on that page.

49. Frankly, in any event, we take the view that the screenshots are almost entirely irrelevant in deciding an appeal against an assessment. They might be relevant in the context of penalties but we are not dealing with that here. Our only issue is whether the assessment was timeously and properly made and, if so, whether it is in the correct sum.

50. The simple fact is that it is not disputed that the appellant was not self-employed when he applied for these grants. These grants were only available to the self-employed. He was never eligible for them.

51. Dr Milton had, what we consider to be, a bizarre argument which is articulated at paragraph 14 of his Skeleton Argument as “The appellant carried on the same trade in all the tax years mentioned in 4.2 a-d” and, at paragraph 20, as “The appellant was an individual and carried on the same trade throughout the relevant period.”

52. Shortly put, although the appellant has always been an individual, the appellant certainly did not carry on the trade as an individual after 31 July 2018. Undoubtedly, at all relevant times, he was a fitness coach but that trade was conducted until 31 July 2018 by him as a sole trader and thereafter by his company. Those are two completely separate and different legal persons. As a sole trader he paid income tax. The company pays corporation tax. PAYE is deducted from the appellant’s earnings from the company but it is not his trade. It is his employment.

53. Furthermore “trade” is defined for the purposes of SEISS as I have recorded in paragraph 36 above. In summary it is defined by reference to income tax legislation.

54. We disagree fundamentally with Dr Milton’s assertion that the legislation does not preclude the validity of a claim where the trade is carried on by a limited company. It does.

55. Bluntly, the clue is in the name, the Support Payment is only available to the self-employed. The appellant has not been self-employed since 31 July 2018.

56. That being the case the appellant is not, and never has been, eligible for SEISS.

57. The law is clear. In plain English, when Officer Sole confirmed that the appellant was not self-employed and did not carry on a trade for income tax purposes after 31 July 2018 but yet he had received SEISS he had the power to raise an assessment under paragraph 9 Schedule 16 FA 2020. He did so well within the time limits available to him (section 34 TMA).

58. The amount of the assessment is the full amount of the payment to which the appellant had no entitlement and therefore complies with paragraph 8(5) Schedule 16 Finance Act 2020.

59. Lastly, and for completeness, Dr Milton placed great stress on the fact that HMRC had stated that they had checked the appellant’s claim at a time when, had they looked at his SATR they would have known that the appellant was trading through a company.

60. The Tribunal has no jurisdiction in relation to matters of legitimate expectation. We must simply find the facts and apply the law. The facts are that the appellant did not qualify for Support Payments and in those circumstances the law gives HMRC the authority to raise an assessment.

61. They did so timeously and competently. The assessment is in the correct amount. We therefore uphold the assessment.

Decision

62. For all these reasons the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 24 AUGUST 2022