TC02062

Appeal number: TC/2009/14404

Income tax – travel expenses – deductibility – ordinary commuting – permanent workplace – temporary workplace – ITEPA 2003, ss 338 and 339

Discovery assessments – TMA 1970, s 29

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL WILLIAMS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 24 May 2012

The Appellant did not appear and was not represented

Philip Jones, Inspector of Taxes, Appeals and Reviews Unit, HMRC, for the Respondents

DECISION

1. The Appellant, Michael Williams appeals against the refusal by HMRC to allow deductions from his employment income for certain travel and subsistence for years of assessment 2002-2003, 2003-2004 and 2004-2005.

2. As we shall describe, the claims arise predominantly in relation to travelling expenses incurred by Mr Williams on travel between his home in Colwyn Bay and lodgings and his work variously as a miner (or tunneller) and as a dumper driver and concreter in the construction of terminal 5 at Heathrow. The claims are for expenses of £5,375 for tax year 2002-2003, £7,730 for 2003-2004 and £7,915 (travel) and £1,803 (subsistence) for 2005-2006.

Absence of Mr Williams

3. The hearing came on at 10.30 am. At that time Mr Williams had not appeared, and there was no appearance of any representative for Mr Williams. The Tribunal clerk telephoned the mobile number for Mr Williams on the Tribunal file, but the call went straight through to voicemail.

4. There is some history to this appeal which I should briefly summarise. It was originally listed to be heard in Colwyn Bay on 8 October 2010. That hearing was postponed because HMRC were unable to produce the necessary bundles in the absence of documents that were to be provided by Mr Williams.

5. It was then re-listed to be heard on 12 January 2011, again at Colwyn Bay. That hearing was postponed on the application of Mr Williams on the basis that he was working in London for a period including the hearing date.

6. The appeal was listed again, this time at Prestatyn, on 11 May 2011. The parties were informed by letter from the Tribunal dated 29 March 2011. On 7 April 2011 Mr Williams wrote to the Tribunal to say that he was starting work in London on 2 May 2011 and that in view of this, and the fact that his accountant lived in Chelsea, he enquired if it would be possible for the hearing to be in London. That enquiry was treated as an application, which was refused. Mr Williams was informed by letter of 21 April 2011, but it appears that he did not receive this letter. Mr Williams wrote again to the Tribunal on 6 May 2011 requesting a London hearing.

7. The hearing on 11 May 2011 went ahead. The Tribunal on that day decided to proceed in Mr Williams' absence. It dismissed Mr Williams' appeal by decision notice released on 1 June 2011.

8. Following an application by Mr Williams, Judge Cannan decided, following a hearing on 19 December 2011, to set aside the decision of the original tribunal of 1 June 2011 and directed a further hearing.

9. By letters dated 11 April 2012, the Tribunal informed both parties that the case would be heard in London on 24 May 2012. The letter to Mr Williams was addressed to his full home address in Colwyn Bay as on the Tribunal file. No application or request for any further adjournment was received from Mr Williams, nor indeed any other correspondence.

10. In these circumstances it fell to me to consider whether the Tribunal should proceed with the hearing in Mr Williams' absence. Two conditions are required to be satisfied under rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The first is whether I was satisfied that Mr Williams had been notified of the hearing or that reasonable steps had been taken to notify Mr Williams of the hearing. In this regard, I cannot say whether Mr Williams received the Tribunal notification of 11 April 2012. There is no correspondence from him to the Tribunal after that date. Nonetheless, I was satisfied that the Tribunal took reasonable steps to notify Mr Williams; the letter of 11 April 2012 was properly addressed to his address on the Tribunal file.

11. The second condition is whether I considered that it was in the interests of justice to proceed. I concluded that it was. This is a case that has been under appeal since September 2009. A number of abortive attempts were made to list it, and when a hearing was listed Mr Williams was unable to attend, and asked for a postponement. This hearing itself results from the Tribunal exercising its discretion in favour of Mr Williams to allow the original decision to be set aside, and the whole matter re-heard. In those circumstances, although the absence of Mr Williams is regrettable, as I would have appreciated the opportunity to ask him for more details of his work at Heathrow, and his understanding of the nature and location of his work under his contract at various points, I concluded that it would not be right to countenance further delay, and that it was in the interests of justice to proceed with the hearing.

The appeal

12. In this appeal there are two issues for me to consider:

(1) The first is whether Mr Williams is entitled, as a matter of law, to deductions for the expenses claimed, or HMRC are right to deny him those deductions. This applies to all the years of assessment in question.

(2) The second, which applies to the assessments for the years 2002-2003 and 2003-2004, is whether HMRC was entitled to make discovery assessment for those years.

The facts

13. In the absence of evidence from Mr Williams, I must determine the material facts from a combination of documents, including in particular the contract of employment under which Mr Williams worked in the relevant period, correspondence passing between Mr Williams and his advisers and HMRC, and notes of telephone conversations between HMRC officers and Mr Williams. In doing so, and without

the ability to question Mr Williams on his own understanding and expectations, I have had to draw certain inferences in those respects. My findings are as follows.

14. At the material times Mr Williams resided at an address in Colwyn Bay.

15. From 16 September 2002 to June 2005 (a total of 33 months) Mr Williams worked at Heathrow airport, on the terminal 5 construction. In June 2005 he was made redundant.

16. Mr Williams had a contract of employment with his employer, Morgan Est Plc, for the work he carried out. That contract (in the form of a statement of particulars of main terms of employment) was issued on 20 September 2002. The material terms were:

> "1c Place of work … **Heathrow**
>
> At any time during your employment you may be transferred from one job or site subject to Working Rule 14 [I did not have copies of the Working Rules.]
>
> 2 Name of Employee: **Michael Williams** Job Title: **Miner**
>
> The job title is not definitive; you may be required to carry out alternative work from time to time. Working Rule 17.3
>
> 13 Length of Notice of Termination to be given by Employer: Working Rule 24
>
> …
>
> 2 years service or more – 1 week for each complete year of service to a maximum of 12 weeks after 12 years."

17. I draw certain conclusions of fact from this contract. First, although expressed to have a place of work at Heathrow, there was no certainty, under the contract, that Heathrow would be the only place Mr Williams would be required to work. Secondly, although Mr Williams was given the job title of miner, the contract enabled the employer to require Mr Williams to carry out alternative work under the contract. Thirdly, the contract itself was not for any fixed period. Fourthly, it was envisaged that the contract could endure for a period in excess of two years, and possibly for more than 12 years, subject to the termination provisions.

18. In a telephone conversation on 16 February 2009 between Mr Williams and Mr A Rattue of HMRC, Mr Williams agreed that he was at the Terminal 5 site for more than 24 months. However, he also said at that time that he had been due to move from Heathrow at approximately 16 months into the contract in order to work on a different site at King's Cross in London. However, he had become aware that the terminal 5 site wanted to maintain its level of workers and he agreed to stay working there for a further 8 to 10 months, but doing different work, moving from being a miner to dumper driving and concreting and other duties.

19. I did not have the opportunity to ask Mr Williams to explain his expectations at the time the contract was entered into in September 2002. Nevertheless, I find that at

that time he expected to work at Heathrow for 16 months, and then, under the same contract, to move to the King's Cross site, possibly for 8 months. This is consistent with the terms of the contract, which is open-ended as to duration and flexible as to the type of work and location. I take into account that Mr Williams maintained the same explanation throughout his, and his advisers', correspondence and discussions with HMRC, although his advisers did at one stage argue that there were two separate employments.

20. There is, as HMRC asserted in their correspondence with Mr Williams, and Mr Jones submitted to me, no documentary evidence to support what Mr Williams said. Nevertheless, Mr Williams did not seek to disguise the fact that he did work at Heathrow throughout the period, and in those circumstances I am prepared to accept that there was a change to his duties after 16 months. That indicates to me that his job as a tunneller on the Heathrow site had come to an end, and I can therefore accept that he expected to be moved at that time to King's Cross. There is no indication of what Mr Williams expected to happen after King's Cross; I infer that this, like the contract itself, was open-ended.

21. In making these findings of fact I am conscious, as Mr Jones reminded me, of the burden of proof that attaches to Mr Williams in relation to the deductibility issue. I have taken that into account in considering the extent to which I am able to make findings in the absence of supporting documentary evidence, or indeed in the absence of Mr Williams himself. It would have been helpful if Mr Williams had attended and answered questions both from me and Mr Jones. But taking all matters into consideration, and from the records of correspondence and notes that I do have, I am satisfied that, on the evidence before me, and without other documentary evidence in support, I am able to make the findings of fact that I have.

Deductibility

22. With these briefly-stated facts in mind I turn to consider whether the travelling expenses incurred by Mr Williams in travelling from his home and lodgings to Heathrow are deductible.

23. In my judgment the material provisions that I must consider are those in s 338 and, in particular, s 339 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). Mr Jones referred me to ss 336 and 337 of that Act, but those clearly would not allow a deduction in these circumstances. In each case there is a requirement that the expense be incurred in the performance of the duties of the employment. The travelling expenses with which I am concerned here clearly relate to travel preparatory to the duties which Mr Williams performed, and so cannot qualify for relief under either of those heads.

24. I move on therefore to s 338, the material provisions of which are:

> **338 Travel for necessary attendance**
>
> (1) A deduction from earnings is allowed for travel expenses if—

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

(2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.

(3) In this section "ordinary commuting" means travel between—

(a) the employee's home and a permanent workplace, or

(b) a place that is not a workplace and a permanent workplace.

25. The effect of s 338, therefore, is to provide for a deduction for travel expenses outside the performance of the employee's duties, but which the employee incurs in necessarily attending a place in performance of his duties. Because this would otherwise allow ordinary commuting to qualify, the law expressly excludes that, and it does so by defining ordinary commuting by reference to travel to a permanent workplace.

26. Section 339 then goes on to explain what is meant by "permanent workplace" in this context. It provides:

339 Meaning of "workplace" and "permanent workplace"

(1) In this Part "workplace", in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment.

(2) In this Part "permanent workplace", in relation to an employment, means a place which—

(a) the employee regularly attends in the performance of the duties of the employment, and

(b) is not a temporary workplace.

This is subject to subsections (4) and (8).

(3) In subsection (2) "temporary workplace", in relation to an employment, means a place which the employee attends in the performance of the duties of the employment—

(a) for the purpose of performing a task of limited duration, or

(b) for some other temporary purpose.

This is subject to subsections (4) and (5).

(4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if—

(a) it forms the base from which those duties are performed, or

(b) the tasks to be carried out in the performance of those duties are allocated there.

(5) A place is not regarded as a temporary workplace if the employee's attendance is—

(a) in the course of a period of continuous work at that place—

(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

(6) For the purposes of subsection (5), a period is a period of continuous work at a place if over the period the duties of the employment are performed to a significant extent at the place.

(7) An actual or contemplated modification of the place at which duties are performed is to be disregarded for the purposes of subsections (5) and (6) if it does not, or would not, have any substantial effect on the employee's journey, or expenses of travelling, to and from the place where they are performed.

(8) An employee is treated as having a permanent workplace consisting of an area if—

(a) the duties of the employment are defined by reference to an area (whether or not they also require attendance at places outside it),

(b) in the performance of those duties the employee attends different places within the area,

(c) none of the places the employee attends in the performance of those duties is a permanent workplace, and

(d) the area would be a permanent workplace if subsections (2), (3), (5), (6) and (7) referred to the area where they refer to a place.

27. Mr Jones did not submit that s 338(1) could not apply on its own terms. His argument was that Heathrow was a permanent workplace, and that accordingly s 338(1) is in this case disapplied as Mr Williams' travel amounted to ordinary commuting.

28. To be a "permanent workplace" within s 339(2), it would first be necessary to determine that Heathrow was in these circumstances "a place which [Mr Williams] regularly attended in the performance of the duties of the employment". There is no doubt about Mr Williams' regular attendance, but a threshold point is whether Heathrow can be a "place" for this purpose. In my view, it cannot. Heathrow is a geographical location, in the same way as a city such as London or a town such as Colwyn Bay would be. That in my view does not have sufficient particularity to be capable of being regarded as a place which an employee "attends". That is more apt to describe a specific location within a given geographical location or area.

29. On the other hand, it might in my view be appropriate to describe a construction site as a place, even if the employee were to work at different parts of the site from time to time. Such a determination would, however, depend on the particular facts. It

was not in this case argued by HMRC that the terminal 5 construction site was the relevant place for this purpose; HMRC's argument throughout had focussed on the wider area of Heathrow. Absent further evidence, I am unable to conclude that the terminal 5 site was a place within the meaning of s 339(2).

30. That leads me, however, to s 339(8). The duties of Mr Williams were defined by reference to the area of Heathrow. I can infer that Mr Williams' duties were performed at different places within Heathrow; if they were performed at one place only, then that place would be within s 339(2). I also assume for this purpose that none of the places within Heathrow where Mr Williams worked was a permanent workplace (if it were then reliance on s 339(8) would not be needed). On that basis, there would be no need to identify a specific place within Heathrow; the relevant tests could be applied with reference to the area of Heathrow instead of to a specific place. Either way those tests must be applied to ascertain if there is a place or area that is a permanent workplace for these purposes.

31. A place or area is excluded from being a permanent workplace if it is a "temporary workplace" (s 339(2)(b)). "Temporary workplace" is defined by sub-section (3). There was no dispute that the terminal 5 project was a task of limited duration. As far as it goes, therefore, Heathrow or the terminal 5 construction site would satisfy the conditions of s 339(3).

32. But s 339(3) is itself qualified by s 339(4) and (5). Turning first to s 339(4), this contains a special rule that treats a place as a permanent workplace if it is a base from which the duties of the employment are performed or if the relevant tasks are allocated there. Although s 339(2) is qualified generally by sub-section (4), this particular qualification is relevant only to the extent that there is an identifiable "place" attended by the employee. For obvious reasons it cannot apply to an area (see s 339(8)(d)). In my view, this provision does not apply in this case. There is no evidence of a particular base from which Mr Williams performed his duties. If terminal 5 was a place for this purpose, it was the place *at which*, not *from which*, the duties were performed. The purpose of s 339(4) is to ensure that a permanent base which is used in itself for tasks of limited duration, but from which the employee is tasked or goes out to work elsewhere, is not thereby pursuant to s 339(3) classified as a temporary workplace. It has no application where the place in question is the place where the duties of the employment are wholly performed.

33. The real issue in this case is the application of s 339(5). That sub-section qualifies the ordinary meaning given to "temporary workplace" by s 339(3). It requires, first of all, a continuous period of work. That condition is clearly satisfied in this case. There are then two alternative conditions. Each depends on the duration of the period of continuous work, calculated on the one hand by reference to a defined period of 24 months, and on the other by the likely period of the employment. I have set out s 339 above, but the language of sub-section (5) is important, so I repeat it here:

> (5) A place is not regarded as a temporary workplace if the employee's attendance is—

(a) in the course of a period of continuous work at that place—

(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

34. Mr Jones made two submissions in this regard. His first was that Heathrow was a place (or, as I have indicated, area) attended for a period exceeding 24 months. Secondly, Heathrow was the place (or area) at which all the duties of the employment were carried out during the period of Mr Williams' employment. This, as I put to Mr Jones at the hearing, applies a hindsight test. Essentially, as things turned out, Mr Williams worked at Heathrow for more than 24 months, and he also worked there throughout the period of his employment. He is not, according to this analysis, entitled to a deduction for any of his travel expenses.

35. In the course of the hearing I referred Mr Jones to the booklet, published by HMRC, E490 entitled *Employee Travel: A tax and NICs guide for employers*, which had been included in the hearing bundle. My reason for doing so was to give Mr Jones the opportunity to explain the apparent discrepancy between his submissions in this respect and certain of the examples in the guide. I set out two particular examples below:

[*paras 3.12 – 14; page 13*]

Example

Earl has worked for his employer for 3 years. He is sent to perform full-time duties at a workplace for 18 months. After 10 months the posting is extended to 28 months. Relief is available for the full cost of travel to and from the workplace during the first 10 months (while his attendance is expected to be for less than 24 months) but not after that (once his attendance is expected to exceed 24 months).

[*para 3.16; page 15*]

Example

Erica is employed as a computer consultant. She works full-time at a site for 18 months developing a new computer system. The work is then extended for another 18 months at the same workplace, for the roll-out of the new computer system. The roll-out is subject to a separate contract between the employer and client.

As long as Erica did not expect to be working on the site for more than 24 months she is entitled to relief for the cost of travelling from home to the site. Once her employer enters into a new contract Erica expects to be working on the site for more than 24 months so from that point she is not entitled to relief for her journey from home to the site.

36. Mr Jones accepted that if hindsight was applied in applying the tests in s 339(5), the examples quoted would be concessionary. Those examples permit relief based on expectation, and only deny relief for a period after that expectation has changed. The

relief available on the basis of the earlier expectation is not later denied by reference to the fact that either the period of continuous work has in the event lasted more than 24 months, or that in the event it has comprised all or almost all of the employment period.

37. In my judgment the examples in the guide reflect, at least in this respect, a proper interpretation of the law. Section 339(5) is expressed in the present tense. It is looking at the position at all relevant times throughout the relevant period. The question is whether at the time the expenses are incurred the period of continuous work is at that time one that is lasting more than 24 months or it is reasonable to assume that it will, or alternatively that the period of continuous work comprises all or almost all of the period for which the employee is likely to hold the employment or it is reasonable to assume that it will. The use of "lasting" rather than "has lasted", and "is likely to hold" instead of "has held" are clear indications that the legislature intended these tests to be applied from time to time, by reference to the position obtaining at the relevant times.

38. As I remarked to Mr Jones in the course of argument, such an interpretation seems to me to accord with the nature of income tax as an annual tax. It would be, in my view, a strange result if an employee such as Earl or Erica, in making a claim for travel expenses, would as a matter of law (if not practice) have to "wait and see" if a temporary assignment that was expected to be for less than 24 months might for some reason be extended beyond that time. It would also be an unsatisfactory result if a claim that was initially valid on the basis of expectation, could retrospectively be disallowed if the reality turned out to be different from the expectation. I do not believe that Parliament could have intended such a result.

39. In the course of his submissions Mr Jones referred me to two authorities, *Ricketts v Colquhoun* [1926] AC 1; 10 TC 118 and *Kirkwood v Evans* [2002] STC 231. I have not derived any assistance from these. *Rickets v Colquhoun* was a case on rules for deductibility which now find their expression in ss 336 and 337 ITEPA; it has no application to the detailed provisions in ss 338 and 339. By contrast, *Kirkwood v Evans* did consider the provisions regarding ordinary commuting that were contained in Sch 12A to the Income and Corporation Taxes Act 1988. But in that case the taxpayer conceded that the office to which he travelled on one day per week was a permanent workplace. There is nothing in *Kirkwood v Evans* that can assist HMRC in that respect.

40. On the basis of my interpretation of the legislative provisions I turn to applying the law to the facts as I have been able to find them. I have accepted that Mr Williams had an expectation that after 16 months he would be moved to the King's Cross site under the same employment contract, which was open ended as to its duration. At the outset of his employment with Morgan Est, therefore, his attendance at Heathrow was for the purpose of performing a task of limited duration for which Mr Williams period of continuous work was not at that time either lasting more than 24 months, nor comprising all or almost all of the period for which Mr Williams was likely to hold the employment. Nor was it reasonable to assume that Mr Williams' attendance at Heathrow would be in the course of such a period.

41. In so concluding I have taken account of s 339(6), which provides that a period is a period of continuous work at a place (or area) if over the period the duties of the employment are performed to a significant extent at that place (or area). In the guide, HMRC say that they regard a significant extent as meaning 40% or more of working time. This would mean, for example, based on the guide, that if Mr Williams had expected to be at King's Cross for, say, 9 months, and the contract had then been expected to come to an end, his work at Heathrow could then have been regarded as for the whole 25-month period (as it would be 64% of the working time in that period), and indeed for the whole period of the employment.

42. I heard no argument on the 40% figure, or on the way HMRC apply it according to their guide, and I need not reach any conclusion on those matters. On the facts I have found in this case, there was no finite end to Mr Williams' contract expected at any time material to this appeal. There was no expectation as to what would happen when Mr Williams' work on the King's Cross project came to an end. He might have returned to Heathrow, as the place mentioned in the contract, or he might not, as was permitted by the contract. The contract was open-ended, and contemplated a term considerably in excess of 2 years. In fact, it lasted for 33 months, and was only terminated by reason of redundancy. Both at the outset, therefore, and at all times up to the change of plan at the end of 16 months, Mr Williams could not have had expectations of what would happen in the future that would have enabled the conclusion to be drawn that, taking account of s 339(6) or the way in which HMRC apply that provision, his work overall at Heathrow would be treated as a continuous period of work lasting more than 24 months, or the whole of his employment. It was not, in my judgment therefore, at any material time reasonable to assume that Mr Williams' attendance at Heathrow would be in the course of a period of continuous work there lasting more than 24 months, or for all or almost all the period of his employment.

43. On the basis of my conclusions, the result is that for the period of 16 months from the commencement of Mr Williams' employment, so up to January 2004, Heathrow was not a permanent workplace, and Mr Williams is accordingly entitled to deductions for his travelling expenses in that period. Thereafter, as he expected from that time that his period of continuous work at Heathrow would last more than 24 months, Heathrow became a permanent workplace, and he is not entitled to deductions for that latter period.

44. It follows that the assessment for 2002-2003 is discharged and the adjustment for 2004-2005 is upheld. For 2003-2004, deductions are available for travel expenses incurred between 6 April 2003 and January 2004, and the assessment is discharged to that extent, but I cannot make a final determination as I do not have a detailed breakdown of the dates on which the expenses were incurred. To that extent, therefore, this decision is in principle only. I hope that the parties will be able to agree the figures for 2003-2004, but if not there is liberty to apply for my further determination. Except to that extent, and subject to what I say about discovery, the 2003-2004 assessment is upheld.

Discovery

45. In light of my decision on the deductibility issue, it is necessary for me to consider the issue of whether the discovery assessment is valid only in relation to the assessment in respect of 2003-2004, part of which I have upheld. However, I also consider the position in case I am found to be wrong to have discharged the assessment for 2002-2003 and part of the assessment for 2003-2004.

46. The material parts of s 29 of the Taxes Management Act 1970 are as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

...

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

...

47. This version of s 29 reflects the amendment to s 29(4) that was made by the Finance Act 2008 with effect from 1 April 2010, or in certain transitional cases from 1 April 2012. The former version referred to the situation being "attributable to fraudulent or negligent conduct" on the part of the taxpayer or a person acting on his behalf, rather than to "carelessly or deliberately". Mr Jones proceeded on the basis that the former wording was applicable to this appeal, as it applied at the time of the assessments in question. I consider that it is the amended wording that is applicable. The amendment was not qualified by reference to years of assessment or the making of the assessment itself, but simply by reference to a commencement date. The question to be answered under s 29(4) is not one that has to be considered at the time the discovery is made or the assessment is made (see *Hankinson v Revenue and Customs Commissioners* [2012] STC 485; the tests in s 29(4) and (5) are objective, and are to be tested on appeal in accordance with s 29(8)).

48. Having said that, I turn first to s 29(5). It seems to me appropriate to do so, as it is only if that condition is not satisfied that I need to consider s 29(4). That was the approach adopted in *Hankinson*, and I believe that it is the proper one to adopt.

49. At the times when HMRC ceased to be entitled to open an enquiry into Mr Williams' tax affairs for 2002-2003 and 2003-2004, and indeed up to the making of the discovery assessments, the only information HMRC had, for the tax years in question, were the entries made in Mr Williams' self-assessment returns for "travel and subsistence". This information comprised only figures. In those circumstances, I agree with Mr Jones that the officer could not reasonably have been expected to have been aware of the fact that, to the extent that it had, excessive relief had been claimed.

50. It follows therefore that the discovery assessment for the relevant part of 2003-2004, and, to the extent it may become relevant, the assessments for 2002-2003 and for the remainder of 2003-2004, were validly made.

51. On this basis, it is not strictly necessary for me to address s 29(4). However, I should say that I do not consider that condition to have been satisfied. There is no allegation that Mr Williams acted fraudulently or deliberately. The case is put by reference to Mr Williams' negligence or, as I have concluded, carelessness. Mr Jones pointed me to the guidance notes for 2003-2004 tax returns (those for 2002-2003 could not be located) and what was said there under the heading *Business Journeys*. He submitted that Mr Williams' claims were not insignificant and that a reasonable man giving his affairs due diligence would read the guidance notes, and where necessary contact HMRC for further guidance. HMRC had no record of Mr Williams having raised any query in this respect before he completed the relevant returns.

52. Mr Jones also referred me to the guidance in booklet E490 (Employee Travel) to which I have referred earlier, along with print outs from HMRC's Employment Income Manual, accessible on the internet.

53. I do not believe that the reasonable and diligent taxpayer, in the circumstances of Mr Williams, could be criticised at all if he failed to negotiate a successful path

through the labyrinth of the law and practice on ordinary commuting and permanent and temporary workplaces. As my own conclusions demonstrate, it appears to me that even HMRC have difficulty in marrying up their view of the law with their published practice in this area. In a straightforward case the answer may be clear, and a taxpayer who fails to reach the right conclusion in such a case might well, depending on the facts, be found to have acted carelessly. But this is, in my view, far from a straightforward case, and I do not consider that the mistake made by Mr Williams in claiming deductions to which he was not entitled can in these circumstances be described as careless.

54. There is one further aspect of s 29 I should consider. It is relevant only to the extent that I might be found to be wrong in allowing deductions for the period up to Mr Williams coming to expect that his period of continuous work at Heathrow was likely to exceed 24 months. In that circumstance I consider that s 29(2) can apply. Under that sub-section, a taxpayer who has made a return (as Mr Williams did) cannot be assessed under s 29(1) if the claim to excessive relief is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed, and the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

55. The only evidence of HMRC's practice in this area was that provided to me in the bundle, in particular the booklet E490, and the examples from that I have described above. On the basis of those examples, my view would be that to the extent of the relief there described, and assuming that this guidance was in force at the relevant times, Mr Williams' tax returns could have been in accordance with that practice. Mr Jones argued that s 29(2) could only apply at all if Mr Williams had been aware of any relevant practice. I do not agree. Section 29(2) makes no reference to the knowledge of the taxpayer; it merely requires the return, objectively, to be in accordance with the relevant practice. It would, as I suggested to Mr Jones, be surprising if the law sought to protect only the well-informed taxpayer, and not an ill-informed one who made his return on an identical basis.

56. As the booklet E490 referred to ITEPA, it is not clear if, and to what extent, it will have applied at the times Mr Williams was completing and filing his tax returns. It may well have done, as ITEPA was a consolidating Act and the relevant law applied before that time, but the information I have does not enable me to say. Accordingly, I reach no conclusion on this point. It will be an issue only to the extent that it might be decided, contrary to my own decision, that Mr Williams is not entitled to the deductions. Further evidence may be required in those circumstances.

Decision

57. For the reasons I have given, I allow this appeal in part.

58. I discharge the 2002-2003 assessment.

59. I discharge the 2003-2004 assessment to the extent that it relates to travel and subsistence expenses incurred from 6 April 2003 to January 2004.

60. Otherwise I confirm the assessment for 2003-2004.

61. I confirm the adjustment for 2004-2005.

62. If the parties are unable to agree the figures for 2003-2004, either party may apply for a further determination by me in that respect.

Application for permission to appeal

This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 31 May 2012