Kunjur: Deductibility of accommodation expenses

Employment Tax | Personal tax

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Keith Gordon considers the First-tier Tribunal's decision in a case looking at an employed dentist's accommodation expenses.

Key Points

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What is the issue?

A Southampton dental surgeon claimed a tax deduction for accommodation expenses incurred to avoid unmanageable commutes for employment purposes at a London hospital. HMRC considered that the expenses were not deductible and charged a penalty for carelessly claiming such a deduction.

What does it mean for me?

By using the self-employment test in the Income Tax (Trading and Other Income) Act 2005, the First-tier Tribunal considered that an apportionment should be permitted so as to allow some of the expenditure to be allowed. It recognised that this will be only a ‘small proportion’. The appeal against the penalty was allowed in full.

What can I take away?

HMRC might decide that the case represents an unhelpful precedent and therefore feel obliged to take the case to the Upper Tribunal. Similar claims for accommodation expenses may be hotly resisted by HMRC.

It is well known that the deductibility of expenses for employees is much tougher than for the self-employed. For the latter category, the principal statutory requirement is that the expenses are incurred ‘wholly and exclusively’ for the purposes of the business (Income Tax (Trading and Other Income) Act 2005 s 34). For employees, the equivalent statutory provision requires both that the employee is obliged to incur the expenses as holder of the employment and also that the amount claimed is ‘incurred wholly, exclusively and necessarily in the performance of the duties of the employment’.

The underlying policy rationale for the stricter regime is clear: employees ought, generally, to be provided by their employers with all the facilities to allow them to carry out their duties and therefore there should be little reason for additional expenditure to be laid out by the employees beyond that incurred by the employer.

The restricted rules will naturally lead to some harsh results in some cases. The recent case of *Kunjur v HMRC* [2021] UKFTT 362 (TC) illustrates the point.

The facts of the case

Mr Kunjur was an experienced dental surgeon who was undertaking further training as a maxillofacial surgeon. To undertake this training, Mr Kunjur took the only available position, which was at a hospital in South London, with occasional duties at another hospital in the same area. His family (wife and children) was based in Southampton: Mrs Kunjur was a teacher there and the children were established in local schools.

The training contract was for four years. In the first week of his employment, Mr Kunjur tried to commute from the family home, but it quickly became apparent that this was not a viable option because of the long hours involved, the fact that Mr Kunjur was becoming exhausted and the risk of a consequential breach of Mr Kunjur's professional obligations to his patients. Furthermore, Mr Kunjur was obliged to be on call for two nights a week (not necessarily the same two nights each week) and for one weekend in six. Whilst on call, Mr Kunjur had to be within 30 minutes of the hospital.

As a result, Mr Kunjur took some modest accommodation relatively close to the hospital, where he stayed during the working week and during those weekends on call. Otherwise, he drove back to Southampton each Friday where he remained until the Sunday, ahead of the start of his working week at 7.30am on Monday. Mr Kunjur did not invite his family to visit him at this accommodation, nor did they ever come uninvited.

It appears that Mr Kunjur might have been entitled to stay at the residential accommodation at the hospital itself (generally available to the medical and nursing students). There was also the possibility that Mr Kunjur could take hotel accommodation for the nights to be spent in London. However, Mr Kunjur ruled out both possibilities because, as a mature adult he felt that the former was inappropriate and with the other constraints on his time (including his study obligations) constantly moving hotel rooms was not an attractive proposition.

With the assistance of his accountants, Mr Kunjur submitted tax returns, claiming a deduction in relation to the accommodation expenses incurred.

HMRC considered that the expenses were not deductible and, furthermore, charged Mr Kunjur a penalty for carelessly claiming such a deduction. Mr Kunjur appealed against both decisions and the case proceeded to the First-tier Tribunal.

The First-tier Tribunal's decision

The case came before Judge Heather Gething who sat with Tribunal Member Michael Bell.

In the course of the submissions on his behalf, Mr Kunjur made the point that his professional duties required him to be close to the hospital when he was on-call. Indeed, whenever he was at the accommodation, he was informally on-call at all

times. Furthermore, he used the premises to undertake his compulsory evening study and when taking calls from the hospital as the need arose, which happened on most evenings.

HMRC argued that none of the limbs within s 336 was met and identified a number of cases where claims by employees for their expenditure had been rejected. In relation to the penalty, HMRC considered that the fact that Mr Kunjur had engaged an accountant was insufficient: the penalty rules require the taxpayer to have taken reasonable care to avoid the error, notwithstanding the use of an agent.

The tribunal worked its way through the various parts of the statutory tests.

The tribunal considered that Mr Kunjur's contractual obligations meant he was required to have accommodation in South London whilst on-call, thereby satisfying the first part of the statutory test, being that 'the employee is obliged to incur and pay it as holder of the employment'.

The tribunal does not appear to have considered the 'necessarily' part of the test, but perhaps it considered that this overlapped with the previous point.

However, it proceeded to consider the other two parts of the second limb. In relation to the 'wholly and exclusively' requirement, the tribunal noted that Mr Kunjur derived no wider private benefit of the accommodation, in the sense that it was not somewhere where he entertained members of his family. Nevertheless, the tribunal noted that Mr Kunjur undertook his private study at the accommodation. Although this was a mandatory part of his employment, there was no obligation for it to be carried out at any particular geographical location.

On the subject of the 'in the performance of the duties part of the test', the tribunal concluded that Mr Kunjur could be said to be performing the duties whilst actually taking a call from the hospital. Similarly, even though it seems to have failed the 'wholly and exclusively' aspect of the test, the tribunal considered that the mandatory private study was itself carried out in the performance of the duties.

Furthermore, by using the self-employment test in the Income Tax (Trading and Other Income) Act 2005 as an analogy, the tribunal considered that an apportionment should be permitted, so as to allow some of the expenditure.

In short, the tribunal felt that some of the expenditure should be allowed and directed the parties to piece together the various components of the decision so as to work out how much should be allowed. As the tribunal recognised, it will be only a 'small proportion'.

The tribunal then proceeded to consider Mr Kunjur's appeal against the penalty. The tribunal said that the rules were counterintuitive and particularly difficult. Furthermore, Mr Kunjur was fully entitled to rely upon his advisers. Thus, Mr Kunjur's appeal against the penalty was allowed in full.

Commentary

Given the constraints of the statutory test in s 336, the tribunal has clearly endeavoured to find a solution that is as fair as the legislation will permit. However, it is my view that this is an example of where fairness and the actual statutory position do not necessarily coincide. Indeed, I fear that HMRC was right to deny the deduction for the accommodation expenditure as neither limb of the statutory test appears to be met.

First, I do not believe that Mr Kunjur could be said to have been 'obliged to incur and pay [the accommodation costs] as holder of the employment'. As the Court of Appeal had said in *Brown v Bullock (HM Inspector of Taxes)* (1961) 40 TC 1: 'The test is not whether the employer imposes the expense but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay.' (*Brown v Bullock* was not one of the cases relied upon by HMRC, but this quotation did feature in some of the later cases referred to by HMRC in its submissions.)

Secondly, the absence of any discussion as to the 'necessarily' part of the test means that the toughest part of the statutory rule has seemingly been sidestepped.

Thirdly, it is my understanding that the apportionment that often takes place in relation to the expenditure of the self-employed is (at least in part) based on a statutory rule found within ITTOIA 2005 s 34(2) and not directly applicable to cases within Income Tax (Earnings and Pensions) Act 2003.

Fourthly, I do not think that the expenditure can be said to have been incurred in the performance of Mr Kunjur's duties. Instead, it is my view that it represents no more than expenditure incurred as a matter of practicality so as to permit Mr Kunjur to

carry out his training and other duties.

Without wishing to criticise Mr Kunjur's decisions, an employee living on the Isle of Skye (for example) but who takes a job in Hastings is not going to be entitled to a deduction for accommodation costs on the South coast, simply because practicality requires her to live closer to the place of employment.

It remains to be seen whether HMRC and Mr Kunjur will manage to reach a resolution in accordance with the tribunal's directions. I suspect that even the tribunal's decision will not afford a particularly significant deduction to Mr Kunjur. Nevertheless, HMRC might decide that the case represents an unhelpful precedent and therefore feel obliged to take the case to the Upper Tribunal. Given my preceding comments, I think that Mr Kunjur would be well advised to try to avoid any exposure to HMRC's legal costs if at all possible.

However, I very much hope that HMRC will not seek to challenge the tribunal's decision on the penalty. This is a clear case where a taxpayer has relied upon professional advice which was not obviously wrong, and there is plenty of case law which establishes that that is enough to avoid any risk of a penalty.

HMRC had argued that, notwithstanding the fact that Mr Kunjur had engaged professional advice, he was nevertheless expected to check his tax return against HMRC's guidance. Such an approach is unrealistic (as well as not being justified by the statutory test). Indeed, HMRC's argument has the flavour of trying to fit the facts to the desired conclusion that a penalty should be paid. There is no sign that Mr Kunjur went through the internal review process, so it might be possible that the penalty decision had been seen by only two officers (the original officer who issued the penalty and the officers carrying out the litigation). However, penalty cases in circumstances such as this should simply not get anywhere near the tribunal.

This is not an isolated case and I believe that the professional and other representative bodies should make urgent representations to HMRC so as to curtail this apparent zeal to charge penalties when penalties are clearly not payable.

What to do next

Although the tribunal's decision appears to open the door to employees claiming accommodation expenses, it is my view that similar claims will be (and should be) hotly resisted by HMRC. Accordingly, I would urge caution before relying upon this

case.

If, in the gap between this case being published and the date of publication of this article, expense claims have been included in 2021 tax returns, I would strongly suggest that the expense claim be carefully considered. At the very least, it might be worth paying the tax at stake (so as to cap any interest charges) and writing to HMRC explaining the extent to which the *Kunjur* case has been relied upon.