UT Neutral citation number: [2025] UKUT 00247 (TCC)

UT (Tax & Chancery) Case Number: UT-2024-000098

Upper Tribunal

(Tax and Chancery Chamber)

Hearing venue: The Rolls Building

London EC4A 1NL

Heard on: 21 May 2025

Judgment date: 23 July 2025

INCOME TAX — FTT erred in deciding Respondent was entitled to coronavirus support payments pursuant to the Self-Employment Income Support Scheme "SEISS" – Respondent was not a qualifying person at the relevant time because he was not self-employed but a director or employee of a limited company which was trading - HMRC's appeal allowed – FTT Decision set aside and remade confirming HMRC's assessment to recover the payments

Before

JUDGE RUPERT JONES

JUDGE VIMAL TILAKAPALA

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

And

MARC GUNNARSSON

Respondent

Representation:

For the Appellants: Ms Laura Inglis of counsel instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

The Respondent appeared in person

INTRODUCTION

1. This appeal concerns the Respondent's entitlement to coronavirus support payments pursuant to the Self-Employment Income Support Scheme (the "SEISS").

2. The Appellants ("HMRC") appeal against the decision of the First-tier Tribunal (the "FTT") dated 4 April 2024 (the "Decision"). The FTT allowed in part the Respondent's appeal against an assessment (the "Assessment") issued to him by HMRC on 15 December 2021 under paragraph 9 of Schedule 16 to the Finance Act 2020 ("FA 2020").

3. The Assessment totalled £12,918.00. It related to the recovery of two coronavirus support payments received by the Respondent under the SEISS during the tax year ended 5 April 2021. The Respondent had made his first SEISS claim on 18 May 2020 (the "First Claim"), following which a payment of £6,890.00 was made to him on 26 May 2020. He then made a further SEISS claim on 8 September 2020 (the "Second Claim"), and a further payment of £6,028.00 was made to him on 16 September 2020.

4. HMRC subsequently determined that the Respondent was not entitled to either of those payments because, at the times when the First and Second Claims were made, the Respondent was not a "qualifying person" within the meaning of paragraph 3.2 of the Schedule to the First SEISS Direction. In particular, HMRC considered that at the times of making his claims the Respondent was not a self-employed individual. They considered that the Respondent was the director or employee of a limited company which was trading and on whose behalf he was performing the services. HMRC therefore issued the Assessment to recover the payments made as income tax.

5. The Respondent appealed against the Assessment, and the FTT upheld his appeal in relation to the First Claim, but not in relation to the Second Claim.

6. In its appeal to the Upper Tribunal ("UT") HMRC submit that, whilst the FTT reached the correct conclusion as regards the Second Claim, the Decision is flawed in respect of both claims because it contains material errors of law.

7. The FTT granted HMRC permission to appeal to the UT on two grounds:
   1) the FTT failed to apply the statutory eligibility test for SEISS payments, and relied instead on a misinterpretation of HMRC's guidance;

2) the FTT applied an "honest belief" test when determining eligibility, which is wholly unknown to the relevant legislation.

8. HMRC invited the UT to set aside the Decision and to re-make it on the basis of the statutory eligibility test, by virtue of its powers under s.12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"). The Respondent submits that the FTT did not err in law in making the Decision and the appeal to the UT should be dismissed.

9. Ms Laura Inglis of counsel appeared for HMRC and the Respondent appeared in person at the hearing on 21 May 2025. We are grateful to them both for their written and oral submissions.

THE LAW

The Legislation

10. Sections 71 and 76 of the Coronavirus Act 2020, as originally in force, provided the Treasury with the power to direct HMRC's functions in relation to the coronavirus pandemic. By this power, the Treasury introduced the First SEISS Direction on 30 April 2020 which provided for the making of support payments to the self-employed. This was followed by the Second SEISS Direction on 1 July 2020 and further SEISS directions during the coronavirus pandemic.

11. Paragraph 3 of the Schedule to the First SEISS Direction, under which the Respondent's First Claim was made, sets out certain eligibility requirements for support payments under the SEISS.

12. In particular, paragraph 3.2 of the Schedule to the First SEISS Direction provides as follows: "A claim must be made by a qualifying person."

13. Paragraphs 4.1 and 4.2 of the Schedule then provide as follows:

> 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.

14. Paragraph 13 of the Schedule also contains the following definition: '"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.' Section 989 ITA 2007 in turn provides that '"trade" includes any venture in the nature of a trade.'

15. The Second SEISS Direction, under which the Second Claim was made, extended the SEISS and incorporated the eligibility requirements contained in paragraph 3 of the Schedule to the First SEISS Direction. Paragraph 3 of the Schedule to the Second SEISS Direction provides that "all the provisions of SEISS continue to apply to this extension as they apply in relation to SEISS… unless the context otherwise provides." Paragraph 10.1 of that same Schedule also specifies that: "A claim for payment under SEISS Extension (a "SEISS Extension payment") must be made in accordance with paragraph 3 of SEISS on or before 19 October 2020." Paragraph 12.1 of the Schedule to the Second SEISS Direction then defines "SEISS" by reference to the First SEISS Direction: '"SEISS" means the Self-Employment Income Support Scheme set out in the Schedule to the direction given by the Treasury to HMRC on 30 April 2020 in exercise of the powers conferred by sections 71 and 76 of the Coronavirus Act 2020.'

16. Accordingly, the Second Claim was also subject to the requirements of paragraphs 3.2, 4.1 and 4.2 of the Schedule to the First SEISS Direction set out above.

17. Paragraph 8 of Schedule 16 to the Finance Act 2020 provides for the full amount of any payments received under the SEISS to which any claimant was not entitled to be recoverable as income tax. Paragraph 9, in so far as relevant, empowers HMRC to recover such income tax by means of an assessment:

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

HMRC's guidance on the eligibility requirement

18. HMRC's original SEISS guidance was published on the government website (www.gov.uk) in March 2020. This edition was in force from 26 March 2020 until 12

May 2020. HMRC's SEISS guidance on eligibility, as it stood on 12 May 2020, included the following statements:

"Who can apply
You can apply if you're a self-employed individual or a member of a partnership and you:
- have submitted your Income Tax Self Assessment tax return for the tax year 2018-19
- traded in the tax year 2019-20
- are trading when you apply, or would be except for COVID-19
- intend to continue to trade in the tax year 2020-21
- have lost trading/partnership trading profits due to COVID-19

Your self-employed trading profits must also be less than £50,000 and more than half of your income come from self-employment…"

19. This guidance reflected, albeit in different order, the eligibility criteria in paragraphs 4.2 (a), (c), (d), (f) and (g) of the Schedule to the First SEISS Direction.

20. HMRC's guidance on eligibility for SEISS was updated on 13 May 2020 – the day on which the online portal was first opened for individuals to make SEISS claims (and five days before the Respondent made his First Claim). It provided as relevant:

"Who can claim
You can claim if you're a self-employed individual or a member of a partnership and all of the following apply:
- you traded in the tax year 2018 to 2019 and submitted your Self Assessment tax return on or before 23 April 2020 for that year
- you traded in the tax year 2019 to 2020
- you intend to continue to trade in the tax year 2020 to 2021
- you carry on a trade which has been adversely affected by coronavirus
…
<u>You should not claim the grant if you're a limited company or operating a trade through a trust.</u>

To work out your eligibility we will first look at your 2018 to 2019 Self Assessment tax return. Your trading profits must be no more than £50,000 and at least equal to your non trading income."

[emphasis added]

21. HMRC therefore had added to its guidance on 13 May 2020 the material and express direction as underlined above regarding the non-eligibility of claims made by limited companies.

Case law

22. Although its decision is in no way binding upon us, the FTT has previously considered the eligibility criteria and whether SEISS might be available to persons trading as limited companies, including as their directors or employees, rather than as self-employed individuals or sole traders.

23. In the case of *Joshua Taylor v HMRC* [2022] UKFTT 304 (TC), Judge Anne Scott and Tribunal Member Patricia Gordon determined that individuals providing services through limited companies were not eligible for SEISS as they were not self-employed nor trading as individuals. The FTT decided that it was the company that was trading and not the individual. The judge stated at [52]-[55]:

> 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.

THE FTT DECISION

24. References in square brackets [] are to paragraphs of the FTT Decision unless context requires otherwise.

25. The FTT included a background section which addressed the procedural history of HMRC's enquiries and the appeal and began at [5]:

> 5. On 18 May 2020 and 8 September 2020, the Appellant made claims for the first and second SEISS grants respectively. At the time of making the claims, the Appellant was the sole director and shareholder of Machinegun Web Development Limited ("MWDL"). The Appellant was appointed as the sole director on the date of incorporation, 5 July 2018, and continued to act as such until MWDL was dissolved on 27 July 2021.

26. The Decision did not contain any section making findings of fact. The lack of express identification of any facts found has not caused real difficulty in the circumstances of this case because they are not in dispute.

27. At [42]-[45] of its Decision, within the section recording submissions made by HMRC which began at [40], the FTT included statements regarding the Respondent's self-assessment tax returns. During the course of the hearing before the UT the parties confirmed that these were not matters in dispute and could reasonably form the basis

of findings of fact before the UT– with two corrections made to [43] as appears in square brackets below:

> 42…The Appellant's Self-Assessment tax return for the tax year 2018/19, filed on 31 January 2020, showed a cessation date of 3 September 2018 for his self-employment. The Appellant also noted that, "as director of Machinegun Web Development Ltd, I received no income, benefits or lump sums and therefore no employee pages have been completed for this employment".
>
> 43. Version 2 of the Appellant's Self-Assessment tax return for 2018/19, received by the Respondents via 'E-Amendment Timestamp' on 30 December 2020, [showed] income from self-employment, [and] 'Dividends from UK companies' totalling £22,870.00.
>
> 44. The Appellant's Self-Assessment tax return for the tax year 2019/20, showed he received 'Dividends from UK companies' totalling £19,336.00 and employment income amounting to £7,230.00 (the Appellant's employment income was also reflected in his RTI records). The Appellant's tax return did not show any income from self-employment.
>
> 45. The Appellant's Self-Assessment tax return for the tax year 2020/21 showed he received 'Dividends from UK companies' totalling £3,178.00. Again, the Appellant's tax return did not show any income from self-employment. Additionally, the Appellant has provided no evidence to show self-employment which is separate to the business conducted through his limited company during the relevant periods.

28. The FTT recorded the key parts of HMRC's submissions on eligibility at [40] & [46]-[48] as follows:

> 40. HMRC claimed that the Appellant did not meet the following requirements:
> (1) The carrying on of a trade the business of which has been adversely affected by reason of circumstances arising as a result of coronavirus or coronavirus disease (Paragraph 4.2(a)),
> (2) The carrying on of a trade in the tax years 2018/19 and 2019/20 (Paragraph 4.2(c)),
> (3) The intention to continue to carry on a trade in the tax year 2020/21 (Paragraph 4.2(d)).
> …
> 46. Thus, when the Appellant made his SEISS claims, he was receiving only employment income as an employee/director of MWDL. This is reflected on his Self-Assessment tax return for 2020/21. Employment income is taxable under the Income Tax (Earnings and Pensions) Act 2003, not under ITTOIA 2005. HMRC therefore contended that the requirement at Paragraph 4.2(a) cannot be satisfied as, at the time of his claims, the Appellant carried on no other trades the business of which had been adversely affected by reason of circumstances arising as a result of coronavirus.
>
> 47. As the Appellant ceased self-employment on 3 September 2018, the Appellant also did not carry on a trade in the tax year 2019/20 and did not satisfy the requirement set out in Paragraph 4.2(c). Furthermore, at the time of the Appellant's claims, as he had no trade which was adversely affected by coronavirus, HMRC submitted that the Appellant could not have intended to continue his trade in the tax year 2020/21 for the purposes of Paragraph 4.2(d).

48. …HMRC submitted that, at the time he made the claims and received the grants, he was no longer carrying on a trade as an individual. At this time, he had formed a limited company of which he is the sole director.

29. The FTT recorded the Appellant's submission on eligibility in the first sentence of [48]:

48.The Appellant states that, further to the First SEISS Direction, he met the qualifying criteria throughout and that he was 'carrying on a trade' and was an 'individual'…

30. The FTT came to its conclusion to allow the Respondent's appeal against the Assessment in respect of the First Claim but dismiss it in relation to the Second Claim. It gave reasons at [55]-[60] of the Decision:

DISCUSSION AND DECISION

55. The Appellant claims that he read all the guidance and consulted his accountant. Although HMRC did not question the Appellant at the hearing about the accountant's advice the Tribunal presumes that the advice was that the Appellant met the qualifying criteria.

56. The Appellant made his first application on 18 May 2020 having read the guidance which was updated on 12 May 2020. This updated guidance did not specifically state that a limited company could not apply. As a lay person the Appellant considered that he was self-employed as he was the only director and shareholder of MWDL. The fact that he had stated in his 2018/19 tax return as originally filed that he ceased self-employment on 3 September 2018 does not alter the Appellant's belief that he was in fact self-employed as he was the only shareholder and director. He was simply completing the relevant questions on his tax return. The dividends which he declared in his 2018/19, 2019/20 and 2020/21 tax returns were his way of receiving income from his trade.

57. HMRC must have realised that its guidance did not make it clear that limited companies could not apply as halfway down the second page of their guidance updated on 12 May 2020 they state:

"You should not claim the grant if you're a limited company or operating a trade through a trust."

This information was not included in previous guidance.

58. Although the guidance was updated on 13 May 2020 the Tribunal finds that, having sought advice from his accountant and read all the HMRC guidance up to 12 May 202[0], the Appellant held an honest belief that he was self-employed and that he met the criteria set out in paragraph 4.2 of Schedule to the First SEISS Direction.

59. The Appellant did not make his second claim until 8 September 2020 and as he made his second claim under Phase 2 he should have read the updated guidance. If he had done so he would have appreciated that the updated guidance on 13 May 2020 stated that a limited company could not apply.

60. The Tribunal accordingly allows the Appellant's appeal against the first claim for £6,890.00 but dismisses the appeal against the second claim for £6,028.00.

THE PARTIES' SUBMISSIONS

HMRC's submissions

31. Ms Inglis made submissions in support of HMRC's appeal which we have adopted or incorporated within our reasons set out in the Discussion section below. We do not repeat them here.

The Respondent's submissions

32. The Respondent submitted that the FTT did not err in law in its decision to allow the appeal regarding the First SEISS Claim. He argued that the FTT applied the statutory framework and relevant principles properly in the context of the evidence and official guidance available at the time.

33. The Respondent relied on an argument as to the inconsistency in HMRC's position. While they now assert that the Respondent's ineligibility was clear from the outset, he suggested that HMRC did not act in accordance with that alleged clarity at the time. The Respondent, like many others, received communications from HMRC inviting him to claim SEISS, communications that he contends implicitly confirmed his eligibility or, at minimum, gave no warning of possible ineligibility. He contended that if the rules were as clear-cut as HMRC now claims, it is difficult to understand why they failed to prevent claims by those they deemed ineligible. HMRC cannot reasonably expect individual claimants to interpret eligibility more accurately than HMRC's own automated communications and frontline systems.

34. In response to Ground 1, the Respondent submitted that the FTT correctly quoted and considered the statutory provisions, including paragraphs 3.2 and 4.2 of the First SEISS Direction, and applied them to the facts as found. The FTT acknowledged that while the Respondent had incorporated a limited company (Machinegun Web Development Ltd), he had continued to carry out the same work as before, and his understanding of his employment status was shaped by HMRC's guidance.

35. He argued that the FTT was entitled to consider HMRC's SEISS guidance as a relevant interpretive aid, particularly in light of the guidance's ambiguity at the time of the First Claim on 18 May 2020. The explicit statement excluding limited company directors from eligibility was only added on 13 May 2020, five days before his First Claim. The guidance before that did not clearly exclude individuals in the Respondent's position.

36. The Respondent noted that HMRC argues that both the legislation and the initial guidance made it clear that individuals in the Respondent's position were not eligible for relief and that this should have been obvious even before that update. Nonetheless, he contended that such a position ignores the real-world situation of claimants. HMRC employs full-time professionals who interpret legislation; the Respondent is not a legal nor tax expert, nor should he be expected to act as one. Most public members rely in good faith on government guidance and not all have access to qualified advisers. He argued that the assumption that a layperson could or should have understood complex statutory requirements more clearly than the government's evolving guidance is unrealistic and legally unreasonable.

37. The Respondent submitted that he took advice from an accountant and relied on HMRC's published guidance in good faith. The FTT's reasoning in allowing the First Claim was based on the legislative context, the guidance available, and the Respondent's reasonable interpretation of both. At the hearing the Respondent had indicated that all his accountants had actually done by way of advice was to refer him to the guidance.

38. In response to Ground 2, the Respondent did not accept HMRC's submission that the FTT invented a new "honest belief" test that was not found in the legislation. He submitted that this mischaracterises the FTT's reasoning. The FTT did not replace the statutory test with a new one but instead used the Respondent's honest belief to assess whether the Respondent reasonably interpreted the SEISS eligibility criteria in good faith, particularly given the lack of clarity in the guidance at the time. Where official guidance is ambiguous, the Respondent submitted that taxpayers' reliance upon it is a relevant factor.

39. He argued that the concept of honest belief was applied as contextual background, not as a substitute for the statutory test. The FTT's reference to honest belief helped explain the Respondent's conduct and understanding of the SEISS requirements, given the rapidly changing and confusing guidance during the early stages of the pandemic.

40. The Respondent also relied upon HMRC's requirement for claimants to claim SEISS personally and its legal implications. He contended that it was significant that HMRC's official SEISS guidance expressly required individuals to make their claims personally and not through an accountant or adviser. The guidance stated: "You must make the claim yourself. Do not ask a tax agent or adviser to claim on your behalf as this will trigger a fraud alert, which will delay your payment."

41. He submitted that this requirement confirmed that HMRC expected ordinary claimants to rely directly on its public-facing guidance, not on legal interpretation nor professional tax advice. It would therefore be inconsistent for HMRC now to argue that claimants should have interpreted the detailed legal framework differently from what was implied or omitted in the guidance at the time. In directing individuals to make these claims themselves, HMRC positioned its guidance as the sole practical tool for assessing eligibility. Claimants like the Respondent were not just relying on the guidance in good faith — they were effectively required to do so by design of the scheme.

42. The Respondent finally observed that HMRC's appeal appears less about correcting a material legal error and more about preserving a rigid interpretative stance that could deter future challenges. He submitted that it is not an error of law for the FTT to consider government guidance, particularly where the statutory language is subject to interpretation and the guidance shapes claimants' conduct during a time of national uncertainty.

43. He therefore submitted that the appeal should be dismissed, and the FTT's Decision regarding the First Claim should be upheld.

DISCUSSION AND ANALYSIS

44. We consider each of HMRC's grounds of appeal in turn.

45. In essence, we agree with Ms Inglis's submissions for the reasons she gave.

Ground 1: The FTT failed to apply the statutory eligibility criteria when evaluating the First and Second Claims and relied instead on a misinterpretation of HMRC's guidance

46. We are satisfied that the FTT did err in law in failing to apply the statutory eligibility criteria when evaluating the First and Second Claims.

47. The FTT appears to have been satisfied that the Assessment was: (i) within the limits HMRC's authority (see Decision at [53]-[54]; (ii) in time (see Decision at [54]); and (iii) correct in amount (see Decision at [3]-[4] and [54]). The FTT stated at [54]:

> 54. The HMRC Officer concluded that the Appellant was not eligible to receive the SEISS grants and that the claim should be repaid and, consequently, raised the Assessment under Paragraph 9 of Schedule 16 FA 2020 to this effect. Paragraph 9(2) of Schedule 16 FA 2020 states that an assessment may be made at any time, but that this is subject to Sections 34 and 36 TMA 1970. Section 34 TMA 1970 provides that there is a time limit of 4 years for raising an assessment. In this case, the first amount of tax became due when the first claim was paid around 26 May 2020. The Assessment was issued on 15 December 2021, within the statutory time limit. The quantum of the Assessment is the full amount of the Coronavirus Support Payments to which the Appellant is not entitled, in line with Paragraph 8(5) of Schedule 16 FA 2020. HMRC's Assessment relates to both claims that did not meet the qualifying criteria set out at Paragraph 4.2 of the Schedule to the First SEISS Direction.

48. Having considered and determined these matters, it remained for the FTT to consider whether the Respondent met the statutory eligibility criteria for SEISS, including those set out in paragraphs 3 and 4 of the Schedule to the First SEISS Direction. HMRC had made clear submissions, recorded at [40] & [46]-[48], as to why the Respondent did not satisfy the criteria in paragraphs 4.2(a), (c) and (d) of the Schedule in relation to both the First and Second Claims.

49. Although paragraphs 3.2 and 4.2 of the Schedule to the First SEISS Direction were quoted in the Decision at [31]-[32], the FTT failed to refer to or apply those provisions in reaching its conclusion (see [55]-[60] as set out above). The FTT failed to address the eligibility criteria at all and particularly those in dispute as outlined in HMRC's submissions. By disregarding those criteria, the FTT failed to apply the law correctly, which amounts to an error of law.

50. Furthermore, the reasoning in [57]-[60] of the Decision, in particular, demonstrates that the supposed lack of clarity in HMRC's SEISS guidance was the material factor on which the FTT relied to reach its conclusion to allow the appeal with respect to the First Claim and to dismiss it in respect of the Second Claim.

51. In so doing, the FTT determined the Respondent's appeal based on its mis-interpretation of HMRC's SEISS guidance and its seemingly unsupported conclusion as to HMRC's rationale for updating it (see Decision at [57]-[60]):

    a. At [57]-[58] of the Decision, the FTT appears to have concluded that HMRC's SEISS guidance prior to 13 May 2020 was unclear, merely because a statement was added on that date expressly confirming that persons trading via limited companies were not eligible for SEISS.

    b. At [59], the FTT acknowledged that HMRC's updated guidance made it clear, well in advance of the Respondent making the Second Claim, that people trading via limited companies could not apply.

    c. It was for these reasons that the FTT concluded at paragraph [60] that the Respondent's appeal should be allowed in respect of the First Claim, but be dismissed in respect of the Second Claim.

52. By basing its conclusion on its view of HMRC's non-statutory and non-binding guidance on eligibility rather than on any interpretation or application of the legislative criteria, the FTT erred in law. The guidance was at best an interpretative aid to the construction of any ambiguity in the legislation but the legislation on eligibility, as set out in paragraphs 3 and 4.1-4.2 of the Schedule to the First SEISS Direction, was perfectly clear.

53. Further and in any event, even if HMRC's guidance was relevant to the construction of the Direction and the determination of the appeal, the FTT misinterpreted that guidance. In particular, it was the clear import of its original SEISS guidance prior to 13 May 2020 that persons trading via limited companies could not claim support under SEISS because it stated that only self-employed individuals or a member of partnership could claim or apply. That could never include directors nor employees of limited companies.

54. From the opening sentence of both the original and updated guidance on eligibility set out above, it is clear that in order to be eligible to claim, a prospective claimant must be a self-employed individual or a member of a partnership. The Respondent did not fall into either of those categories when he submitted the First Claim on 18 May 2020. By necessary implication, anyone who did not fall within either of those categories was not entitled to claim SEISS.

55. The actual or deemed state of knowledge of the ordinary or reasonable taxpayer or any individual claimant as to their entitlement to SEISS is irrelevant to their eligibility as we explain below. This is because the knowledge or understanding of a claimant as to their eligibility forms no part of the criteria for entitlement. Therefore, the extent of the public's knowledge or understanding of HMRC's guidance could not affect the eligibility in law as provided by the Schedule to the First Direction. Nonetheless, we do observe that the separate legal personality of limited companies is reasonably known, or at least readily understandable, to the public at large not simply to those with legal, company or tax expertise. Thus, to the reasonable and ordinary taxpayer it would

be apparent that a necessary implication of the criteria in the guidance was that a person employed by or a director of a limited company would be ineligible for SEISS in respect of services provided by the company. It was reasonably clear from HMRC's original guidance, even before the update of 13 May 2020, that persons trading through the use of limited companies were not eligible to claim under the SEISS because it would be the company performing the trade and not them personally.

56. HMRC added the following express statement to its guidance on 13 May 2020, five days before the Respondent made the First Claim and on the day when the portal first opened to allow any taxpayer to make any claim: "You should not claim the grant if you're a limited company or operating a trade through a trust". This was a negative statement or direction as to eligibility which simply reinforced the scope of the positive guidance as to eligibility. The Respondent does not appear to have checked the updated guidance before he made his First Claim on 18 May 2020.

57. Contrary to the FTT's Decision, the addition of this negative statement (presumably to deter erroneous claims) did not change the message of HMRC's original SEISS guidance. As set out above, HMRC's earlier guidance did not include any suggestion that limited companies, or those trading them through them, were eligible to claim; the insertion of an explicit statement to that effect does not mean that the earlier guidance was unclear (contrary to the FTT's assertion at paragraph [57] of the Decision). The FTT therefore misinterpreted HMRC's earlier SEISS guidance.

58. The criteria quoted above from the original guidance above also make clear that "you" (i.e. the prospective claimant) must have traded in 2019/20, be trading at the time of the application (save for interruptions attributable to coronavirus) and intend to continue to trade in the tax year 2020/21.

59. In conclusion, the FTT erred by failing to apply the law correctly or at all, applying non-binding guidance instead of the applicable legislation, and in any event by misinterpreting the guidance on which it relied. There were material errors of law in making the Decision. For the reasons we explain below, had the FTT applied the statutory test as to eligibility, it would have dismissed the Respondent's appeal as regards both the First Claim and the Second Claim.

<u>Ground 2: In evaluating the First Claim, the FTT applied an "honest belief" test which does apply to nor form part of the relevant legislation</u>

60. At [58] of the Decision, the FTT concluded that, at the time the First Claim was made, the Respondent (having consulted his accountant and read the available guidance) held an "honest belief" that he was self-employed and that he met the criteria set out in paragraph 4.2 of the Schedule to the First SEISS Direction.

61. HMRC do not challenge the FTT's finding that the Respondent held such an honest belief. Likewise, the UT accepts it.

62. Nonetheless, a misunderstanding of the law or guidance does not justify special tax treatment. Nor would it render a taxpayer entitled to a benefit or relief to which they would not otherwise be entitled by application of the strict statutory criteria. As Bingham LJ (as he then was) stated (albeit in the different context of payment of tax or receipt of relief rather than the receipt of a benefit such as SEISS), a taxpayer's only legitimate expectation is that he will be taxed according to statute, not untaxed by concession or a wrong view of the law (see *R v IRC ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 at 1569).

63. The law is beyond doubt: neither the First or Second SEISS Directions nor Schedule 16 to the Finance Act 2020 contains any provision permitting a claimant's beliefs when a claim is made to be taken into account when evaluating their eligibility under the SEISS.

64. By applying an "honest belief" test in paragraph [58] of the Decision, the FTT departed from the test established in the legislation and based its conclusion in respect of the First Claim on a misinterpretation and misapplication of the law. This too constituted a material error of law.

Legitimate Expectation

65. The FTT did not rely on the Respondent holding any legitimate expectation as to his entitlement to SEISS in making its Decision in his favour in respect of the First Claim. Instead, it incorrectly relied on the Respondent's honest belief as to his eligibility, as we have identified above. Likewise, no legitimate expectation argument was relied upon in any Respondent's Notice to the UT identifying the issue as an alternative basis in law for the UT to uphold the FTT's Decision. Nonetheless, the nature of the Respondent's argument before the FTT and UT, understandably put in layperson's language, comes close to asserting that he held a legitimate expectation as to his entitlement to SEISS.

66. In that regard, we should address the arguments of the parties briefly. In short, we accept Ms Inglis's argument that legitimate expectation could not apply so as to entitle the Respondent to SEISS or to uphold any part of the FTT's Decision.

67. First, there is a procedural bar to the Respondent relying on any such argument. In this case, the Respondent did not seek to argue that he held a legitimate expectation before the FTT, it formed no part of the FTT Decision, it was not raised as a point of law in response to HMRC's appeal to the UT and the Respondent was not granted permission for it to be argued.

68. Second, any argument as to legitimate expectation may not fall within the UT's jurisdiction to determine on appeal from the FTT as it is not clear whether it would fall within the FTT's jurisdiction. Even if there had been any unequivocal statements or assurances given by HMRC to the Respondent in guidance or communications, HMRC argue that the proper context in which the Respondent could and should have raised a

legitimate expectation argument would have been in proceedings for judicial review rather than on appeal to the UT. The Respondent has not brought judicial review proceedings and any claim would now long since be out of time. There is nothing within paragraphs 3, 4.1 nor 4.2 of the Schedule to the First Direction that confers upon HMRC nor the FTT any discretion that should be exercised in relation to the eligibility criteria. However, it has not been argued whether there was anything in relation to the statutory scheme for making and appealing assessments to recover SEISS sums paid (pursuant to Schedule 16, FA 2020 and sections 31(1)(d) and 49D Taxes Management Act 1970) that requires a discretion to be exercised by HMRC or the FTT that would import a public law jurisdiction into this appeal. As the UT has explained in *Caerdav Ltd v HMRC* [2023] UKUT 00179 (TCC), at [152]-[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, as the UT in *Henryk* explains.

69. Third, we consider that the substance of the argument on legitimate expectation would have no merit in any event.

70. We are satisfied that even if there had been any ambiguity in: a) HMRC's published SEISS guidance as to the eligibility of those trading as limited companies; and b) the communications sent by HMRC to the Respondent, these could not and did not give rise to a legitimate expectation that he was eligible for or entitled to support payments.

71. The authorities on legitimate expectation in the context of taxation are helpful to consider, albeit that a distinction may be made as to expectations regarding the eligibility to an HMRC administered benefit such as SEISS rather than the liability to tax. Ultimately, SEISS to which a person is not entitled will be recovered as if it is income tax.

72. In relation to a), we have addressed HMRC's guidance on eligibility above. Neither HMRC's original nor updated guidance contained any unequivocal statement or unambiguous assurance (or "a promise which is 'clear, unambiguous and devoid of relevant qualification") that the Respondent was eligible for SEISS nor of the kind capable of giving assurance that persons trading as limited companies would qualify for support under SEISS (see *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 and *R (on the application of Aozora GMAC Investment Ltd)* v HMRC [2019] EWCA Civ 1643 at [26]-[33]).

73. As explained by Sir Ross Cranston in *Glint Pay Services Ltd, R (On the Application Of) v Commissioners for His Majesty's Revenue & Customs* [2023] EWHC 1621 (Admin) at [36]-[38] there is a high threshold to satisfy before legitimate expectation can be made out in the taxation context:

> ‘36…The hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice: *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioner* [2019] EWHC Civ 1643, [27], per Rose LJ (as she was).
>
> 37.In *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 Arden LJ (as she was) helpfully gathered together the legitimate expectation principles relevant in the taxation context: HMRC is a public body invested with the power to collect tax, and taxpayers must expect to pay the right amount of tax; a taxpayer's only legitimate expectation is, prima facie, that they will be taxed according to statute, not concession or a wrong view of the law; in assessing the meaning, weight and effect reasonably to be given to statements of HMRC, the factual context, including the position of HMRC themselves, is all important; a statement formally published by HMRC to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them; there was a distinction between a decision that amounted to "mere unfairness" (conduct 'a bit rich' but understandable), and a "decision so outrageously unfair that it should not be allowed to stand": [37], [40], [42].

74. As to unfairness, Rose LJ explained in *Aozora* that it "has to reach a very high level; it has to be outrageously or conspicuously unfair." She also said:

> "47…There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas … But there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law."’

75. There was no assurance nor promise given to the Respondent in this case that he was entitled to SEISS and no unfairness caused to the Respondent by HMRC seeking to recover the payments to which he was not eligible. The original guidance necessarily implied that limited companies, and individual directors or employees trading through such, were ineligible for SEISS and the updated guidance expressly stated as much. In any event the law remained consistent throughout providing unambiguously that directors or employees of limited companies and the companies themselves were not so eligible.

76. The same applies in relation to b), the emails which were sent to the Respondent on 8 and 13 May 2020 by HMRC. HMRC’s communications with the Respondent did not contain any promise, unambiguous assurance or unequivocal statement that the Respondent would be eligible to receive SEISS payments.

77. The first email that the Respondent relied upon was one dated 8 May 2020 which he received from HMRC. It was generic in nature:

> ‘Dear customer,

The Chancellor, Rishi Sunak, announced a new scheme at the end of March to support self-employed people impacted by coronavirus. It's about to launch ahead of schedule and we're writing to you because you might be eligible to make a claim under the scheme.

The Self-Employment Income Support Scheme provides a taxable grant of 80% of average monthly trading profits, paid in a single instalment of up to a total of £7,500.

This email sets out how to check your eligibility and how to make a claim.

How to check if you are eligible
Search GOV.UK for 'Self-Employment Income Support Scheme' from Monday 4 May.
To complete this eligibility check, you'll need to have your:
…
How to make a claim
You'll need to make the claim yourself, although you can seek advice from an agent if you use one.
…
Jim Harra
Chief Executive and Permanent Secretary – HMRC'

78. The next email from HMRC was dated 13 May 2020:

'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 when 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 '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.
…
Please note that we will calculate the amount of self-employment support you will receive; you don't need to do this yourself.

Once you have made your claim, you will have your money within six working days.
…
Jim Harra
Chief Executive and Permanent Secretary – HMRC'

79. The first email simply explains to all customers (taxpayers) who might be eligible to make a claim for SEISS and how they might do so. The second email refers back to the first and at its highest states to all customers that, 'We contacted you recently because we think you are eligible for a grant…The scheme is now open and every eligible customer has been given a date from when they can claim…'.

80. There was no positive assurance that the Respondent was eligible or that there had been specific consideration of his tax affairs. The guidance also contained reference to HMRC's approach on a 'pay now check later' that it would seek to recover any payments made because of fraud or inaccuracy. This was consistent with the Government's decision that there was urgent need for financial support during the pandemic. Even if the Respondent did rely on HMRC's communications or guidance in good faith, it was not unclear and did not give him positive assurance of his eligibility to SEISS.

81. There was nothing within either communication sent by HMRC to the Respondent that assured or could reasonably be taken as assuring the Respondent personally that he was in fact or law entitled to or eligible for SEISS. It should also be noted that the context in which HMRC published its guidance and sent its communications was in the context of developing a support scheme and providing urgent financial relief for those taxpayers affected by coronavirus at the beginning of the pandemic in the UK in March 2020.

82. Likewise, the Respondent could not reasonably rely on any statement made by the gov.uk online portal when processing his claim to SEISS that might have suggested to him he was eligible. The Respondent did not challenge the finding which is set out at [49] of the Decision:

> …when completing the SEISS application form [on the online portal], the Appellant was presented with the correct criteria and guidelines by way of 'Disclaimer' screens. Whilst HMRC accept that the wording on the 'Disclaimer' pages suggested that full checks of his eligibility had been carried out (in the first paragraph by reference to his previously submitted Self-Assessment tax returns) and that he was considered to be eligible, it goes on to provide qualification to this statement by including eligibility criteria. Additionally, the final paragraph makes clear that claims would be checked and monies recovered in the event of inaccurate information, error or where claims have not been made for the purpose described.

83. Again, there was no assurance nor anything which could reasonably be taken as assurance as to the Respondent's eligibility from the use of the online portal and the manner in which his claim was made. Ms Inglis further highlighted that the Respondent's later attempts to make claims to SEISS, following the First and Second Claims, would have made clear that the Respondent was not entitled to any payments because, once his 2019/20 tax return had been filed which declared no self-employed income, the UTR entered into the portal would have been linked to the Respondent's return and any claim would have been declined.

84. For these reasons, any attempt to uphold the FTT's Decision on an alternative ground of the Respondent's legitimate expectation must fail.

Conclusion

85. We therefore allow the appeal on both grounds. There were material errors of law in the FTT Decision. The Decision must be set aside.

RE-MAKING THE DECISION

86. We are satisfied that we should re-make the Decision rather than remit it to the FTT in circumstances where we have all the relevant material before us and the primary facts are not in dispute. To do otherwise would cause unnecessary delay and not be just nor fair to the parties.

87. In re-making the decision, pursuant to section 12(4) of the Tribunal Courts and Enforcement Act 2007 we may make any decision which the FTT could make if the FTT were re-making the decision and may make such findings of fact as we consider appropriate.

88. When the First and Second Claims were made (i.e. in May and September 2020), the Respondent was not a "qualifying person" within the meaning of paragraph 3.2 and 4.1 of the Schedule to the First SEISS Direction, such that he was not entitled to claim support under the SEISS.

89. This is because he did not satisfy three of the eligibility criteria in paragraph 4.2 of the Schedule to the First SEISS Direction as submitted by HMRC.

90. First, the Respondent did not satisfy the condition in paragraph 4.2(a) of the Schedule to the First SEISS Direction, in that he was not carrying on a trade.

91. When he made the First and Second Claims, the Respondent was the sole director and shareholder of Machinegun Web Development Limited ("MWDL"), which was incorporated on 5 July 2018 and dissolved on 27 July 2021 (see Decision at [5]). He had previously carried on a self-employed trade as a web developer, but his self-assessment return for the tax year 2018/19 showed a cessation date of 3 September 2018 for his self-employment (see Decision at [42]).

92. HMRC accept that the Respondent carried out the same type of activity at all relevant times, whether as a sole trader or as a director of MWDL. However, as a limited company, MWDL was a legal person distinct from the Respondent, and once the Respondent began acting or trading through the use of MWDL, it was that corporate person (and not the Respondent himself) that carried on the activities or the trade. We endorse the decision in *Joshua Taylor* as including the correct analysis and interpretation of the law.

93. Accordingly, the Respondent did not satisfy the condition in paragraph 4.2(a) of the Schedule to the First SEISS Direction on the basis of MWDL's trading.

94. Further, the Respondent's self-assessment returns for the tax years 2019/20 and 2020/21 did not show any income from self-employment (see Decision at [43]-[45]). Moreover, the Respondent provided no evidence that he carried on any other self-employed trade (separate to the business of MWDL) between that cessation date and the dates when his SEISS claims were made (see Decision at [45]).

95. Even apart from the issue of separate legal personality, the Respondent's activities for MWDL and MWDL's trading did not amount to him carrying on a trade within the meaning of paragraph 13 of the Schedule to the First SEISS Direction.

96. As set out above, paragraph 13 restricts the meaning of "trade" to a trade, profession, or vocation the profits of which are taxable under Part 2 of ITTOIA 2005, which deals with income tax as it applies to trading income from self-employment. The Respondent's amended return for 2018/19 does show some self-employment income from the time prior to September 2018 when he ceased trade as a self-employed individual but thereafter, in the same tax year, from dividends as a director of MWDL as incorporated. The Respondent's self-assessment returns for the tax years 2019/20, and 2020/21 do not disclose any income from self-employment, but do disclose "Dividends from UK companies" and/or employment income (see Decision at [42]-[45]).

97. The Respondent's receipts from his activities for MWDL were therefore taxable as dividend income (under Part 4 of ITTOIA 2005) or as employment income (under ITEPA 2003[1]), but not as trading income under Part 2 of ITTOIA 2005, as required by paragraph 13 of the Schedule to the First SEISS Direction. This is another reason why the Respondent's activities for MWDL did not amount to a trade for purposes of the SEISS.

98. Further and for the avoidance of doubt, MWDL itself was not eligible to claim support under the SEISS either – firstly because it was not an individual (and so did not satisfy condition (f) in paragraph 4.2 of the Schedule to the First SEISS Direction). Moreover,

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[1] Section 5 ITEPA 2003 provides that the income of officer holders, such as directors of companies, is to be taxed as employment income:
Application to offices and office-holders

(1) The provisions of the employment income Parts that are expressed to apply to employments apply equally to offices, unless otherwise indicated.

(2) In those provisions as they apply to an office—

(a) references to being employed are to being the holder of the office;

(b) "employee" means the office-holder;

(c) "employer" means the person under whom the office-holder holds office.

(3) In the employment income Parts "office" includes in particular any position which has an existence independent of the person who holds it and may be filled by successive holders.

as a UK resident company, MWDL's profits were chargeable to corporation tax, and not to income tax under Part 2 of ITTOIA 2005 (see ss. 2, 3 and 5 of the Corporation Tax Act 2009), with the result that MDWL's activities did not constitute a trade within the meaning of paragraph 13 of the Schedule.

99. The Respondent's beliefs as to his entitlement to SEISS, or even his beliefs as to his continued self-employed status post September 2018, however honestly held, are irrelevant even if we, like the FTT, have some sympathy for his position. While the Respondent states that at the time he believed the UTR number was a reference only for the self-employed, he now understands that it is simply a unique tax reference numbers for taxpayers generally: the self-employed, the employed or other taxpayers. Even if the position in which the Respondent now finds himself is rather unfortunate, he was neither self-employed nor trading when acting as a director (and / or employee) or shareholder of MDWL and when it supplied its services from September 2018 onwards.

100. Second, the Respondent did not satisfy the condition in paragraph 4.2(c) of the Schedule to the First SEISS Direction, in that he did not carry on a trade in tax year 2019/20.

101. As noted above, the Respondent's self-employment ceased on 3 September 2018, and he provided no evidence that he carried on any other self-employed trade between that date and the dates when the First and Second Claims were made (see Decision at [42] and [45]).

102. Third, the Respondent did not satisfy the condition in paragraph 4.2(d) of the Schedule to the First SEISS Direction. As he was not carrying on a trade at the time of making the First and Second Claims, he could not "intend to continue" to carry on a trade in tax year 2020/21.

103. We remake the Decision on the basis of the test for eligibility in paragraphs 3 and 4.1 & 4.2 of the First SEISS Direction. The Respondent was not eligible for nor entitled to any payment by way of either the First or Second Claim to SEISS. There is no other challenge to the lawfulness of HMRC's Assessment to recover the payments made in respect of the First and Second Claims.

104. The Respondent's appeal against HMRC's Assessment is therefore dismissed and the Assessment to recover the payments made under both Claims is confirmed. HMRC have also confirmed to the Respondent that they only seek to recover interest upon the Assessment. They do not seek, and never have sought, any penalties against the Respondent in respect of the SEISS payments.

CONCLUSION AND DISPOSITION

105. For the reasons set out above, we allow the appeal against the Decision of the FTT and set it aside based upon material errors of law. We re-make the decision

dismissing the Respondent's appeal against HMRC's Assessment. We confirm that HMRC is entitled in law to recover from the Respondent the sums paid to him by way of SEISS in respect of the First and Second Claims.

POSTSCRIPT

106. The Respondent was an unrepresented litigant in person. In the run up to the hearing he had not provided a skeleton argument in accordance with the direction that one should be filed and served 7 days before. The Tribunal therefore explained to him in ordinary language in an email dated 16 May 2025 what type of information a skeleton argument might be expected to include on an appeal to the UT.

107. The Respondent filed at the UT and served upon HMRC the first draft of his skeleton argument on 20 May 2025, the day before the hearing. This contained reference to three previous decisions purportedly made by the FTT which were said to support the Respondent's interpretation of the legislation. Paragraphs 22-25 of this draft of his skeleton stated:

> 22. In *Patel v HMRC [2023] UKFTT 138 (TC)*, the First-tier Tribunal (FTT) found that HMRC's SEISS guidance was unclear at the time of the claim and that a claimant's reasonable belief in eligibility, based on that guidance, could be considered. The Tribunal allowed the appeal in part.
>
> 23. In *Ali v HMRC [2022] UKFTT 329 (TC)*, the Tribunal found that the Appellant reasonably relied on their accountant's advice and HMRC's guidance. The FTT held that this context was relevant to the statutory interpretation.
>
> 24. In *Kamran v HMRC [2023] UKFTT 91 (TC)*, the Tribunal noted the continuity of work before and after the SEISS claim and applied a purposive approach to paragraph 4.2 of the SEISS Direction. The First-tier Tribunal (FTT) allowed the appeal in part, finding that the claimant continued the same trade.
>
> 25. These authorities demonstrate that the First-tier Tribunal can take a holistic view when determining eligibility under SEISS legislation, including the clarity of HMRC's guidance and the taxpayer's reasonable understanding.

108. In preparation for the hearing HMRC searched public and internal databases to check the decisions purportedly made by the FTT as relied upon by the Respondent. They discovered that the cases referred to by the Respondent do not exist.

109. On HMRC challenging the Respondent, he filed and served an amended and final skeleton argument later the same day with these paragraphs removed. During the hearing the Respondent accepted that he had used online Artificial Intelligence ("AI") software to assist him with his written submissions.

110. The Divisional Court has recently given guidance of the use of AI in court proceedings: see *Ayinde, R (On the Application Of) v Qatar National Bank QPSC & Anor* [2025] EWHC 1383 (Admin) ("*Ayinde*"). Much of the guidance applies equally to tribunal proceedings. The focus of the judgment is upon the use of AI by lawyers

or legal representatives rather than unrepresented litigants. The court notes at [15]-[16]:

> 15.Guidance is also given to judges about the use of artificial intelligence. That guidance, first provided in December 2023 and updated in April 2025, is published on the judiciary's website.[4] Its contents are as relevant to the use of artificial intelligence by lawyers as they are to its use by the judiciary. It makes clear that it is necessary to uphold confidentiality and privacy by not entering into a public artificial intelligence tool any information that is not already in the public domain. It also makes clear that it is necessary to check any information that is provided by an artificial intelligence tool before it is used or relied upon. It further emphasises the need to be aware that artificial intelligence tools may make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist, or provide incorrect or misleading information regarding the law or how it might apply, or make factual errors.
>
> 16.Importantly, the guidance says that: "All legal representatives are responsible for the material they put before the court/tribunal and have a professional obligation to ensure it is accurate and appropriate." It warns about the risks of using generative artificial intelligence for legal research or legal analysis: "Legal research: AI tools are a poor way of conducting research to find new information you cannot verify independently. They may be useful as a way to be reminded of material you would recognise as correct. Legal analysis: the current public AI chatbots do not produce convincing analysis or reasoning."

111. The updated guidance for judicial office holders of 14 April 2025 includes a section "3. Guidance for responsible use of AI in Courts and Tribunals". Paragraph 7 is titled "Be aware that court/tribunal users may have used AI tools" and includes the following guidance:

> "AI chatbots are now being used by unrepresented litigants. They may be the only source of advice or assistance some litigants receive. Litigants rarely have the skills independently to verify legal information provided by AI chatbots and may not be aware that they are prone to error. If it appears an AI chatbot may have been used to prepare submissions or other documents, it is appropriate to inquire about this, ask what checks for accuracy have been undertaken (if any), and inform the litigant that they are responsible for what they put to the court/tribunal. Examples of indications that text has been produced this way are shown below."

112. We repeat this guidance in relation to unrepresented litigants. The accuracy of Artificial Intelligence (AI) should not be relied upon without checking, particularly when it comes to statements or arguments that it makes concerning the law. There is a danger that unarguable submissions or inaccurate or even fictitious information or references may be generated. Unrepresented parties, just as legal representatives, remain responsible for the accuracy, both the reliability and credibility, of the information, both evidence and submissions, they present to the FTT or UT.

113. In this case, HMRC was put to the trouble of having to investigate the existence of the purported decisions relied upon by the Respondent. Fortunately, they did so. Depending on the circumstances, there may be occasions when the opposing party or

the tribunal are not able to discover the errors relied upon. There may be others where an adjournment is required to investigate or address the inaccurate information.

114. On these facts, we do not consider the Respondent to be highly culpable because he is not legally trained or qualified, not subject to the same duties as a regulated lawyer or other professional representative and may not have understood that the information and submissions presented were not simply unreliable but fictitious. He was under time pressure given his other competing responsibilities and doing his best as a lay litigant seeking to assist the UT by preparing written submissions.

115. Nonetheless, in the appropriate case the UT may take such matters very seriously. Sanctions available for the misuse of AI by a party or representative are highlighted in *Ayinde* at [23]-[31]. Many of these sanctions are available to the UT.

JUDGE RUPERT JONES **JUDGE VIMAL TILAKAPALA**

UPPER TRIBUNAL JUDGES

DATE RELEASED: 24 July 2025