

Analysis

Taxing excess Covid-19 support payments

Speed read

FA 2020 Sch 16 empowers HMRC to tax Covid-19 support payments. Taxpayers should check their CJRS and SEISS claims and notify HMRC of any mistakes within the 90 day deadline, unless they can repay the monies beforehand. Excessive claims may be rectified by declaring and paying income tax, unless HMRC issues an assessment. Failure to notify or error penalties may be levied too. Businesses that knowingly made incorrect claims and fail to notify (or repay) in time face failure to notify penalties of up to 100% of the excessive claims, as their behaviour is deemed deliberate and concealed.



Helen Adams

BDO

Helen Adams is a principal in the tax dispute resolution team at BDO LLP. She advises individuals, companies and trustees on resolving a range of contentious tax issues including voluntary disclosures, enquiries, COP8/COP9 investigations and alternative dispute resolution. Email: helen.adams@bdo.co.uk; tel: 020 7893 3447.



Richard Morley

BDO

Richard Morley is a partner in BDO LLP's tax dispute resolution team with more than 30 years of tax experience. He specialises in defending both corporate and personal clients against any type of tax investigation as well as guiding clients through the process of voluntary disclosures. Email: richard.morley@bdo.co.uk; tel: 020 7486 5888.

HMRC paid £7.8bn to 2.7m individuals under the self-employment income support scheme (SEISS) by 19 July 2020. By 16 August 2020, HMRC paid £35.4bn to approximately 1.2m employers under the coronavirus job retention scheme (CJRS) as a result of 9.6m employees being furloughed. Covid-19 support payments (CSPs) were also made under coronavirus statutory sick pay rebate scheme and other grant schemes. HMRC is keen to recoup any support payments which recipients were not entitled to receive or retain. Consequently, FA 2020 s 106 and Sch 16 enables HMRC to tax CSPs to which recipients were entitled ('legitimate CSPs') and creates a mechanism empowering HMRC to clawback excessive CSPs in relation to the CJRS and SEISS.

This article primarily explores how HMRC is able to recover excessive CSPs. References in this article to paragraphs are to those in FA 2020 Sch 16 unless otherwise stated.

Taxing legitimate CSPs

Paragraphs 1–7 specify how legitimate CSPs are taxed. In broad terms, the receipts will be included as income in

recipients' accounts. They will therefore be factored into business's tax returns and income tax or corporation tax paid, depending on which the recipient pays. Business for these purposes includes a trade, profession, vocation, property business (UK or overseas) or a business consisting wholly or partly of making investments (para 1(6)). Where there is no business then the CSPs are still charged to income tax or corporation tax, whichever the recipient pays.

Whilst most CSPs are taxable according to normal accounting rules, SEISS payments are taxable in 2020/21. The exception is that for partnerships where the SEISS was received by the partnership rather than the individual partner, the SEISS is added as income in the accounts. The legislation contains special rules for post-cessation receipts (paras 2 and 3). Paragraph 4 provides exemptions and reliefs such as those for charities and community amateur sports clubs. HMRC will be able to check recipients' tax returns using its usual statutory powers and will impose penalties under FA 2007 Sch 24 should any extra tax then be found to be due.

Why might mistakes occur in furlough and SEISS claims?

Errors will arise if taxpayers confirmed that they met the SEISS criteria for the claim when (whether they knew it or not) they did not actually meet the criteria. The amount paid may be wrong if it is later found that the person's tax return entries on which the payments were based contained errors or omissions (for example, after an enquiry or investigation).

Errors in CJRS claims may occur for several reasons including:

- employers claiming despite not meeting the criteria (for example, not putting the paperwork in place to legally furlough staff or claiming CJRS despite keeping staff working);
- not using the CJRS money as required by the scheme's rules;
- mistakes in the online claims; and
- fraudulent claims by organised crime.

Can HMRC prosecute taxpayers' incorrect CSPs?

HMRC's Fraud Investigation Service can conduct criminal investigations with a view to prosecution. In deciding whether to do so it would consider HMRC's criminal investigation policy (for HMRC's online guidance, see bit.ly/3h7RJpX). HMRC could prosecute for cheating the public revenue (for the incorrect claim or the FTN), fraudulent evasion of income tax (TMA 1970 s 106A) or the corporate criminal offence of failure to prevent the facilitation of tax evasion (Criminal Finances Act 2017 Part 3). HMRC made an arrest for suspected furlough fraud in July 2020, alongside freezing money in a bank account and seizing computers, digital devices, business and personal records.

Can CSPs be simply repaid?

If the recipient of CJRS or SEISS decides that they want to repay some or all of the monies then they can contact HMRC to start the process. Details of how to do this are available on gov.uk for the CJRS (see bit.ly/321nyup) and the SEISS (see bit.ly/2Q38maC). Repaying monies to which the recipient was not entitled may eliminate the need to follow the notification process depending on the timing of the repayment, as set out below.

How can HMRC clawback excessive CSPs?

Excessive CSPs occur if monies are claimed despite the claimant not meeting the criteria for the scheme (CJRS or SEISS). Failing to meet the CJRS's additional criteria on the use of the furlough monies will also mean that excessive CSPs arise. Paragraph 8 created a mechanism enabling HMRC to recoup excessive CSPs via a 100% income tax charge, *net* of any amounts repaid to HMRC. The tax point for the para 8 charge is the later of:

- the date of receipt of the incorrect payment; and
- when the person ceased to be entitled to keep the CJRS money.

For example, if a business received £100,000 of CJRS it was not entitled to, it must pay £100,000 income tax under para 8. This is the case even if the business is a company which normally pays corporation tax. This liability is separate to the rest of the business' profits or losses. Offsetting losses or expenses against this 'income' is precluded (para 8(7)) and the para 8 charge cannot be deducted in calculating a company's corporation tax liability (para 8(8)). The tax charge under para 1 (on legitimate CSPs) is not levied on monies subject to the para 8 charge.

Paragraph 9 empowers HMRC to assess the 100% income tax charge if it considers that the taxpayer received CJRS/SEISS payments that they were not entitled to receive/retain. HMRC can assess this at any time, subject to assessment time limits. The assessment time limits are set as a number of years after the end of the tax year or accounting period in which the income tax is assessable. If the mistake arises due to an error in a return then the assessment time limits are six or 20 years for errors caused by careless or deliberate behaviour, respectively, and four years in all other cases. Paragraph 12(6) confirms that for failures to notify the time limits are four years unless the failure arose in a situation where the person knew, at the time the income tax first became chargeable, that they were not entitled to the CSP on which the para 8 liability arises. In this case, the 20 year time limit applies.

How will HMRC identify excessive CSPs?

Taxpayers are required to tell HMRC that they received CJRS/SEISS money which they were not entitled to receive or retain (see below). HMRC has reportedly received more than 8,000 tip-offs from the public about misuse of CSPs. It will use this and other information at its disposal to identify cases for investigation. HMRC can use its information powers (FA 2008 Sch 36) to obtain information and documents in order to quantify the tax due.

If a business received excess CJRS/SEISS payments, what must it do?

Paragraph 12 requires companies and individuals to notify HMRC under TMA 1970 s 7 that they received CJRS/SEISS payments to which they were not entitled to receive/retain (i.e. money that is chargeable under para 8). This notification obligation applies regardless of whether they need to notify under TMA 1970 s 7 or FA 1998 Sch 18 para 2 for other reasons and regardless of whether HMRC previously issued a notice to file a tax return for the period.

The deadline for notifying HMRC is 90 days after the later of:

- 22 July 2020 (royal assent), i.e. 20 October 2020; and
- the tax point for the money they shouldn't have received (para 8(4)).

See example 1.

Example 1: notification deadlines

ABC Ltd claimed monies from the CJRS for furloughing ten staff. In early October 2020, the finance director realises that significant errors were made in the company's four claims. Its para 12 notification deadlines are:

CJRS monies received	Deadline for notifying
1 June 2020	20 October 2020
1 July 2020	20 October 2020
3 August 2020	1 November 2020
10 September 2020	9 December 2020

Whilst para 12 does not specify how to make the notification, in practical terms this could be done by letter or by email to the business's HMRC customer compliance manager (if they have one). As usual, proof of postage or email delivery should be retained. The alternative is to contact HMRC to arrange repayment of the monies before the notification deadline.

If HMRC does not issue a para 9 assessment before the taxpayer's income or corporation tax return is submitted, the para 8 liability must be declared on that return (paras 10 and 11(4)). If too little income tax was declared in the return, HMRC may charge a penalty for the error (FA 2007 Sch 24).

When must taxpayers pay the clawback income tax?

TMA 1970 Part 5A applies where the liability is included in a corporation tax return (para 11(2)). Payment is due nine months and one day after the end of the accounting period unless the liability is covered in group payment arrangements (TMA 1970 s 59F) or in a managed payment plan (TMA 1970 s 59G). This income tax liability does not affect a company's quarterly instalment payments. If the income tax is included in an individual's income tax return, the tax is payable on standard due dates.

However, taxpayers must pay the income tax 30 days after HMRC issues an assessment under para 9 unless that deadline is postponed as a consequence of an appeal with a postponement application (TMA 1970 s 55). It may also be possible to obtain a time to pay arrangement to pay by instalments.

It is unclear whether HMRC will issue assessments in preference to permitting taxpayers to include the tax charge on their returns. Issuing assessments could mean the tax is payable earlier. Taxpayers who need to repay some or all of their CSPs and have the funds to do so should contact HMRC to repay before the 90 day notification period expires (so they do not need to separately notify). Taxpayers experiencing cashflow difficulties are more likely to notify rather than repay in the 90 day period; such taxpayers may need a time to pay arrangement if HMRC issues a para 9 assessment before the normal due dates for declaring and paying the income tax.

What are the failure to notify penalties?

HMRC can charge tax-gated failure to notify (FTN) penalties under FA 2008 Sch 41 as a failure to notify under TMA 1970 s 7 (which is invoked by this new legislation) is a trigger for Sch 41. HMRC issued penalty factsheets for the CJRS (see bit.ly/3hl1pOl) and SEISS

(see bit.ly/2EgLASZ).

The standard penalty bands for FTN penalties are:

	Unprompted disclosure	Prompted disclosure
Reasonable excuse for FTN	0%	0%
Not deliberate FTN	0/10%–30%	10/20%–30%
Deliberate FTN	20%–70%	35%–70%
Deliberate and concealed FTN	30%–100%	50%–100%

No penalty is due if the taxpayer had a reasonable excuse for a non-deliberate failure and rectified it without undue delay after the excuse ceased. The non-deliberate minimum penalty varies depending on whether the person tells HMRC of the FTN within 12 months of the date on which the tax first becomes unpaid by reason of the failure (FA 2008 Sch 41 para 13(3)(b)). The minimum penalty may increase if the disclosure happens a significant period of time after a deliberate

Example 2: para 13 irrelevant

ABC Ltd claimed £500,000 CJRS payments before July 2020, in the accounting year to 31 December 2020. The finance director thought that the company's claims were correct as submitted.

Situation	Potential FTN penalties
Mistakes found in the claims when the advisers checked them whilst preparing ABC's CT return in August 2021. ABC paid the income tax on 30 September 2021 and included the para 8 liability in its CT return for the year to 31 December 2020.	None: the para 8 tax was paid in full before the date in FA 2008 Sch 41 para 7(3).
Non-deliberate mistakes were found in the claims after HMRC contacted ABC in January 2021. HMRC issued a para 9 assessment in March 2021, which ABC paid within 30 days.	None: the para 8 tax was paid in full before the date in FA 2008 Sch 41 para 7(3).
Non-deliberate mistakes were found in the claims after HMRC contacted him in January 2022. HMRC issued a para 9 assessment in March 2022, which ABC paid within 30 days.	FTN penalties of 10%–30% of the incorrect CJRS claim following the prompted disclosure.

Example 3: para 13 relevant

XYZ Ltd claimed £500,000 CJRS payments before July 2020, in the company's accounting year to 31 December 2020. When he submitted the CJRS claim, the finance director knew the company told some staff to continue working despite making furlough claims in relation to their salaries.

Situation	Potential FTN penalties
XYZ Ltd failed to notify under para 12 but they included the para 8 charge on their CT return in September 2021 and paid the tax at the same time.	Para 13 criteria met: unprompted disclosure via the tax return. FTN penalties are 30–100% of the para 8 liability.
XYZ Ltd failed to notify under para 12. HMRC opened an investigation in February 2022 before issuing a para 9 assessment for the income tax.	Para 13 criteria met: prompted disclosure following HMRC's action. FTN penalties are 50%–100% of the para 8 liability.

FTN (see HMRC's *Compliance Handbook* at CH73360). Penalties are mitigated within these bandings depending on the quality of the person's disclosure, after taking into account the timing, nature and extent of any 'telling', 'helping' and 'giving access' actions during the disclosure process (FA 2008 Sch 41 para 12).

The FTN penalties are a percentage of the para 8 income tax unpaid by the date specified in FA 2008 Sch 41 para 7 (i.e. 31 January following the tax year for individuals and 12 months after the end of the accounting period for companies) unless para 13 applies. Paragraph 13 deems the failure to notify to be deliberate and concealed if:

- the excessive CSPs are not repaid before the 90 day notification deadline;
- the person fails to notify HMRC before the deadline; and
- the person knew, at the time the income tax first became chargeable, that they were not entitled to the CSP on which the para 8 liability arises.

The potential lost revenue on which the para 13 penalty is based is the para 8 tax charge which would be due on the notification deadline (para 13(5)). Consequently, if the excessive CSPs are repaid before the 90 day period expires then HMRC cannot impose a para 13 penalty. If the CSPs are repaid subsequently then HMRC may impose the penalty even if the para 8 charge cannot be assessed (*HMRC v Robertson* [2019] UKUT 202 (TCC)). Please also note that the person's awareness of the requirement to notify is ignored for the purposes of the para 13 test. Someone may therefore be ignorant of the requirement to notify HMRC and still be charged this penalty. See examples 2 and 3.

What are the other consequences of failure to notify penalties?

Incorrect claims and failures to notify may affect a company's senior accounting officer (SAO) position. In addition, if the taxpayer is charged a penalty for a deliberate failure to notify, then:

- HMRC may transfer the penalties to company/LLP officers whose behaviour the failure to notify can be attributed to (FA 2008 Sch 41 para 22);
- the business' details may be published on gov.uk (TMA 1970 s 94);
- it may be placed in HMRC's managing serious defaulters regime (see the factsheet at bit.ly/2Q3alf4); and
- it may be unable to obtain government contracts (see the Public Contracts Regulations, SI 2015/102, and the related Cabinet Office note at bit.ly/31ZGYA0).

What are the special rules for partnerships (including LLPs)?

Assessments under para 9 may be made on any of the partners in relation to the total tax due under para 8 and the partners are each jointly and severally liable for the tax assessed (para 9(4)). However, if the total amount of tax that is chargeable is included in a return under TMA 1970 s 8 by one of the partners, the other partners are not required to include the tax in 8 returns made by them. If the para 8 liability relates to an individual partner's SEISS claim that is retained by the partner rather than being distributed amongst the partners, the firm is not regarded as receiving it (para 8(9)).

For the purposes of failure to notify penalties, each partner is deemed to know what each other partner knows. The partners are jointly & severally liable to these penalties (para 14, varying FA 2008 Sch 41 para 22).

What happens if a company cannot pay the clawback income tax charge?

FA 2020 s 100 and Sch 13 makes officers personally liable for some tax liabilities. Officer is defined as including director, shadow director or someone concerned (directly or indirectly) or who takes part in the management of the company. This legislation is extended by para 15 to apply to the para 8 income tax charge.

Consequently, a company officer is jointly and severally liable to the 100% income tax charge if HMRC issues a notice to them. The following criteria for the issue of a notice all need to be met:

- the company is subject to an insolvency procedure (or there's a serious prospect of this happening);
- the company is liable to income tax under para 8;
- the individual was responsible for the company's management when the income tax first became charge and knew that the company was not entitled to some or all of the CSP; and
- there is a serious possibility that some or all of the income tax will not be paid.

What should advisers do?

Advisers should make their clients aware of the obligation to notify under para 12. Some clients will need help to check their furlough and SEISS claims in order to identify mistakes now, so that there is time to contact HMRC to repay or notify before the deadline.

Subsequently, advisers should ensure that tax is correctly included in tax returns in respect of CSP claims (under paras 1–6 or 8), irrespective of whether the claims were correct or excessive, as part of the process of preparing those returns. If mistakes in claims are subsequently identified (for example, during a compliance check) then the para 1–6 liability will need to be reduced as the additional para 8 liability is calculated.

If the notification deadline is missed, then:

- If para 13 applies, consider advising the client to make a voluntary disclosure under COP 9 (the contractual disclosure facility). Specialist advice may be needed in respect of the disclosure process and, if COP 9 is not offered by HMRC, potential criminal offences.
- If para 13 does not apply, consider advising the client to contact HMRC to offer to repay the excessive CSPs immediately (so no para 8 liability needs to be included on the return) or at least notify HMRC that it will be included in their return. The client needs to know the amount due so that payment can be made before the FTN penalty trigger date in FA 2008 Sch 41 para 7 or a time to pay arrangement reached. ■

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