Neutral Citation Number: **[2024] UKUT 00437 (TCC)**
UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicant: Digital Buying Partners Limited	**Tribunal Ref: UT-2024-000106**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

DECISION NOTICE FOLLOWING ORAL RENEWAL

JUDGE JEANETTE ZAMAN

1. The applicant, Digital Buying Partners Limited ("DBP"), applied to the Upper Tribunal (Tax and Chancery Chamber) for permission to appeal against the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) ("FTT") released on 9 May 2024 (TC/2021/19787). DBP applied to the FTT for permission to appeal against the Decision on five grounds. In a decision notice released on 25 July 2024, the FTT refused permission on all grounds.

2. On 17 August 2024 DBP renewed its application for permission to appeal for all five grounds, within the applicable time limit (the "Application"). I refused permission in a decision released on 16 October 2024 (the "Papers Refusal").

3. On 30 October 2024 DBP made an in-time application for that decision to be reconsidered at a hearing (the "Renewal Application"). The hearing (the "Renewal Hearing") was held on 12 December 2024.

4. Pursuant to s11(1) Tribunals Courts and Enforcement Act 2007 an appeal to the Upper Tribunal may only be made on a point of law. An application for permission to appeal must demonstrate that it is arguable that the FTT made an error of law in reaching its decision which was material to that decision. "Arguable" means an argument that carries a realistic as opposed to fanciful prospect of success.

5. References below in the form FTT[x] are to paragraphs of the Decision. Capitalised terms refer to such terms as defined in the Decision.

THE APPLICATION AND SUBSEQUENT RENEWAL APPLICATION

6. The FTT had decided that the (two) CJRS Employees of DBP were not eligible for CJRS payments because they were not included in a RTI return on or before 19 March 2020.

7. The Application had listed five grounds of appeal, namely:

(1) error in statutory interpretation of the CJRS;

(2) failure to properly consider evidence of HMRC's inconsistent application of the law;

(3) misapplication of the principle of consistency in public law decision-making;

(4) failure to consider the potential improper fettering of discretion in the application of CJRS rules; and

(5) inadequate consideration of relevant evidence.

8. The Application then set out the reasons which were relied upon, and attached what was described as "new evidence". In the Papers Refusal I refused permission on all five of these grounds.

9. The Renewal Application and Mr Verma's submissions at the Renewal Hearing were then based on what was said to be HMRC's discretionary application of the CJRS rules and its inconsistent treatment of different taxpayers.

10. The Renewal Application also included:

(1) request for a stay (pending the final outcome of the Renewal Application) of penalties and interest charges assessed by HMRC for late payment; and

(2) application for a protective costs order to ensure that DBP could pursue this matter in the interest of justice and fairness for similarly affected taxpayers.

11. I gave my decision on the request for a stay at the hearing (and record it below) and reserved my decision on the remaining matters.

WHETHER DECISION OF THE FTT INVOLVED AN ARGUABLE ERROR OF LAW

12. It was common ground before the FTT that the CJRS Employees were not included in a RTI return submitted to HMRC on or before 19 March 2020, which was the relevant CJRS day (FTT[26]).

13. One of the submissions made on behalf of DBP before the FTT was that there had been a reasonable excuse for the failure to include the CJRS Employees in a RTI return submitted to HMRC on or before the relevant CJRS day (FTT[26]). DBP had also made submissions based on the spirit of the rules and fairness. The FTT decided it could not consider whether there was a reasonable excuse for the failure – CJRS payments cannot be made where the employees were not included in a required return by the relevant date, and provisions relating to reasonable excuse do not apply (FTT[38] to [40]). The FTT also stated at FTT[41] that it had no jurisdiction to consider the submissions based on the spirit of the law and fairness.

14. DBP's submissions at the Renewal Hearing were based on HMRC having exercised a discretion to allow CJRS claims for other taxpayers where the 19 March 2020 deadline had not been met, with evidence (considered below) being provided in relation to one other taxpayer. Mr Verma emphasised that he wanted to demonstrate that HMRC had used discretion when they identified that a claim was made in relation to an employee who had not been included on a RTI return on or before the relevant CJRS day, and that Mr Murali Nair's evidence showed inconsistency of decision-making by HMRC.

15. I proceed on the basis that the error(s) of law sought to be relied upon were that it was arguable that HMRC had discretion to make CJRS payments in circumstances where a RTI return had not been filed before the relevant CJRS day, and/or the FTT arguably failed to take account of, or place sufficient weight on, evidence of the exercise of discretion by HMRC in respect of another taxpayer and the resulting inconsistency between taxpayers.

Whether FTT made an error of law when it concluded that HMRC did not have a discretion as to whether to make CJRS payments in respect of employees not included on a RTI return on or before the relevant CJRS day

16. The FTT decided that the CJRS Employees were not eligible for CJRS payments because they were not included in a RTI return submitted on or before 19 March 2020. The FTT's analysis is set out at FTT[37] to [42]. That includes an analysis of why the FTT could not consider whether there was a reasonable excuse for the failure to include those employees on a relevant return on or before that date. The FTT thus rejected the submission that the relevant law, which is mainly comprised of the Directions issued by the Chancellor of the Exchequer, provided for any element of discretion in relation to this requirement.

17. DBP have not identified any arguable error of law in the FTT's interpretation of the relevant law, and permission to appeal on this ground is refused.

Whether FTT failed to take account of, or place sufficient weight on, evidence of the exercise of discretion by HMRC in respect of another taxpayer and the resulting inconsistency between taxpayers

18. The FTT had heard witness evidence from Mr Nair (FTT[5]). Mr Nair provided payroll services to DBP and other clients. The FTT recorded at FTT[27] that DBP had submitted that there were instances where lateness and reasonable excuse had been allowed by HMRC when assessing similar claims, and that Mr Nair had recounted an instance of a similar experience where an investigating officer had allowed a claim (by another taxpayer). The FTT did not make a finding in relation this evidence.

19. I have considered:

(1) whether there is new evidence, and whether that should be admitted; and

(2) the jurisdiction of the FTT (and the Upper Tribunal on an appeal) in relation to claims based on public law principles.

20. DBP provided two documents to the Upper Tribunal:

(1) a seven-page document which had been included with its Application, which it referred to as "new evidence" – I refer to this document as the "Further Evidence"; and

(2) an email of 28 November 2024 from Mr Nair to Mr Verma (the "November 2024 email"). That email was sent to the Upper Tribunal, and forwarded to me, during the course of the Renewal Hearing, and comprised a brief outline of the compliance check undertaken by HMRC in relation to another taxpayer.

21. Where a party wishes to rely on new evidence that had not been provided to the FTT then it requires permission to do so.

22. The November 2024 email itself was clearly new, ie it had not been provided to the FTT before the hearing of the appeal. However, it was sent by Mr Nair, and summarised events which had happened before the FTT hearing, and the Decision referred to Mr Nair having given evidence about a claim by another taxpayer having been allowed. The November 2024 email states that Mr Nair had responded to HMRC's query about the eligibility of one employee (where the first RTI return was after 19 March 2020), explaining that there had been a mix-up

at the unit, and they had no reply from HMRC and were then advised that the person dealing with the compliance had been seconded to another area and another inspector was assisting with the check. They (the payroll company) sent all their responses to the new inspector, and she then wrote and confirmed that she had finished the checks and there were no amendments. At the Renewal Hearing, Mr Verma and Mr Nair emphasised that two HMRC inspectors had been involved with this other taxpayer, and they explained that this had not been made clear to the FTT.

23. There was some confusion, even at the Renewal Hearing, as to whether the Further Evidence was new. On its face, the Further Evidence comprised an email from Mr Verma to the FTT (and copied to HMRC) dated 13 October 2023 (ie before the date of the FTT hearing), which referred to the "below and attached", and the attachments were a one-page undated letter from Mr Nair referring to an enquiry where the employer had missed the RTI cut-off point and the furlough payments were not requested to be paid back by HMRC, and redacted extracts of correspondence with HMRC which were also annotated (apparently by Mr Verma or someone else at DBP) with explanatory comments.

24. When considering the Application I had said in the Papers Refusal that the Further Evidence was available before the hearing of the appeal and had been sent to the FTT's correct email address. This was material which had been provided by Mr Nair to DBP, and Mr Nair had given evidence before the FTT. However, whilst Mr Verma initially said at the Renewal Hearing that the Further Evidence had been sent to the FTT (as it appeared) and that he had added the annotations when sending it with the Application (hence why he had referred to it as "new"), he subsequently confirmed (ie later in the hearing) that only the letter from Mr Nair had been included with the email in October 2023. It was that document which had been before the FTT, not the redacted correspondence. The Further Evidence did therefore include some new evidence.

25. The approach to be taken to the question of admission of new evidence in an appeal was explained by the Upper Tribunal in *Ketley v HMRC* [2021] UKUT 218:

> "52. There is no doubt that the Upper Tribunal has power to admit new evidence that was not before the FTT pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"). Rule 15(2)(a)(ii) states that the power should be exercised in accordance with the overriding objective to deal with cases "fairly and justly".
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> 53. Both parties referred us to the three-part test for the admission of new evidence on an appeal in the civil courts set out by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489 at page 1491:
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> "… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."
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> 54. The parties agree that these criteria should be regarded as being of persuasive authority, but should not be applied as strict rules in the exercise of the Tribunal's discretion (see *Anglian Water Services Limited v HMRC* [2018] UKUT 431 ("*Anglian Water*") at [100])."

26. All of this information (albeit not in the form of the November 2024 email itself) was available to DBP before the FTT hearing. The "new" evidence comprised the redacted correspondence within the Further Evidence and the explanation in the November 2024 email that two HMRC inspectors had been involved in the check into the other taxpayer. This was

all known to Mr Nair at that time – he had recounted the inconsistency in the one-page letter within the Further Evidence, and had given oral evidence to the FTT. He had had every opportunity to present the full picture to the FTT.

27. At the Renewal Hearing, Mr Nair stated that his video evidence to the FTT had been "disrupted" because of connection issues. There is no reference in the Decision to the FTT having had any concerns about the ability of any of the parties or witnesses to participate fully in the video hearing. DBP had not mentioned any difficulties with the hearing in the Application or the Renewal Application. Whilst I have considered, in accordance with the overriding objective, whether there is any arguable error of law based on procedural fairness of the hearing, I concluded that this point does not arise here - not only had this point not been raised previously (with DBP having had several opportunities to do so) but more significantly it was not DBP's submission that this additional evidence had in fact been given orally by Mr Nair and the FTT had been unable to hear it or understand it because of connection issues; rather, DBP's submission at the Renewal Hearing was that the FTT had not taken sufficient account of HMRC having acted (in relation to another taxpayer) on the basis that it did in fact have discretion as to how or whether to apply the deadline of 19 March 2020.

28. The explanation given by Mr Verma and Mr Nair as to why this additional information (in particular the redacted correspondence) was not before the FTT was based on Mr Nair's concerns in relation to client confidentiality, and wanting to avoid the risk of HMRC seeking to re-open matters for the other taxpayer.

29. I am satisfied that the new evidence is apparently credible, comprising of redacted correspondence with HMRC and Mr Nair's explanation that a question as to eligibility had been raised by one officer, an explanation provided, and then another officer taking over and not requiring any claims to be amended.

30. The approach set out in *Ladd v Marshall* also requires consideration of whether the evidence "would probably have an important influence on the result of the case, though it need not be decisive". Two different issues arise in this respect:

> (1) The new evidence is consistent with the evidence which had been given by Mr Nair to the FTT, and which had been recorded by the FTT at FTT[27]. The FTT had neither accepted nor rejected that evidence; rather, the FTT decided that the question of reasonable excuse did not arise and it had no jurisdiction to consider whether the claims were within the spirit of the CJRS or whether the law is fair. I accept that the new evidence adduced by DBP provides some further support for an inconsistent approach having been adopted by HMRC in relation to another taxpayer. (I do also note that this new evidence relates to a single taxpayer, and it remains mere speculation as to whether there may have been other instances.) It is not the case that this new evidence is being relied on to show that a finding of fact which had been made by the FTT was not well-grounded.
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> (2) The new evidence was relied upon to support DBP's submissions as to discretion and inconsistency in HMRC's approach (which had been made to the FTT). The significance of the new evidence is intrinsically linked to the broader issue of whether, even if it were found as a matter of fact that HMRC considered that it had discretion to allow claims for CJRS Employees which had not been included in a RTI return on or before 19 March 2020, and HMRC had exercised that discretion in another taxpayer's favour resulting in inconsistency, such an exercise of discretion and resulting inconsistency could (or would probably) have influenced the result of DBP's appeal against the assessment to income tax.

31. The submissions made by DBP as to inconsistent treatment, fairness (raised before the FTT) and whether HMRC have a discretionary power in applying the CJRS rules raise questions of public law. The new evidence is clearly relevant to those submissions, although it is difficult to say it would have had an important influence in relation to those questions (ie distinct from whether it would have had an important influence on the result of the appeal) given the other evidence that was already before the FTT.

32. Whilst finely balanced (as the new evidence was available to DBP before the hearing and concerns about confidentiality could have been addressed by the redactions which have been made), I decided I should give permission for the new evidence to be adduced as this enables more informed consideration of DBP's submissions in relation to the FTT having arguably made an error of law in its approach to the public law issues.

33. The question of whether the FTT has jurisdiction to consider public law issues has been described as "vexed", with the authorities presenting a "fragmented" picture (see, eg, *KSM Henryk Zeman SP Zoo v HMRC* [2021] UKUT 182 ("*KSM Henryk Zeman*")).

34. In that case the Upper Tribunal made it clear that the critical question is whether the relevant statutory scheme expressly or by implication excludes the ability to raise a public law argument – there, the defence of legitimate expectation. On the facts in that case, and given the broad subject-matter of the relevant statutory provisions, they saw strong reasons for thinking it would be artificial and unworkable to exclude such a defence.

35. I have considered the approach taken by the Upper Tribunal in *KSM Henryk Zeman* carefully to assess whether it is arguable here that the FTT made an error of law when it concluded that it had no jurisdiction to consider whether the CJRS claims made in relation to the CJRS Employees were in the spirit of the legislation, or whether the law was fair. I have also in this context considered whether it is arguable that the failure to take account of any evidence of inconsistency (as some evidence was before the FTT even without the new evidence) or the exercise of discretion by HMRC for other taxpayers constituted an error of law.

36. The FTT set out the relevant law at FTT[16] to [25]. Paragraph 5 of the Schedule to the First Direction sets out the costs for which a claim could be made. Paragraph 5 provides that the costs of employment in respect of which an employer may make a claim for payment under CJRS are costs which relate to an employee to which the employer made a payment of earnings in the tax year 2019-2020 which is shown in a return under Schedule A1 to the PAYE Regulations, ie an RTI return, that is made on or before the "relevant CJRS day". The "relevant CJRS day" is defined for this purpose in paragraph 13 as 19 March 2020. There are then additional requirements, namely that the employer has not reported a date of cessation of employment in relation to that employee on or before that date, and the employee is a furloughed employee (as defined).

37. Whilst paragraph 5 does expressly include an element of discretion, that is a discretion for the employer as to whether or not to make a claim (the employer "may make a claim"). Thereafter, the conditions that need to be satisfied for eligibility are each bright-line requirements in that they are specifically stated and are standalone. They do not contain alternative limbs that, eg, ask whether the employee's employment had commenced before the relevant CJRS day.

38. This contrasts with the separate provisions which set out the time limit for making CJRS claims. Paragraph 33.2 of the Fifth Direction sets out the CJRS deadline days, and paragraph 33.3 then provides that HMRC may accept a CJRS claim made after the relevant CJRS deadline day if there is a reasonable excuse for the failure to make the claim in time and the claim is made within such further time as HMRC may allow. This provision is an example of a

provision where there is a specified date for a particular purpose (in this case, the date for making the claim) but then an express grant of discretion to HMRC to accept a late claim.

39. I do not consider that the provisions relating to the relevant CJRS day of 19 March 2020 offer any possibility of taxpayers being able to rely on public principles to expand their rights and result in a different, later, relevant CJRS day. I am not persuaded that it is arguable that public law principles of fairness, consistency, or the exercise or fettering of discretion apply to the relevant CJRS day in paragraph 5.

40. I have therefore concluded that it is not arguable that the FTT made an error of law and permission to appeal is refused.

APPLICATION FOR A STAY OF PENALTIES AND INTEREST

41. The Renewal Application attached a letter from HMRC issued on 22 October 2024 which referred to DPB not having paid back the CJRS payments to which it was not entitled, that HMRC would be charging penalties for paying late. DBP requested that the Upper Tribunal advice HMRC to suspend these charges and refrain from accruing further interest until the matter is resolved.

42. The appeal to the FTT was against an assessment to income tax in respect of an amount that had been claimed and received by DBP under the CJRS. It did not relate to any penalties (unsurprisingly, as it appears from the dates that such penalties had not been issued at the time the appeal was made by DBP to the FTT).

43. At the Renewal Hearing I informed DBP that the penalties (and interest) were not within the subject-matter of DBP's appeal which had been made to the FTT, the Upper Tribunal has no jurisdiction to direct that HMRC suspend these, I was not making any such direction and that DBP would need to address this more recent correspondence separately with HMRC.

APPLICATION FOR PROTECTIVE COSTS ORDER

44. The Renewal Application included an application for a protective costs order.

45. At the Renewal Hearing I explained that I would only decide this application if I decided to grant permission to appeal. I have decided to refuse permission and I do not therefore decide this application.

DECISION

46. Permission to appeal is REFUSED.

Signed: **Jeanette Zaman**	**Date: 23 December 2024**
Issued to the parties on: 23 December 2024	