Doctor at large

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Keith Gordon considers a case concerning the deductibility of a doctor’s travel costs

Key Points

Dispute over deductibility of travel expenses Tribunal agreed with HMRC that certain journeys were not undertaken ‘wholly and exclusively’ Illustrates one of the most difficult principles in UK tax

We have had barristers, bricklayers, dentists and milkmen. Now it is the turn of the doctors. The First-tier Tribunal has recently considered the tax deductibility of travel expenses incurred by a self-employed doctor in ***Samadian v HMRC* [2013] UKFTT 115 (TC)**.

The facts of the case

Dr Samadian is employed as a consultant within the NHS, based principally at St Helier Hospital in South London, with a weekly clinic at Nelson Hospital in Kingston upon Thames. Dr Samadian also has a private practice which involves weekly clinics at two private hospitals. Each week, Dr Samadian has a three-hour session at each of the two hospitals, which gives him the use of a consulting room there; at the end of each session, he is obliged to vacate the room and allow another doctor to occupy it.

At Dr Samadian's home, he carried out a considerable number of administrative tasks, including the storage of patient records and invoicing; he also used his home office for clinical research and the preparation of patient care plans. He will on very rare occasions see patients at his home – on the whole, however, they will be seen at the clinics or occasionally in other places such as their own homes.

The dispute with HMRC concerns the deductibility of the travel expenses incurred to and from the private clinics: in particular, those journeys between the private clinics and the NHS places of work; and those journeys between the private clinics and Dr Samadian's home.

It was accepted by HMRC that the cost of journeys between Dr Samadian's home (or the private clinics) and his patients' homes would be deductible; similarly with journeys between the two private clinics themselves. For the other two classes of journey, however, HMRC argued that the journeys were not undertaken 'wholly and exclusively' for the purposes of Dr Samadian's profession. They considered that there was inevitably some disallowable private purpose in undertaking the journeys, thereby offending what is often known as the principle of 'duality of purpose'.

The Tribunal's decision

The Tribunal (Judges Kevin Poole and Kamal Hossain) agreed with HMRC.

In reaching their conclusion, the Tribunal considered the previous case law on the travel expenditure incurred by self-employed individuals (all of which concerned travel from the taxpayer's home). In addition, the Tribunal looked at the leading case on the phrase 'wholly and exclusively' (the case of ***Mallalieu v Drummond (HM Inspector of Taxes)* [1983] 2 AC 861**).

In ***Newsom v Robertson* (1952) 33 TC 452**, the Court of Appeal held that a barrister (who worked extensively from home during the court's vacations) could not claim as an allowable deduction the expenses incurred in travelling between his home and his chambers. The reasons given by each of the judges in that case vary slightly; however, the case is generally considered authority for the proposition that travel costs between home and a fixed place of work are not deductible.

The point is well illustrated when compared with the subsequent case of ***Horton v Young* [1971] 2 All ER 351**. Mr Horton was the leader of a team of bricklayers. His business was based at his home, in that the little administration that it involved was conducted there. However, inevitably, the practical application of the taxpayer's trade was conducted at different sites: in the tax year in question, Mr Horton had worked on seven different building sites within a 55-mile radius of his home. Mr Horton's journeys were all considered to be allowable on the basis that the various building sites (although workplaces) were only temporary in nature.

The dentist's case (***Sargent v Barnes* (1978) 52 TC 335**) and the milkman's case (***Jackman (HM Inspector of Taxes) v Powell* [2004] EWHC 550 (Ch)**) consider variants of the idea of home-to-work travel (and offer commentary on the earlier cases), but probably do not merit further discussion here.

Applying the various cases dealing with travel costs, the Tribunal noted that the only case where the taxpayer had succeeded was in *Horton v Young*. The Tribunal, however, distinguished Dr Samadian's facts from those applying to Mr Horton by concluding that, although Dr Samadian's presence at the private clinics was 'temporary and transient in the sense that he has only occupied consulting rooms or attended on ward rounds for comparatively short periods of time and without having any permanent base', the clinics could not be compared to the building sites which Mr Horton attended, because his presence there 'followed a pattern which [despite some changes] has been generally fixed and predictable'.

Having concluded that Dr Samadian's facts did not come sufficiently close to those in *Horton v Young*, the Tribunal concluded that the body of case law relating to travel expenditure did not assist him in relation to his journeys between his home and the private clinics.

However, the Tribunal then turned to first principles and considered whether, in the light of the House of Lords' decision in *Mallalieu v Drummond*, a deduction was nevertheless available for the
travel expenses.

Mallalieu v Drummond concerned the status of a female barrister's black court dress (which she purchased only for the purposes of her profession, the court having accepted her evidence that she would not have purchased black clothes had it not been because it was required for court wear). Although the House of Lords accepted that the needs of her profession represented the principal purpose behind Miss Mallalieu's purchase of those clothes, the purchase did nevertheless satisfy a secondary (perhaps subconscious, but nevertheless more than incidental) purpose: that of providing Miss Mallalieu with something to wear – that being something that she would have been expected to do even if she were not at work. Consequently, the expenditure incurred by her was tainted by a so-called duality of purpose and therefore could not attract tax relief as a deductible expense.

Recognising how easy it is to fall foul of the duality of purpose rule, the Tribunal held that Dr Samadian's expenditure was incurred so as to allow him to live away from his work and, therefore, not able to be deducted from his taxable profits.

The Tribunal similarly rejected the taxpayer's claim in relation to a second scenario: the deductibility of costs incurred in travel between Dr Samadian's NHS places of work and the private clinics. The Tribunal, following the approach taken in *Newsom v Robertson*, held that 'a man's profession is not exercised until he arrives at the place at which it is carried on'.

On the other hand, the Tribunal accepted Dr Samadian's claim in respect of travel to and from places where his work was carried out on an irregular basis (for example, a patient's home).

Commentary

This case illustrates what is, from an academic perspective, one of the most difficult principles in UK tax – where an overly strict interpretation of the statutory language offends common sense and the courts are required to resolve any conflicts between the two. For example, any individual carrying on a trade from business premises will inevitably enjoy some personal benefit from those premises. To apply the *Mallalieu v*

Drummond analogy, it might be obvious that the expense of maintaining the business premises would not have been incurred but for the trade; nevertheless, the premises will still provide the individual with some form of shelter, running water etc, things that the individual would probably have needed even if he or she was not at work.

Of course, in practice, one would not expect either HMRC or the courts to disallow the expenditure of maintaining business premises. However, from a philosophical perspective, it is difficult to distinguish between such an expense and those incurred by Miss Mallalieu on maintaining her court wardrobe. Over the years, however, we have become accustomed to certain expenses being deductible and others not and, in most cases, the status quo seems to work, even if it cannot always be rigorously justified. Nevertheless, there are pressure points as this case clearly demonstrates.

If one started at first principles (without the benefit of any case law), I would challenge the universally accepted proposition that the legislation generally precludes any self-employed individual from claiming a deduction in respect of home-to-work travel. One can obviously see the policy objections – for example, UK taxpayers would be obliged to subsidise the travel expenses of individuals working in the UK but living abroad.

> **According to the Tribunal's reasoning, a deduction would be available if the patient were still at the patient's home, but not if the patient has been admitted into the private hospital**

One justification for the currently accepted restriction given in *Newsom v Robertson* was that home-to-work travel costs are incurred 'not to enable a man to do his work but to live away from it'. However, this is not wholly satisfactory. First, it seems to start from the wrong point – a place of work is more likely to be subsidiary to a person's home. Therefore, the expenditure is in fact incurred precisely to enable a person work away from home: how exactly does this fall outside the statutory test 'incurred wholly and exclusively for the purposes of the trade'? Second, a strict interpretation of that justification might preclude a deduction for the expenses incurred when an individual returns home at the end of a working day, but would nevertheless permit a deduction for getting to work in the first place.

An alternative justification sometimes given is based on the distinction between expenses incurred to enable a person to carry on the trade and those actually

incurred in the course of the trade. I shall return to this argument later, but for the time being would emphasise the importance of the difference in wording between the test for trades (and professions and vocations) and the various tests used for employees in relation to deductible expenditure where this distinction is probably more apposite.

Nevertheless, a consensus has developed concerning home-to-work travel and, for present purposes, I shall assume that the current practice generally reflects correctly the statutory provisions and that the Tribunal was right to try to follow the earlier case law.

However, I still have two difficulties with the approach that the Tribunal took with regard to these earlier cases on travel expenditure. While it is true that Mr Horton is the only taxpayer in the main authorities to have secured a deduction for home-to-work travel, it is wrong in principle to apply a test that effectively requires a taxpayer to ensure that his or her facts are on all fours with those of Mr Horton, rather than tackling the real question as to whether the expenditure was incurred wholly or exclusively for the purposes of the trade.

Secondly, part of the Tribunal's logic in trying to distinguish the facts of the two cases does seem open to challenge. The Tribunal concluded that Dr Samadian's attendance at the clinics 'involved significant performance of professional functions of his clinical work (consulting with and treating patients)'. Again, this conclusion seems pretty uncontroversial. However, that is hardly a point to distinguish the case from *Horton v Young*. Mr Horton must inevitably have carried out 'significant performance of professional functions' at the various building sites he attended. Indeed, it is arguable that Mr Horton's work (as a bricklayer) at the building sites was even more fundamental to his business than Dr Samadian's work at the clinics was to his, given that some of Dr Samadian's productive work was carried out at home.

I fully accept that there is a key difference in that Dr Samadian's attendance at the clinics has more regularity to it than Mr Horton's visits to any particular building site – once a building job is complete, one would expect Mr Horton not to revisit the site, whereas one can expect Dr Samadian's attendance at the clinics to be more indefinite in nature. It is possible that this was in fact the key distinction that the Tribunal wanted to focus on. As to whether that is sufficient to give rise to a different outcome, however, I am not yet convinced.

In particular, it will be hard to identify where the line falls. What happens if a doctor starts to work at a clinic on an occasional basis for a limited period (say, three months) and then has that term extended for another three months? When the line is crossed, would that require earlier periods to be recategorised in the light of subsequent events? Is it simply a matter for the First-tier Tribunal to determine, on a case-by-case basis, whether a workplace is too permanent for the purposes of a travel expense claim, or does the very difficulty of the exercise in fact mean that the question should not have to be asked in the first place?

The Tribunal's reliance on the approach in *Newsom* (which considered that work is not commenced until a person arrives at the workplace) also illustrates the shortcomings of that particular approach. I simply cannot understand why Dr Samadian can be said to be working when he gets into his car and drives to a patient's house but not when he gets into his car and drives from home to visit a patient at the hospital attached to one of his clinics. Indeed, suppose Dr Samadian were on holiday and received an emergency call to see a patient, requiring him to return unexpectedly. According to the Tribunal's reasoning, a deduction would be available if the patient were still at the patient's home, but not if the patient has been admitted into the private hospital. Taking this example one stage further, even if the patient were still at home, Dr Samadian would not be entitled to a deduction for the return journey if he had to collect his equipment or the patient's records from his home en route to visiting him.

The Tribunal was undoubtedly attempting to apply the case law on the subject to a set of facts slightly different from those previously considered by the courts. However, I suspect that it is the case law itself that is in need of a thorough examination. Perhaps this might occur if this case is able to proceed on appeal to the Upper Tribunal or beyond.

Finally, on the subject of *Mallalieu v Drummond*, it is perhaps worth noting that most advisers consider the case to preclude a barrister (or, indeed, any other professional) from claiming capital allowances in respect of work clothes. In fact, the case had nothing to do with capital allowances. For capital allowances, the legislation expressly permits allowances to be given in respect of plant and machinery acquired only partly for the purposes of a qualifying activity, the amount of the allowance being reduced on a just and reasonable basis.