Neutral Citation: [2023] UKFTT 00272 (TC)

FIRST-TIER TRIBUNAL
TAX CHAMBER

Case Number: TC08749

By remote video hearing

Appeal reference: TC/2022/06593

Coronavirus Pandemic – Self Employment Income Support Scheme ("SEISS") – was the appellant self-employed and eligible for support – no – was a valid assessment raised by HMRC to recover the support – yes – does the F-tT have jurisdiction to consider public law concepts such as 'legitimate expectation' – no – appeal dismissed

Heard on: 31st January 2023
Judgment date: 07 March 2023

Before

TRIBUNAL JUDGE RUDOLF, KC
MEMBER: JANE SHILLAKER

Between

THOMAS MERLIN ASH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Stephen Handley, of J. Richard Hildebrand & Co.

For the Respondents: Paul Davison and Paul Marks, litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. In this case Mr Thomas Merlin Ash is the Appellant. His Majesty's Revenue and Customs ('HMRC') are the Respondents.

2. This is Mr Ash's appeal against an assessment dated 14th April 2021 in the sum of £14,070 raised under paragraph 9 of Schedule 16 to the Finance Act 2020 for the tax year 2020/21. It relates to HMRC's decision to recover that amount paid by way of two grants to the Appellant in the sums of £7,500 and £6,570 in May and July 2020 respectively. These were claimed by Mr Ash under the "Self-Employment Income Support Scheme" (known as SEISS) resulting from the Coronavirus pandemic.

3. No allegation of dishonesty is made against Mr Ash. HMRC accepted before us that they accept this case is one of innocent error. Further, it was confirmed that no penalties have been charged.

4. The issues are narrow. It was accepted on Mr Ash's behalf that he was not eligible for the money received under SEISS. Instead, Mr Handley seeks to persuade us that the appeal should be allowed on the basis that Mr Ash had a legitimate expectation to the money after being invited to apply for it by HMRC; notwithstanding his ineligibility. HMRC responded that the First-tier Tribunal ('F-tT') has no jurisdiction to allow an appeal on such grounds and that once they have proven a valid assessment in the correct amount as timeously raised, the appeal must be dismissed; unless Mr Ash can show he was overcharged.

5. With the consent of the parties, the form of the hearing was video attended by Mr Handley, accountant to and representative of, Mr Ash, Mr Woods, HMRC's witness and Mr Davison and Mr Parks, representing HMRC. Other staff of HMRC observed. A face-to-face hearing was not held for the convenience of the parties.

6. 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 to observe the proceedings. As such, the hearing was held in public.

7. We thank both Mr Davison and Mr Handley for the economy and clarity of their respective presentations which allowed the hearing to be concluded within a half day, rather than the full day which had been allocated to the case.

8. We received a 320-page bundle (a single page of evidence had been omitted by accident which was admitted without objection) including the Mr Ash's Notice of Appeal and enclosures and HMRC's detailed statement of case and their evidence. We also received a skeleton argument from Mr Davison and a bundle of authorities. We heard evidence from Mr Woods of HMRC who adopted his witness statement as it stood and was not cross examined. The Appellant did not attend the hearing and did not give evidence. The only direct evidence from him was that contained within the body of his Appellant's Notice where he states he was led into any error by HMRC and encloses such documentation upon which he relies.

THE FACTS

9. In the event none of the primary facts as documented were in dispute given it was accepted that Mr Ash was not eligible for SEISS.

10. We were presented with generic 'screenshots' of what we were told were part of the electronic process for making the claims. Mr Handley properly informed us there was no challenge to these as representing what Mr Ash would have seen (of which more below). As a result, in this case, we do not need to decide whether HMRC need to avail themselves upon

what is set out in Edwards v HMRC [2019] UKUT 131 (TCC) at paragraphs 50-59 where documents are produced without a supporting witness statement.

11. We accept, in entirety, the evidence of Mr Woods and, in this case, the contemporaneous documents put before us.

12. Mr Handley sought to rely upon as evidence a statement of what a lay person would understand by the email of 13th May 2020 and what was said on the 'screenshot' regarding eligibility (see paragraphs 15 and 21 below). However, this was from a third party and does not assist us with what Mr Ash understood. He also sought to rely upon other types of clients and their situations but none of these help with the issues raised in this appeal. In those circumstances no weight is attached to either.

13. We make the following findings of fact.

14. Mr Woods told us that Mr Ash stopped his self-employment on 7th August 2018 as a TV and Film Editor. Thereafter he began his employment through a company limited by guarantee Ysgydion Ltd. This, we find, was known to HMRC as Mr Ash's 2018-19 tax return was filed, at least four months, before the email below was sent.

15. On 13th May 2020 Mr Ash was sent an email by HMRC at 15.45 headed *Reminder – claim self-employment support*. This email is at the heart of Mr Handley's submissions on behalf of Mr Ash. We set it out the relevant parts. It stated:

> *"Dear Customer*
>
> *We contacted you recently because we think you are eligible for a grant under the Self-Employment Income Support Scheme.*
>
> *The scheme is now open and every eligible customer has been given a date from which they can claim, between 13 and 18 May. You won't be able to apply before your claim date, but you will be able to make a claim after that day.*
>
> *Don't worry if you can't remember the date you were given, you can check again by logging into the online checker at any time.*
>
> ***Making your claim***
>
> *You can access the claim system on GOV.UK by searching for the 'Self-Employment Income Support Scheme'.*
>
> *It's important that you make this claim yourself, although you can ask your accountant or tax agent to help you. Please don't pass on any of your information to people who may offer to make a claim on your behalf."*
>
> … [emphasis added].

16. It is agreed that when Mr Ash used gov.uk the first relevant screen he encountered (as provided to the F-tT by him) said in large block capital letters YOU ARE ELIGIBLE TO MAKE A CLAIM followed by a button saying 'continue'.

17. On 20th May 2020 Mr Ash made a claim under SEISS with reference SES1693470. The amount claimed (calculated by HMRC) was the maximum of £7,500. It was paid the following day. We entirely accept that Mr Ash made this claim (and the subsequent one) himself and did not involve his accountant. We entirely accept that Mr Ash did not do so dishonestly but fell into error.

18. On 26th May 2020 Mr Ash's co-director made coronavirus support claims under the Coronavirus Job Retention Scheme ('CJRS') in relation to her work through the company. On 23rd June 2020 further claims were made, this time for Mr Ash and his co-director. The

same occurred on 24th July 2020. Each of these claims was properly made on behalf of Mr Ash and his co-director by their accountant Mr Handley (on the basis that CJRS permitted an accountant to make claims directly; in contrast with SEISS).

19. On 18th August 2020 Mr Ash made a further claim under SEISS with reference SESB4252001. The amount claimed (calculated by HMRC) was the maximum under the second scheme of £6,570. It too was paid the following day.

20. It is not entirely clear to us what the full process was by reference to what Mr Ash would have done or seen online when making his claims. However, we were also presented with audit logs by HMRC evidence showing Mr Ash viewed what has been termed the 'disclaimer' page (see paragraph 21 below) at 1.50pm and 9.04pm respectively on the dates which he made his claims under SEISS and the 'declaration' (see paragraph 23 below) at 1.53pm and 9.05pm respectively.

21. The terms of those pages are important to Mr Ash's submissions. We set them out in full from the 'screenshots' provided by HMRC (there are minor differences between the two sets but that does not matter for these purposes and we use the first in time). The 'disclaimer' reads:

> "***You must read the following before making a claim***
>
> *After checking the details of your previously submitted Self Assessment tax returns, you are eligible for this grant.*
>
> *This grant does not need to be repaid, but it is subject to Income Tax and self-employed national insurance contributions. You will need to report the grant on your Self Assessment tax return.*
>
> *Before continuing, you need to confirm:*
>
> - *You traded in the tax year 2019 to 2020*
> - *You intend to continue to trade in the tax year 2020 to 2021*
> - *Your business has been adversely affected by coronavirus*
>
> ***If you are non-resident or choose the remittance basis***
>
> *You also need to confirm that your UK trading profits are at least equal to your other worldwide income for the relevant tax years. You must read read the guidance (opens in another window or tab) (https://www.gov.uk/guidance/how-different-circumstances-affect-the-self-employment-income-support-scheme#if-youre-non-resident-or-chose-the-remittance-basis) to make sure you understand you are eligible.*
>
> ***After you claim***
>
> *HMRC will check your claim and may withhold or recover payment if your claim:*
>
> - *Is not made in accordance with HMRC's published guidance*
> - *Contains or is based upon inaccurate information*
> - *Is paid in error*
> - *Is fraudulent or abusive or not made for the purposes of the Self-Employment Income Support Scheme*
>
> *By continuing into the claim service, you are confirming you have read the relevant guidance and you meet any requirements specific to your circumstances.*

Accept and continue" [emphasis added]

22. The link (in blue) under the heading *If you are non-resident or choose the remittance basis* at the time of the claim led to a section of guidance that appears irrelevant to the issues here. We are not persuaded that this is the same document that HMRC were referring to as the 'published guidance' in the bullet point above and which was provided to us for the purposes of the appeal by HMRC because it dealt with the position of limited companies. It was accepted by HMRC that this may not have been provided to Mr Ash as a part of this process; by link or otherwise.

23. The 'declaration' reads:

> "***Declaration***
>
> *By submitting this claim you are confirming the following:*
>
> - *Your business has been adversely affected by coronavirus*
> - *Your claim is in accordance with HMRC's published guidance*
> - *The information you have provided is correct, to the best of your knowledge*
> - *If any of this information changes, you will contact HMRC to amend the claim*
>
> *The grant does not need to be repaid, but it is subject to Income Tax and self-employed National Insurance contributions. You will need to report the grant on your Self Assessment tax return.*
>
> ***! HMRC will check claims and take appropriate action to withhold or recover payments found to be dishonest or inaccurate.***
>
> *Accept and submit*" [emphasis added].

24. The 'published guidance' referred to, updated on 13th May 2020, is a longer document than the parts we were provided with for the purposes of the appeal. At p213 of our bundle, and within that guidance, it states:

> *"You should not claim the grant if you are a limited company or operating a trade through a trust".*

25. We find that Mr Ash, in relation to both claims, having been told he was eligible, without more simply completed his claim without looking at the 'published guidance'. We infer he simply didn't think he needed to in light of what he was viewing and the email he had been sent.

26. On 15th October 2020 HMRC sent an email to Mr Ash telling him that as he had indicated on his 2018/19 or 2019/20 tax return, he had stopped trading he was not eligible for the SEISS grants and would need to repay the money.

27. After an exchange of correspondence between HMRC and Mr Handley, on 6th January 2021 HMRC wrote to indicate they were opening a formal check into the claims. After further exchanges of correspondence Mr Ash wrote to HMRC on 23rd March 2021 describing the terms of the email sent by HMRC on 13th May 2020 (see paragraph 15 above) and what he saw when he logged in to make his claim on 20th May 2020 (see paragraphs 21 and 23 above). On 24th March 2021 Mr Handley wrote to HMRC accepting that Mr Ash had ceased self-employment in August 2018 (and correctly pointing out the tax consequences of that) but that Mr Ash had understood that in real terms nothing had changed. Mr Handley also pointed

out that the 2018/19 tax return had been filed – showing this change – four months before the email that Mr Ash received on 13th May 2020.

28. HMRC had relied upon the content of the declaration (see paragraph 23 above) and on 14th April 2021 raised the assessment. Mr Ash appealed. In the meantime, an independent review was offered and accepted. On 6th September 2021 Mr Paul Lowery of HMRC, as an officer who had before this stage had nothing to do with Mr Ash's case, upheld Mr Woods's assessment in his detailed letter and rejected the two grounds of appeal.

29. As part of his reasoning in relation to the first – that Mr Ash had been invited to apply – Mr Lowery stated:

> "*I have had sight of the email issued to you from HMRC and the opening line is "we contacted you recently because we think you are eligible for a grant under the Self Employment Support Scheme" (sic). It is my view that this passage actually puts the ouns (sic) on you to check that you meet the conditions of the scheme before making a claim*".

30. He continued:

> "*You had incorporated your sole-trader business so clearly did not meet the eligibility criteria of being a sole-trader, which you were required to certify as part of the claims process. Whilst you were invited to apply and initially HMRC advised, based on the information held at that time, that you qualified, it is my view that any reasonable person in your circumstances would have checked whether trading as an incorporated company would still make you eligible to make the claim. Even more so as the company was already claiming CJRS payments on your behalf*".

31. The second ground involved the lack of any 'transcript' of the electronic process and what Mr Ash actually did or did not say, and, it was submitted to Mr Lowery, on the "basis of the presumption of innocence", it ought to be assumed Mr Ash answered honestly and that the fault lay in the framing of the questions.

32. Mr Lowery having reviewed what HMRC said Mr Ash would have seen simply said:

> "*I do not consider that the framing of the questions was at fault, it was clear that eligibility needed to be considered and then certified and the disclaimer was also clear as to what criteria needed to be met before making the claim*".

33. There were then further exchanges of correspondence as to the review. Additionally, HMRC decided not to impose penalties.

34. Mr Ash was aggrieved by HMRC's upholding of the assessment and continued his appeal to the F-tT.

THE LAW

35. Our analysis of the law is in two stages. First, we consider the position regarding SEISS itself and whether and how HMRC can recover any sum paid where an individual was in fact ineligible for support. Secondly, given the submissions of Mr Handley for the Appellant, we consider the jurisdiction of the F-tT and whether we possess something akin to that exercised by the High Court by way judicial review to be able to allow an appeal against an otherwise validly, correctly and timeously raised assessment.

THE SELF-EMPLOYED INCOME SUPPORT SCHEME ("SEISS")

36. Mr Davison made certain introductory remarks as to the purpose of SEISS and the situation that it was catering for. He pointed out that initially the government allowed for taxable grants of up to 80% a self-employed tax-payer's average monthly trading profit over

a three-month average, capped at £7,500 from 30th April 2020. That scheme opened for applications on 13th May and closed on 13th July 2020. From 29th May 2020 SEISS was extended by a second direction made on 1st July 2020, that permitted applications between 17th August 2020 and 19th October 2020 but this time up to 70% of the same average income, capped at £6,570. Mr Handley did not take any issue with Mr Davison's analysis.

37. We consider the legal position to be as follows.

38. Section 71 and 76 of the Coronavirus Act 2020 ('CA 2020') 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*".

39. Pursuant to those, on 30th April 2020, the then Chancellor of the Exchequer made the 'Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme) Direction' ("Direction 1"). That stated:

> "*1. This direction applies to Her Majesty's Revenue and Customs.*
>
> *2. This direction requires Her Majesty's Revenue and Customs to be responsible for the payment and management of amounts to be paid under the scheme set out in the Schedule to this direction (the Self-Employment Income Support Scheme).*
>
> *3. This direction has effect for the duration of the scheme*".

40. Attached to Direction 1 was a schedule made up of 13 consecutively numbered paragraphs and sub paragraphs which provide a complete code for the claim of a grant including the strict requirements of eligibility. Paragraph 2 provides:

> "***Purpose of scheme***
>
> *2. 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. Paragraph 3 deals with claims and permits HMRC to receive such in a manner that they require and from a qualifying person. Paragraph 4 deals with eligibility. That provides:

> "***Qualifying person***
>
> *4.1 A person is a qualifying person if the following conditions are met.*
>
> *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 continue to carry on a trade in the tax year 2020-21,*
>
> *(e) if that person is a non-UK resident or has made a claim under section 809B of ITA 2007 (claim for remittance basis to apply), certify that the person's trading profits are equal to or more than the person's relevant income for any relevant tax year or years,*
>
> *(f) be an individual, and*
>
> *(g) meet the profits condition.*
>
> *4.3 In paragraph 4.2, "relevant tax year" means all or any of the tax years 2016-17, 2017-18 and 2018-19, as the case may be, for which a person's trading profit and relevant income must be determined for the purposes of SEISS*".

42. As can be seen, there are a number of conjunctive conditions that must be met before a person becomes a qualifying individual for the purposes of a grant under SEISS. We set them all out for completeness here although HMRC in this case rely upon the failure of Mr Ash in relation to paragraph 4.2 (c) and (d).

43. Finally, insofar as is relevant, paragraph 13, headed 'Interpretation' states:

> "*"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*";

44. Put another way, for example, income solely received as a director of a limited company means a person does not trade for the purposes of SEISS. Such a person would not be a qualifying individual for the purposes of paragraph 4.2 of the schedule to direction 1 and ineligible for support. In this instance, as the name of the scheme indicates, grants were only capable of being provided to those who were self-employed.

45. On 1st July 2020, the then Chancellor made the 'The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Self-Employment Income Support Scheme Extension) Direction' ("Direction 2"). This has the effect of extending Direction 1 but with modifications. Paragraph 2 of Direction 2 read:

> "*2. The purpose of the modification and extension to SEISS is to—*
>
> *(a) specify a date by which claims must be made for a payment under SEISS (see Part 2),*
>
> *(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 (see Part 3), and*
>
> *(c) provide for payments to be made to persons and relevant persons carrying on a trade the business of which is adversely affected by the health,*

social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease on or after 14 July 2020 (see Part 4)".

46. The eligibility criteria from Direction 1 were left intact and applied to Direction 2.

47. To discover HMRC's powers to recoup a payment made to an ineligible person who was not, in fact, a qualifying individual we turn to two provisions within the Finance Act 2020 ('FA 2020'), namely paragraphs 8 and 9 of Schedule 16 (as amended). They state in pertinent part:

"***SCHEDULE 16 TAXATION OF CORONAVIRUS SUPPORT PAYMENTS***

...

Charge if person not entitled to coronavirus support payment

8

(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 or the self-employment income support scheme (a) ... (b) in any other case, 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 or the self-employment income support scheme (a) as the recipient is not entitled to, and (b) as has not been repaid to the person who made the coronavirus support payment.

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."

48. The reference to FA 2008 is to the Finance Act of that year. The reference to TMA is the Taxes Management Act. In a case where careless or deliberate behaviour is not established, s34 TMA 1970 requires HMRC to raise an assessment within four years of the end of the year to which the assessment relates. Section 36 TMA 1970 governs the position where careless or deliberate behaviour is established (and the limit is raised to six and 20 years respectively).

49. Mr Davison submits, and we agree, that only bad faith or some other infection which would simply invalidate the exercise conducted under paragraph 9 (1) of Schedule 16 FA 2020 on its face would render what was produced no assessment at all. An assessment is validly raised if the relevant officer follows the plain words of that paragraph and, in this case, does so within four years of the end of the year to which the assessment relates. The overall amount may vary depending upon the facts, but it is clear from paragraph 8 (5) that it may be up to the total received.

50. Finally for these purposes, section 50 TMA 1970 provides the power of the F-tT on an appeal involving an assessment. It is important to note the limitations. It states:

> "***50*** ***Procedure***
>
> *(1) - (5) . . .*
>
> *(6) If, on an appeal notified to the tribunal, the tribunal decides-*
>
> *(a) that, . . ., the appellant is overcharged by a self-assessment;*
>
> *(b) that, . . ., any amounts contained in a partnership statement are excessive; or*
>
> *(c) that the appellant is overcharged by an assessment other than a self-assessment,*
>
> *the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."*

51. Pausing there we note, as Mr Handley raised the issue of reasonable excuse, that s118 TMA 1970 (2) states:

> "*For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased …* "

52. As is clear from that section this can only relate to the failure of a person in not doing something. It does not apply to an individual taking a positive step. There is no room for reasonable excuse in this case as nothing in the FA 2020 or in Direction 1 or 2 permit such a consideration. The terms of the legal framework are, as we have shown, straightforward.

53. Standing back, HMRC must show the F-tT, on the balance of probabilities, that (a) an assessment was validly raised, in this instance under paragraph 9 (1) of Schedule 16 FA 2020 (2) in the correct amount, in this instance up to the maximum of the total received by Mr Ash and (3) within time, in this instance within four years of the end of the tax to which the assessment relates. Absent any further jurisdiction of the F-tT if those three matters are proven to the requisite standard, in the words of s50 TMA 1970, *the assessment shall stand good*.

THE JURISDICTION OF THE FIRST TIER TRIBUNAL

54. We can deal with this shortly. The F-tT is a creature of statute created by the Tribunals, Courts and Enforcement Act 2007 ('TCEA') and has the powers given to it by the TCEA and the relevant taxing legislation under which any appeal has been made. In Trustees of the BT Pension Scheme v HMRC [2015] EWCA Civ 713, the Court of Appeal (Civil Division) in the context of closure notice appeals under schedule 1A TMA 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 …"*

55. In HMRC v Noor [2013] UKUT 071 (TCC) the Upper Tribunal (Mr Justice Warren, P., and Judge Colin Bishopp) held in the context of an appeal relating to Value Added Tax ('VAT') under s83 of the Value Added Tax Act 1994 ('VATA') that the F-tT did not have

jurisdiction based upon the concept of legitimate expectation to adjudicate upon Mr Noor's claim. In relation to judicial review, they said:

> "*78. ... as we have explained in the preceding paragraph, ... we think that the features which we have mentioned in that paragraph point strongly to the conclusion that Parliament did not intend to confer a judicial review function on the VAT Tribunal or the F-tT in relation to appeals under section 83 VATA 1994*."

56. In reaching that conclusion the Upper Tribunal followed its own decision in HMRC v Hok [2012] UKUT 363 where Warren J, P., and Judge Bishopp said in a case involving the imposition of penalties:

> "*56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include —whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct.*
>
> *57. If that conclusion leaves "sound principles of the common law ... languishing outside the Tribunal room door", as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the 2007 Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal."*

57. In our judgment, the terms of s50 TMA are clear and leave no room for the importing of a consideration of the appeal by reference to public law grounds such as legitimate expectation. They provide a clear, succinct and exclusive framework for the F-tT and its decision making in these cases of assessment (always acknowledging the burden and standard of proof). Anything else would be the F-tT providing for itself a jurisdiction it simply does not have and which Parliament has seen fit not to provide it with.

58. With the weight of high and long-standing authority, the F-tT must decide the appeal by reference to the four corners of s50 TMA. This appeal can only be solely concerned with the raising of an assessment, the amount, and the time frame within which the assessment was raised.

DISCUSSION

59. Our conclusions follow.

60. Mr Woods of HMRC followed paragraph 9 (1) of Schedule 16 FA 2020 concluding that Mr Ash had received payments he was not entitled to in the full amount. There is no doubt that Mr Ash was not trading at the relevant times for the purposes of SEISS and was not a qualifying individual under paragraph 4 of the schedule to Direction 1 (as carried over by Direction 2). Mr Woods did not act in bad faith, and it was not suggested otherwise. Nor has any other matter been raised that would invalidate the assessment such that it could not be said to be an assessment at all.

61. HMRC have proven to us to at least the civil standard of proof under s50 TMA that a valid assessment has been raised, that the amount is the correct amount as reflecting that under paragraph 8 (5) of Schedule 16 FA 2020 and that it was raised within the four years permitted in a case of simple error. Mr Ash has not shown us that he has been overcharged. On that basis the assessment must stand good unless the appeal may be allowed for some other reason.

62. We turn to the issue allowing an appeal against an otherwise valid assessment and the jurisdiction of the F-tT. This was the focus of Mr Handley's submissions. It seems to us he was making three principal submissions. First, he sought to persuade us that a lay person would not appreciate the distinction between self-employment with regard to tax consequences and working through a company limited by guarantee. Secondly, and further to that, HMRC excluded accountants from making such claims, because if he had been allowed to be involved, the claim would not have been made, or been cancelled had he become aware of it. Thirdly, and most importantly, he submitted that the terms of the email of 13th May 2020 and the disclaimer during the online process amounted to 'guidance' which the taxpayer ought to be permitted to follow, rather than the 'published guidance' which he accepted did contain content about working through a company making a person ineligible for SEISS. He gave as an example that most drivers didn't read the highway code before embarking on a journey.

63. Mr Davison responded that although there was some sympathy from HMRC there was no jurisdiction to consider this matter and to allow an appeal against an otherwise validly raised assessment. In any event, he submitted, there was nothing in the argument presented on the facts in this case.

64. As we have stated, in our judgment Mr Davison is correct and we have no jurisdiction to consider this and allow an appeal to an otherwise validly raised assessment. That simple conclusion is sufficient to dispose of the appeal.

65. In deference to Mr Handley's submissions, and if we were wrong in relation to jurisdiction, we deal briefly with them. First, we are not persuaded that it is axiomatic that lay people would not appreciate the distinction between self-employment and working through a company for tax purposes. This was a scheme for self-employed people. Mr Ash believed he was eligible when he made the claims because that is what he thought he was being told. Secondly, there is in the email of 13th May 2020 a sentence, in terms, that says that *you can ask your accountant to help you*. Thirdly, it is the taxpayer's responsibility to claim properly (hence the 'disclaimer' and 'declaration' that Mr Ash viewed, accepted and submitted). The published guidance did make it clear that claiming through a limited company was not permissible. Mr Handley's example of the highway code is not in our judgment a good one. A person may or may not read (or re-read) the highway code before embarking on a journey. But if they breach it, they risk a driving offence.

66. However, we wish to say something about the wording which led Mr Ash to claim.

67. No doubt everyone was doing their best at the time to reach out to the maximum numbers of taxpayers to inform and facilitate assistance where it was appropriate and lawful to provide it.

68. HMRC knew that Mr Ash had moved away from self-employment to working for his own company (and at least by March 2019 he had not reverted back). The terms of the 'disclaimer' that told Mr Ash in terms he was eligible because HMRC had checked his tax returns (and explains why the first part of the criteria for trading in 2018-19 was omitted from it (cf. paragraph 4.2 (c) Direction 1) was right insofar as the returns showed Mr Ash was self-employed in the early part of the tax year 2018-19. The way it was expressed, in our view,

made this erroneous claim more likely where a more carefully crafted 'disclaimer' together with the provision of the actual guidance, rather than reference, might have meant Mr Ash would not have claimed at all. This is a claim (and an appeal) that could have been avoided had clearer wording been employed by HMRC at the time and the published guidance provided rather than referred to.

69. That cannot matter insofar as our decision is concerned. For the reasons given above the assessment stands good and Mr Ash's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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: 07th MARCH 2023