# TC03354

**Appeal number: TC/2009/10215**

***INCOME TAX - self-employed flying instructor with office at home - travel between home and two airfields where he gave flying lessons - deductibility of travel expenses and telephone expenses - whether travel expenses incurred wholly and exclusively for the purpose of his self-employment - no - whether amounts assessed in relation to telephone expenses were excessive - no - whether discovery assessments were valid – yes – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**NOEL WHITE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE GREG SINFIELD**
**MRS SHAMEEM AKHTAR**

**Sitting in public at Brighton on 10 October 2013 and after consideration of the parties' written submissions received on 4 and 7 February 2014**

**Peter Clarke of Clarke & Co, Accountants and Practitioners in Revenue Law, for the Appellant**

**David Linneker, officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is an appeal by Noel White, a self-employed flying instructor and examiner. Mr White gave flying lessons and conducted examinations at two airports. Mr White claimed the cost of travel by car between his home and the airports in his tax return for 2006-07. He also claimed certain expenses relating to his home telephone.

2. The Respondents ("HMRC") decided that Mr White was not entitled to deduct his travel expenses, ie the costs of driving his car and associated capital allowances, on the ground that they were not wholly and exclusively incurred for the purposes of his business. HMRC also reduced the telephone expenses claimed on the ground that Mr White had not provided any evidence to support his claim to use the telephone for business purposes.

3. On 30 April 2009, HMRC issued discovery assessments and a closure notice assessing Mr White for the disallowed expenses for 2003-04, 2004-05, 2005-06 and 2006-07. On 4 April 2013, HMRC issued a discovery assessment in respect of travel expenses, and associated capital allowances, claimed by Mr White in his tax return for 2008-09. The total amount thus assessed is £9,434.79. Mr White appealed against the assessments and closure notice.

4. On 4 June 2009, HMRC issued a Notice of Enquiry under section 9A Taxes Management Act 1970 ("TMA") and an Information Notice under Schedule 36 Finance Act 2008 in relation to the tax year ended 5 April 2008. Mr White appealed against the notices on the ground that they were unlawful. At the hearing of the appeal, Mr Peter Clarke, who appeared for Mr White, withdrew the appeals against the notices. Mr Clarke was careful to say that he did not concede that the notices were lawful but felt that they added little to the proceedings, involved complex matters of tax law and could lead to the appeals being adjourned part heard. Accordingly, we do not consider the issue of the lawfulness of the notices further in this decision.

5. For the reasons set out below, we have held that Mr White was not entitled to deduct the travel expenses as they were not incurred wholly and exclusively for the purposes of his trade, profession or vocation. We have also found that the closure notice and assessments disallowing some of the telephone expenses claimed by Mr White were not excessive. Finally, we concluded that the discovery assessments were properly made. Accordingly, our decision is that Mr White's appeal is dismissed.

### Legislation

6. During the period under consideration in this appeal, the legislation governing the deduction of expenses for income tax purposes changed. Until 5 April 2005, Section 74(1)(a) of the Income and Corporation Taxes Act 1988 ("ICTA") provided as follows:

> "74 General rules as to deductions not allowable
>
> (1) Subject to the provisions of the Tax Acts, in computing the amount of the profits to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of -
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation;"

7. For the tax year 2005-06 and subsequent years section 34(1)(a) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") applied for income tax purposes and was as follows:

> "34 Expenses not wholly and exclusively for trade and unconnected losses
>
> (1) In calculating the profits of a trade, no deduction is allowed for-
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> …
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

8. The assessments were discovery assessments made under section 29 TMA. Section 29(1) relevantly provides:

> "(1) If an officer of the Board or the Board discovers, as regards any person (the taxpayer) and a year of assessment -
>
> (a) that any income which ought to have been assessed to income tax … have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) …
>
> 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."

9. Section 29(3) provides that, where a taxpayer has made and delivered a return, an assessment cannot be made under section 29(1) in respect of that year of assessment unless one of two conditions, set out in section 29(4) and (5), is satisfied. The first condition is contained in section 29(4) and is not relevant to this appeal. The second condition is set out in section 29(5) as follows:

> "(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."

10. What is meant by "information made available" is set out in section 29(6) as follows:

"(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, whether in pursuance of a notice under section 19A of this Act or otherwise; 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."

**Burden of proof**

11. Mr Clarke submitted that the burden of proof in the appeal was on HMRC. Mr Clarke noted that HMRC relied on section 50(6) of the TMA as placing the burden of proof on Mr White. Mr Clarke said that this was manifestly untrue. Mr Clarke read out the section which is as follows:

"50 Procedure

…

(6) If, on an appeal notified to the tribunal, the tribunal decides -

(a) that … the appellant is overcharged by a self-assessment;

… or

> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good."

12. Mr Clarke submitted that section 50(6) was, as the heading to the section revealed, merely concerned with procedure. Mr Clarke contended that nothing in section 50(6) displaced the common law principle that he who avers must prove.

13. We agree that there is a principle that that he who asserts or avers must prove. The general rule was reaffirmed by the Outer House of the Court of Session in the Scottish case of *SGL Carbon Fibres Limited v RBG Limited* [2012] CSOH 19 at [21] of the opinion. We cannot, however, accept Mr Clarke's submission that HMRC has the burden of proof in an appeal against the amount of an assessment. It has been settled law for almost 90 years that the burden is on the appellant to show that the sums charged to tax by an assessment are excessive.

14. In *T Haythornthwaite & Sons Limited v Kelly (Inspector of Taxes)* (1927) 11 TC 657, Lord Hanworth MR said at 667:

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject - the Appellant - establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

15. In *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, Mustill LJ stated at 642:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornthwaite & Sons Ltd v Kelly* (*Inspector of Taxes*) (1927) 11 TC 657."

16. More recently still, the position was confirmed by the Inner House of the Court of Session in *Rouf v HMRC* [2009] CSIH 6, [2009] STC 1307 at [29] where, having quoted the passage above from *Haythornthwaite*, the Court stated that the general onus to show an overcharge lay upon the appellant.

17. In our view, these cases are not inconsistent with the general rule that the burden of proving an assertion lies on the person making it but reflect the fact, clearly shown by section 50(6) of the TMA, that it is the appellant who, by bringing the

appeal, makes the relevant assertion, namely that he or she has been overcharged by an assessment. The cases cited above are binding on us and we hold that the burden is on the appellant, Mr White, to satisfy us that the sums charged to tax by the assessments and closure notice are excessive.

## Issues

18. The issues that we must determine in this appeal are

(1) whether the travel expenses claimed by Mr White in respect of journeys between his home and the airports were incurred wholly and exclusively for the purposes of his business as a flying instructor and examiner;

(2) whether the assessments in relation to the telephone expenses claimed by Mr White are excessive; and

(3) if the answer to either question or both is no, whether the assessments for years ended 5 April 2004, 2005, 2006 and 2009 were properly made as discovery assessments.

## Evidence

19. We heard oral evidence from Mr White who also provided a witness statement. Mr Clarke, as well being a tax practitioner and Mr White's representative, was formerly also a qualified pilot and used Mr White's services for training in preparation for revalidation of his private pilot licence instrument meteorological conditions rating. In that capacity, Mr Clarke provided a witness statement and gave evidence. We also received a witness statement and heard oral evidence from Mr Paul Bartram, one of the HMRC officers who conducted the enquiry. In addition, the bundles contained a comprehensive collection of correspondence and other documentation generated by the enquiries which we have taken into account in this decision. On the basis of that evidence, we make our factual findings on the basis of the balance of probabilities as follows.

## Facts

20. Mr White is a senior flying instructor and examiner. He gives flying lessons and examines pilots, including other examiners, in aircraft that fly from airports at Bournemouth and Shoreham. Mr White lives at Maytrees, Fox Hill, Haywards Heath, Sussex with his wife and teenage child. He operates his business from his home. Mr White keeps his business records as well as equipment such as charts and navigation equipment at his home. Mr White does not have an office in his home. He uses a laptop for business purposes and might use it in any one of a numbers of rooms in his house. Mr White does not have a separate telephone line or number for the business.

21. Mr White's home is also the address at which he is registered with the Civil Aviation Authority ("CAA") and the CAA contacts him at that address. Mr White reads any new CAA materials in order to stay up to date as an examiner at home. Mr White's home telephone number is on the CAA website and people can contact him as a result of that but most of his work comes from recommendations by word of

mouth. People who wish to engage him as a flying instructor or examiner contact Mr White at his home to make the arrangements by calling the home telephone number. Mr Clarke contacted Mr White at his home because although Mr White had a mobile phone, it had to be switched off when flying. The home telephone is also used by Mr White to call the airports to check weather conditions before a flight and to contact his students in advance of a lesson to discuss flying conditions and plan the flight. The charges for the telephone are billed monthly by British Telecom. The bills do not itemise the calls except to show long distance calls. The telephone bill is paid from Mr White's personal bank account.

22. Mr White gives flying lessons and examines pilots at either Shoreham airport or Bournemouth airport. Mr White can teach at other airports as his licence to instruct and examine applies throughout the UK. He has driven to Lydd airport to give a lesson but he is almost invariably at Shoreham or Bournemouth. Mr White travels between his home and the airports at Shoreham and Bournemouth to conduct his business as flying instructor and examiner. There was no suggestion that Mr White travelled between Shoreham and Bournemouth to carry on his business and we infer that he generally travels from his home to one or the other airport and then returns to his home.

23. Mr White does not have any office or other accommodation at either Shoreham airport or Bournemouth airport or anywhere else. Mr White does not own an aircraft nor does he hire one. He teaches his students or examines pilots in aircraft that they own or hire. Mr Clarke hired an aircraft in which to fly and be examined by Mr White.

24. Mr White normally meets his students in the car park at each airport or in the airport canteen. Typically, they would fly to another airport, land and then return to the airport where they started. Any de-briefing after the flight would be carried out in the aircraft, walking back to the airport building or in the airport canteen over a cup of coffee. Mr White signs the 'Tech-Log' for the aircraft at the airport but only if the student is not qualified to sign it, for example if the student does not hold a pilot licence. If Mr White examines a pilot, he completes the report to the CAA at home. The students or candidates usually pay Mr White by cheque at the airport. Mr White pays the cheques into a separate business bank account.

25. Mr White's self-assessment tax return for the year ended 5 April 2007 was submitted on 21 January 2008. On 18 June 2008, Mr Bartram issued a notice of enquiry under section 9A of the TMA into the return. As well as other things that are not relevant to this appeal, the enquiry related to expenses of £9,905 shown on the return. Mr Bartram wrote to Mr White's tax advisers, Wood Branson Dickinson, to ask for further information about the return. In a letter dated 24 July 2008 to Mr Bartram, Wood Branson Dickinson stated that Mr White did not keep a formal expenses book and provided a summary reconciliation with receipts for the expenses claimed. The letter stated:

> "Only the business proportion of motor expenses has been included in the accounts. 15% has been disallowed as private usage. Our client

> only uses his car for business with the odd private local journey, as he has the use of the main family car for private usage.
>
> There is a minimal annual allowance of £100 (i.e. less than £2 per week) for use of home as office. Our client advises us that he does not use any specific room in the house exclusively for business purposes. There is no separate business telephone number."

26. In relation to the travel expenses, Mr Bartram initially disputed the amount of estimated business usage (85%) claimed. On further consideration, Mr Bartram concluded that Mr White's place of work was the airports where he taught or examined pilots and that the costs of travelling between home and places of work were not allowable. Mr Bartram decided that the motoring expenses fell to be disallowed in full.

27. In relation to the telephone expenses, Mr Bartram decided to check whether the amount claimed as business use was reasonable. Mr White had claimed £288 in relation to telephone calls. In the absence of itemised telephone bills that showed how many calls had been made or any other records of business calls made, Mr Bartram had to estimate the business use of the telephone. Mr Bartram had information that showed that the number of flights made during the year was 48. Mr Bartram was told that Mr White made telephone calls to the airports to check weather conditions before flying. Mr Bartram concluded that a reasonable claim would be for 100 calls i.e. 50 calls to the airport and 50 calls to students. Mr Bartram estimated an average cost of £1 per telephone call. Accordingly Mr Bartram allowed £100 for telephone calls during the year ended 5 April 2007.

28. Having come to the conclusion that there were amounts to be disallowed for the year ended 5 April 2007, Mr Bartram reviewed Mr White's tax returns for earlier years. Mr Bartram asked for a breakdown of the amounts shown on the tax returns the earlier years ending 5 April 2004 to 5 April 2006. Mr Bartram also asked for confirmation of whether there had been any change in the way the business was conducted in those years. Mr White did not provide any information in relation to those years. Mr Bartram concluded that the amounts claimed as expenses for the earlier years also included amounts that should be disallowed on the same basis as the travel expenses that had been disallowed in relation to the year ended 5 April 2007.

29. On 30 April 2009, Mr Bartram issued a closure notice under section 28A TMA 1970 for the year ended 5 April 2007 and discovery assessments under section 29A TMA 1970 the years 2003-04, 2004-05 and 2005-06. To ascertain both the telephone and motoring expenses for the earlier years, Mr Bartram used the amounts for the year ended 5 April 2007 and, using the retail price index ("RPI"), worked back to produce figures for the expenses in the three previous years. In evidence, Mr Bartram described the process as an educated estimate of the amounts.

30. On 4 April 2013, Mr Bartram issued a discovery assessment for the year 2008-09 under section 29A TMA 1970 disallowing the motoring expenses and related capital allowances claimed by Mr White on the same grounds as the previous assessments.

31. The details of the disputed discovery assessments and closure notice are as follows:

| Date of assessments or closure notice | Tax year | Additional amount |
|---|---|---|
| 30 April 2009 discovery assessment | 2003-04 | £1,015.37 |
| 30 April 2009 discovery assessment | 2004-05 | £2,068.00 |
| 30 April 2009 discovery assessment | 2005-06 | £2,097.20 |
| 30 April 2009 closure notice | 2006-07 | £2305.99 |
| 04 April 2013 discovery assessment | 2008-09 | £1,948.23 |

**Travel expenses**

32. It is well established that the costs of travel between a person's home and place of business are not generally allowable deductions even where the person uses the home for business purposes, for example by carrying out some business related activity there.

33. In *Newsom v Robertson* [1952] 1 Ch 7 and (1952) 33 TC 452, the Court of Appeal considered the case of a barrister, Mr Newsom, who had a home in the country and his professional chambers in London. Mr Newsom did much of his professional work in his well-equipped study at home, especially during court vacations (when he only visited his London chambers on rare occasions for conferences). Mr Newsom claimed a deduction for his costs of travelling between his home and chambers. The Special Commissioners found that, in court vacations, the basis of Mr Newsom's professional operations moved from London to his country home and the costs of travelling to London during vacations were allowable.

34. In the High Court, Danckwerts J held that none of the travel expenses were deductible because they were not incurred wholly and exclusively for the purposes of his profession. The basis of this decision was that the travel expenses were incurred because he chose to live in the country and were thus not wholly and exclusively for the purposes of his business. Danckwerts J stated:

> "He travels backwards and forwards between his home and his chambers in 15, Old Square because he has to live somewhere, and because he wishes to go backwards and forwards between his chambers and his home. It does not seem to me that it makes any substantial difference that he also carries on his profession and does a lot of work at a place which happens to be his home. His motive, his object and his purpose in travelling between these places, as it seems to me, are mixed."

35. The Court of Appeal upheld the decision of Danckwerts J. Denning LJ said:

> "A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense."

36. Romer LJ agreed and stated that:

> "… the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it."

37. *Newsom* established that travel between home and a place of business is not allowable, as its purpose is, at least partly, to take the taxpayer home and then to undo that journey. In those circumstances, it cannot be said that the costs of travelling between home and a place of business are incurred wholly and exclusively for the purposes of the trade, profession or vocation which is the statutory test that must be satisfied before an expense may be deducted.

38. Mr Clarke did not seek to challenge the general rule that the costs of travel between a person's home and place of business are not allowable as shown by *Newsom*. Mr Clarke relied instead on another decision of the Court of Appeal, namely *Horton v Young (Inspector of Taxes)* [1972] Ch 157, [1970] 47 TC 60 ("*Horton*").

39. Mr Horton was a self-employed bricklayer who was the leader of a bricklaying team of three men. Mr Horton had no business premises. He wrote up his books and kept his tools at home. During the relevant period, Mr Horton worked for a single main contractor, Mr Page. Mr Page would visit Mr Horton at his home to agree the details of each job, such as the site and the rate of pay. During the year in question, Mr Horton worked at seven different sites, at distances of between 5 and 55 miles from his home. He mostly worked at each site for a period of three weeks or so. Mr Horton travelled daily between his house and the building site where he was working by car, taking his team to the site with him. The Inland Revenue, as HMRC then were, refused Mr Horton's claim to deduct the expenses incurred in travelling between his home and the various building sites. The Special Commissioners decided that the expenses of travelling between Mr Horton's home and the building sites were not allowable as a deduction. Mr Horton appealed.

40. In the High Court in *Horton*, Brightman J held that the expenditure was deductible and allowed Mr Horton's appeal. He observed:

> "In the majority of cases a self-employed person has what can properly be described as his place of business or base of operations. In the case of the medical practitioner, it is his surgery or consulting rooms; in the case of the shopkeeper it is his shop; in the case of the barrister it is his chambers, and so on. There are, however, some occupations in which the self-employed person does not have any location which can readily be described as his place of business, but rather a number of places at which from time to time he exercises his trade or profession. It seems to me that there is a fundamental difference between a self-employed person who travels from his home to his shop or his chambers or his consulting rooms in order to earn profits from the exercise of his trade or profession and a self-employed person who travels from his home to a numbers of different locations for the purely temporary purpose at each such place of there completing a job of work, at the conclusion of which he attends at a different location. … The point is that his trade or profession is by its very nature itinerant."

41. Brightman J also observed:

> "In my view, where a person has no fixed place or places at which he carries on his trade or profession but moves continually from one place to another, at each of which he consecutively exercises his trade or profession on a purely temporary basis and then departs, his trade or profession being in that sense of an itinerant nature, the travelling expenses of that person between his home and the places where from time to time he happens to be exercising his trade or profession will normally be, and are in the case before me, wholly and exclusively laid out or expended for the purposes of that trade or profession."

42. The Inland Revenue appealed to the Court of Appeal which held that Mr Horton's travel expenses between his home and the sites were allowable and dismissed the appeal. In the Court of Appeal, Lord Denning MR compared this case with *Newsom* and said:

> "The present case is very different. Mr Horton's base of operations was Eastbourne. He claims his travelling expenses to and from that base. I think he is entitled to deduct them. ... On the finding of the Commissioners there is only one reasonable inference to draw from the primary facts. It is that Mr Horton's house at Eastbourne was the locus in quo of the trade, from which it radiated as a centre. He went from it to the surrounding sites according as his work demanded."

43. Salmon LJ agreed. He held that Mr Horton's house was the base from which he carried on his business and rejected the submission that Mr Horton had shifting bases of business at each site at which he worked. Salmon LJ observed that Mr Horton agreed all his contracts at his home which was where Mr Page, his only customer, sought him out and where he kept his tools and business books and did his office work. By contrast, the sites where Mr Horton actually carried out his bricklaying work were many and spread across a large area.

44. Stamp LJ also agreed and pointed out how difficult it was to draw a line between what he called itinerant traders, whose business actually involved travel, and persons such as the barrister Mr Newsom. He observed that:

> "The facts of such cases are infinitely variable and one must … look at the facts of each case and decided whether the expenses are money wholly and exclusively laid out or expended for the purpose of the trade or the profession."

45. Stamp LJ found that Mr Horton had "no place which you could call his place of business except his home": he entered into contracts there, he kept his tools and other trading items there, and it was the only place where he was to be found. Stamp LJ held that the home was the centre of Mr Horton's business activities. He rejected the general proposition that the place or places at which a man carries out the work he has contracted for must necessarily be his place or places of business.

46. *Horton* was considered by Lewison J in *Jackman (Inspector of Taxes) v Powell* [2004] EWHC 550 (Ch), [2004] STC 645, in the context of another claim to deduct expenses of travel between home and a place of work. Mr Powell was a milkman who operated a milk round at some distance from his home under a franchise agreement with Unigate. Every day, Mr Powell travelled from his home to the Unigate depot some 26 miles away, where he collected his milk float, milk and other items before going on his round which was near the depot. Mr Powell kept his float and stock at the depot. Mr Powell was registered for VAT, giving his home address as his place of business. He did all his office work at home and kept all his business records there. Mr Powell claimed to deduct the expenses of travelling between his home and the depot. The Inland Revenue disallowed the expenditure. The Special Commissioner allowed Mr Powell's appeal against that decision. The Inland Revenue appealed. In the High Court, Lewison J considered *Horton* and pointed out that Mr Horton's places of work were entirely unpredictable. Lewison J went on to hold that the 35 roads of Mr Powell's milk round plainly amounted to his base of operation.

47. We were also referred to *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665. This case concerned a claim for the costs of suitable clothing for wearing in court by a barrister. Ms Mallalieu sought to deduct the expenses on the basis that she would not have purchased such items of clothing if they were not required in order to carry on her profession. The Inland Revenue disallowed the claim and Ms Mallalieu appealed. The General Commissioners dismissed Ms Mallalieu's appeal but she was successful in the High Court and the Court of Appeal. The case came before the House of Lords which held that, in order to determine whether an expense was for the purposes of a taxpayer's business, it was necessary to discover the taxpayer's object in making the expenditure. Although the conscious motive of a taxpayer was of vital significance in ascertaining the taxpayer's object, it was not decisive and the Commissioners had been entitled to find on the facts that, as Ms Mallalieu had to wear something, one object was the provision of clothing that she needed as a human being. It followed that the expenditure was not incurred wholly and exclusively for the purposes of her profession and was not deductible.

48. All the above cases were examined closely by the FTT (Judge Kevin Poole and Mr Kamal Hossain FCA FCIB) in *Samad Samadian v HMRC* [2013] UKFTT 115 (TC). Dr Samadian was employed as a full time consultant in the NHS at certain NHS hospitals. He also had a private practice. Dr Samadian had an office at his home where he did work relevant to his private practice. He also hired consulting rooms at two private hospitals where he saw his private patients. A dispute arose between Dr Samadian and HMRC as to whether the expenses of certain journeys, including travel between home and the private hospitals, were deductible as expenses incurred wholly and exclusively for the purposes of his private practice. The matter came before the FTT.

49. The FTT accepted that Dr Samadian's home was a place of business where he carried out part of the professional work necessary to his overall professional practice as well as the majority of the administrative work related to it.

50. Having referred to the fact that, in *Horton*, the taxpayer's single business base was at his home, the FTT observed at [71] that:

> But things now are less simple than in 1970. There is an almost infinite variety of methods of working for the self-employed in the current era. In a situation where a taxpayer's business activities are fragmented across a number of different locations (including his home) and he claims to deduct the cost of travel between those locations, it is much less straightforward to apply the "wholly and exclusively" test than it was in the four main cases we were referred to. In particular, judicial comments specifically made in the context of a single "business base" (as was found to exist in *Newsom*, *Horton*, *Sargent* and *Jackman*) need careful consideration before they are applied in the context of multiple "places of business".

51. The FTT compared the situation in *Horton* with that of Dr Samadian at [73] – [80] as follows:

> "73. What were the decisive features in *Horton*? [Counsel for Dr Samadian] argues they were that:
>
> (1) Mr Horton held himself out as trading from his home address and he negotiated and entered into his contracts there. The Appellant, he says, is in a similar position. He holds himself out as practising from his home address, to his patients, the insurance companies and his professional body; the formation of his contracts is 'elusive' in its location and involves little or no negotiation and therefore as a factor carries little weight in this case.
>
> (2) Mr Horton kept his tools (the essential equipment for his business) at his home. The Appellant does the same with his medical instruments.
>
> (3) Mr Horton kept his books and records at his home. The Appellant does the same, both with his business records and his clinical records.

74. In addition, [Counsel for Dr Samadian] points to the fact that the Appellant carries out significant administrative and professional work at his home.

75. On this basis, [Counsel for Dr Samadian] argues that the Appellant's position is parallel or analogous to that of Mr Horton and all his travel to and from his home should therefore be allowable.

76. However we consider that [Counsel for Dr Samadian]'s analysis misses an important point. Denning LJ held that Mr Horton's home was:

> 'the locus in quo of the trade, from which it radiated as a centre. He went from it to the surrounding sites according as his work demanded.'

Salmon LJ held that Mr Horton's home was:

> 'the base from which [he] carried on his business'.

Stamp LJ held that Mr Horton had:

> 'no place which you could call his place of business except his home'.

In other words, all three of the Lords Justices held that Mr Horton's home was the only place of business he had. That was why his travel to and from his home was deductible; as Salmon LJ put it:

> 'Since 2 Penshurst Close was his business base and the place where his chief, and indeed only, customers knew that he was always to be found, it would be understandable that exclusively for the purposes of his business he would think it right to return to his base at night from any site on which he was working during the day.'

77. When viewed in this way, we consider the analysis in *Horton* is put in its proper context. In our view, it is good authority for the limited proposition that a taxpayer who can establish that his business base is at his home and that he has no place of business away from it can generally (absent some non-business object or motive for the travel) claim a deduction for his travel between his home and the various places where he attends from time to time for the purposes of his business.

78. We acknowledge there is no particular significance attaching to the description 'itinerant' under the legislation or the case law, but we consider it does provide a readily understandable shorthand description of the situation of a trader such as Mr Horton, whose travel expenses to and from his home will generally be deductible (though, following Brightman J in *Horton*, we acknowledge that this may not always be the case, for example where he lives in a place far removed from his operational area).

79. Why did the Court of Appeal not find that the building sites at which Mr Horton worked amounted to additional places of business? It was because of the lack of any fixed or regular place at which Mr Horton actually plied his trade. They were effectively holding that Mr Horton was itinerant (though only Stamp LJ used that word). …

80. Lewison J in *Jackman* acknowledged this important point when he said (with reference to Denning LJ's comment set out at [76] above):

> 'It seems to me that the phrase 'according as his work demanded' is an important one. There is no predictability about Mr Horton's places of work when he was employed on a bricklaying contract. He would have to go wherever Mr Page's main contracts took him.'

52. At [83] of the decision, the FTT, having reviewed the authorities, concluded that the two private hospitals were Dr Samadian's places of business because he attended them regularly and predictably to carry out his professional activities as more than just a visitor. The FTT did not accept the submission that Dr Samadian was an itinerant worker in the same way as Mr Horton. On the basis that Dr Samadian had a number of places of business, including the two private hospitals, and was not an itinerant worker like Mr Horton, the FTT held that Dr Samadian fell outside the ratio of *Horton*. The FTT ruled that travel expenses for journeys between Dr Samadian's home and the private hospitals were not in general deductible. Dr Samadian appealed to the Upper Tribunal.

53. At the hearing of this appeal, we told the parties that we were aware that the Upper Tribunal was shortly to hear the appeal in *Samadian* and that we thought that the Upper Tribunal's decision might provide useful guidance on the issues that arose in this case. We indicated that we would delay issuing our decision until we had seen the decision of the Upper Tribunal in *Samadian* and, if we considered that it was or might be relevant to our decision in this case, we would invite the parties to make further submissions in writing.

54. In a decision released on 15 January 2014, [2014] UKUT 0013 (TCC), the Upper Tribunal (Sales J) upheld the FTT's decision and dismissed Dr Samadian's appeal. The Upper Tribunal held that the FTT was correct, at [83], to characterise the private hospitals as places of business. The Upper Tribunal endorsed the FTT's analysis of *Horton* agreed with the reasons it gave for distinguishing *Horton* from the case before it.

55. The Upper Tribunal endorsed the FTT's focus on establishing whether the travel expenses were incurred (or laid out) wholly and exclusively for the purposes of Dr Samadian's private practice. The Upper Tribunal observed at [18] that:

> "… the FTT correctly directed itself that the only statutory test which fell to be applied was the 'wholly and exclusively' test set out in section 74 ICTA and section 34 ITTOIA. The authorities provide guidance and illustrations from which it is possible to reason by analogy, but the FTT correctly recognised that it should not be distracted in its analysis from the critical question it had to determine, which was set by the statutory test."

56. At [25] and [26], the Upper Tribunal held:

> "25 The 'wholly and exclusively' test is to be applied pragmatically and with regard to practical reality. Private interests may be served by expenditure in the course of a trade or profession, but be so subordinate

> or peripheral to the main (business) purpose of the expenditure as not to affect the application or prevent the satisfaction of the statutory 'wholly and exclusively' test. On the other hand, as the FTT correctly noted, the decision and reasoning in *Mallalieu* show that a reasonably strict test of focus on business purposes is applicable, and the language used in the relevant provisions likewise supports that view.
>
> 26 In my opinion, it is appropriate that in applying the statutory test the tax tribunals should be practical and reasonably robust in their approach. … They should bear in mind that it is desirable, as an aspect of the rule of law, that in broad terms like cases should be treated alike. Accordingly, they should be willing to draw analogies where it is sensible for cases to be grouped together for similar treatment, but at the same time should recognise that at some point the practical approach which is appropriate will require a clear line to be drawn, where the analogies which are pressed on them become remote from the paradigm cases where a particular tax treatment is clearly warranted."

57. The Upper Tribunal held at [30] and [32] that Dr Samadian's journeys from home to the private hospitals and back again were made partly for the purpose of conducting his private practice at the hospitals and partly for the private or non-business purpose of enabling him to maintain his home at a location away from the place where he carried on his private practice. The Upper Tribunal concluded in [32] that:

> "… it cannot be said that the expenses incurred by Dr Samadian to undertake these journeys are incurred "wholly and exclusively" for the purposes of his private practice, and accordingly they also are not deductible expenses."

58. The Upper Tribunal summarised the position as follows in [46]:

> "Travel expenses are treated as deductible in relation to itinerant work (such as Dr Samadian's home visits to patients). Travel expenses for journeys between places of business for purely business purposes are treated as deductible. Travel expenses for journeys between home (even where the home is used as place of business) and places of business are treated as non-deductible (other than in very exceptional circumstances …)."

59. We communicated the UT's decision in *Samadian* to the parties and gave then the opportunity to make further submission in writing which they both did. We have taken account of those submissions in our discussion of the issues below.

60. Mr Clarke submitted that the facts of this case exactly paralleled those of *Horton* and we should reach the same conclusion as the Court of Appeal in that case. Mr Clarke referred to [79] of the FTT's decision in *Samadian* (set out above) which analysed the ratio of *Horton* and was quoted and endorsed by the UT in [20] of its decision in that case. Mr Clarke said that Mr White's profession was based at his home and he had no separate place of business other than at his home and, as in *Horton*, everything radiated from that central point. Mr Clarke contended that Mr

White was an itinerant worker in the same way as Mr Horton in that he went from one airport to another, exercising his profession in accordance with the verbal contracts made with his students who contacted him at his home. Mr Clarke submitted that, applying *Horton*, the journeys to and from Mr White's home to the airports were allowable.

61. Mr Clarke also referred us to HMRC's guidance at BIM 37675 which states as follows:

> "No separate business premises
>
> There are some types of business where the taxpayer has no separate business premises away from home. For example, a doctor whose only office is a surgery attached to his home or an accountant whose only office is at his residence. In these cases, the doctor's costs in travelling to visit patients and the accountant's costs incurred in visiting clients are both clearly allowable. Similarly an insurance agent who has no office away from their residence but who visits clients would also incur allowable travelling expenditure.
>
> In the cases above, the taxpayer would normally visit a large number of different premises to carry on the business. The position is rather different where a subcontractor works at one or a very small number of different sites during the year. In such a case it may be that the premises where the taxpayer carries on the business are, in fact, the business base. If this is so, the cost of travelling between the taxpayer's home and the business base should be disallowed.
>
> Following the decision in *Horton v Young* [1971] 47 TC 60 (see BIM37620), where a subcontractor works at two or more different sites during a year travelling expenses between the taxpayer's home and those sites should normally be allowed.
>
> However, where the subcontractor works at a single site in the year and this is the normal pattern for the business, travelling expenditure between the subcontractor's home and the single site should only be allowed if the home is, in some real sense, the centre or base of the business. That will depend on the facts of the case and specifically what business activities are carried out at home."

62. Mr Clarke said that the guidance in the first and third paragraphs of BIM 37675 above was consistent with and supported his submissions in this case. Mr Clarke's case was that, as described in BIM 37675, Mr White had no separate business premises apart from his home; he worked at two different sites, namely the airports, during the year and, therefore, his travel expenses between his home and the airports should be allowed.

63. Mr David Linneker, who represented HMRC, accepted that if we were to find that Mr White's home is his only place of business then *Horton* would apply and his travel expenses would satisfy the wholly and exclusive statutory test and be allowable. Mr Linneker submitted that *Horton* did not apply in this case because the facts were very different and Mr White's home was not his base of operations within the meaning of *Horton* although it was a place of business where Mr White carried

out some administrative functions of his business. Mr Linneker contended that Mr White also had places of business at the airports where he met, instructed and examined his students and carried out his professional activities. Travel between home and places of business is not allowable in these circumstances as the expenditure was not incurred wholly and exclusively for the purposes of the profession.

64. Mr Linneker submitted that *Mallalieu* is important in clarifying the distinction between 'object' or 'motive' on one hand and 'effect' on the other and making it clear that a court may look behind the conscious motive of a taxpayer where the facts are such that an unconscious object should also be inferred. Mr Linneker contended that it followed from *Mallalieu* that Mr White's claim for a deduction for travel expenses also failed because the facts were such that there must have been a non-business motive in mind as well as a business purpose. The cost of travelling between home and the airports arose as a result of Mr White's decision to live away from the airports. Consequently, the expenditure has a mixed business and private purpose and is generally not allowable because the journeys are not wholly and exclusively for the purposes of the business.

65. In approaching this issue, we apply the statutory test in section 74 ICTA and section 34 ITTOIA, namely whether the expenses relating to Mr White's journeys between his home and the airports at Bournemouth and Shoreham were incurred wholly and exclusively for the purposes of his business. The cases discussed above provide only guidance as to and illustrations of the application of the test.

66. We accept that, although he did not have a separate office in the house, Mr White's home was a place of business. HMRC allowed Mr White to deduct some costs in relation to his use of the home as an office and also some of the home telephone charges as expenses relating to business. Mr Clarke, in effect, contended that the two airports were not Mr White's places of business but, as in *Horton*, places at which he exercised his trade or profession from time to time. We disagree. We consider that Mr White also had places of business at the two airports where he met his students, taught them to fly and sometimes examined them or qualified pilots. Mr White worked almost exclusively at Bournemouth and Shoreham airports. Although Mr White could teach and examine at other airports, he could only give one example of ever doing so which was when he taught at Lydd airport. We find that the two airports were Mr White's places of business because he attended them regularly and predictably to carry out his professional activities. The fact that Mr White was only contacted at his home to arrange flying lessons or examinations does not mean that the airports where Mr White invariably carried out those activities were not places of business.

67. It follows, in our view, that Mr White's situation is not the same as that of Mr Horton. Both Mr Horton and Mr White conducted their businesses from their homes but the similarity ends there. Mr Horton's only place of business was at his home. Although Mr Horton worked in many other places, he did so with no predictability or regularity and none of them became his place of business. Mr White conducted his business from the same two airports throughout the year. Mr White's situation was

much closer to that of Dr Samadian than to that of Mr Horton. Like Dr Samadian, Mr White did not have a fixed presence at the places, the airports, where he carried on his business but he attended them regularly and predictably to teach people to fly or examine them. Although he did not hire a room as Dr Samadian did, Mr White used the facilities of the airport to carry out his professional activities as more than just a visitor. We do not, however, reach our decision on the basis that Mr White's circumstances were closer to those of Dr Samadian than Mr Horton but on the basis of the application of the statutory test.

68. We conclude that the travel expenses claimed by Mr White in respect of the journeys between his home and the airports were not incurred wholly and exclusively for the purposes of his profession as a flying instructor and examiner but also as a result of his decision to live away from the airports at Bournemouth and Shoreham where he carried on his business. Accordingly, Mr White was not entitled to deduct the expenses of travelling between his home and the airports.

*Telephone expenses*

69. In relation to the telephone expenses, Mr Clarke submitted that HMRC had not proved that the reduction of £288 claimed to £100 was correct. He contended that it was simply a guess. He also maintained that the figures in relation to telephone expenses for the years 2003-04, 2004-05 and 2005-06 were guesses arrived at by applying the RPI to the original guess. In effect, Mr Clarke's submission was that the burden of proof is on HMRC to show that the amounts disallowed in respect of telephone expenses are correct.

70. We have already held that the burden is on Mr White to satisfy us, on the balance of probabilities, that the amounts charged to tax by the assessments and closure notice are excessive. The telephone was the only one in the home and available for general family use. The telephone bills were paid out of Mr White's personal bank account rather than his business account. Mr White did not keep any record of the business use of the telephone or produce any evidence to support the amount claimed for business use. His evidence before us was that he called the airports to check weather conditions and also called students in advance of flights and sometimes on other occasions. We accept that evidence and find that it confirmed, rather than undermined, the assumptions made by Mr Bartram to estimate the business use of the telephone. We find that Mr Bartram's calculation of the telephone expenses relating to business use during 2006-07 was a reasonable estimate. We also accept that the use of the RPI produced a reasonable estimate of the position for the years 2003-04, 2004-05 and 2005-06. In the absence of any contrary evidence, our decision is that Mr White has failed to establish, on the balance of probabilities, that the closure notice and assessments in relation to the telephone expenses claimed by him were excessive.

*Validity of the assessments*

71. Where a person has submitted a return, HMRC cannot make a discovery assessment under section 29(1) TMA in relation to that return unless one of two

conditions is met. The relevant condition in this case is that contained in section 29(5) TMA. The effect of section 29(1) and (5) in this case is that HMRC could only assess Mr White if Mr Bartram discovered that Mr White's self-assessment tax return showed insufficient tax and that, at the time when the enquiry window closed, HMRC could not reasonably have been expected to be aware of the insufficiency on the basis of the information provided on Mr White's tax return.

72. Mr Clarke submitted, on behalf of Mr White, that HMRC were not entitled to raise the assessments in relation to years 2003-04, 2004-05, 2005-06 and 2008-09 under section 29 TMA. Section 29(1) applies where HMRC discover that income has not been assessed to tax or has not been sufficiently assessed. Mr Clarke contended that HMRC had not discovered anything. Mr Clarke contended that a discovery means that HMRC become aware of some definite and exact figure which they did not have at the time of the return. He stated that the evidence showed that HMRC had simply made a guess and used the RPI to calculate a figure. His case was that there was no provision in section 29 for making an estimated discovery and that the discovery must be of a finite amount.

73. We do not accept Mr Clarke's submission that "discover" in section 29(1) TMA is restricted to a situation where HMRC become aware of a definite and exact amount of income not included in the return or tax not assessed. The meaning of discover is extremely broad. This can be seen from the decision of the Upper Tribunal in *HMRC v Charlton Corfield and Corfield* [2012] UKUT 770. At [28], the Upper Tribunal held:

> "We agree with [counsel for the taxpayer] that the word 'discovers' does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed."

And at [37], it held:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

74. The Upper Tribunal in *Charlton* concluded at [44] that a discovery assessment can be made merely where the original HMRC officer changes his mind or where a different officer takes a different view.

75. In *Langham (Inspector of Taxes) v Veltema* [2004] STC 544, 76 TC 259, Auld LJ stated at [36]:

> "It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a Section 9A enquiry, have clearly alerted him to the insufficiency of the assessment, not where the

> Inspector may have some other information, not normally part of his checks, that may put the sufficiency of the assessments in question."

76. In this case, there was nothing in or with Mr White's tax returns to alert HMRC to the nature of the expenses claimed. The self-assessment tax return for 2006-07 simply included an amount of £9,905 claimed as expenses without any breakdown. Mr Bartram only became aware of the nature of the expenses claimed in response to his notice of enquiry into the 2006-07 return.

77. Mr Bartram only became aware that Mr White made regular journeys from his home to Bournemouth and Shoreham airports, where he carried on his business, when he had seen the flight log. It was only in April 2009, having made enquiries, that Mr Bartram concluded that the travel expenses were not allowable business expenditure. We consider that that was a discovery.

78. Further, Mr Bartram only became aware that the claim for the business element of telephone costs was not supported by the telephone bills or other records when he made enquiries into the 2006-07 return. The information provided by Mr White's accountants and Mr Bartram's own calculations led Mr Bartram to conclude that there was an insufficiency in Mr White's self-assessment and that further assessments were necessary. That, too, was a discovery.

79. In the circumstances of this case, we find that HMRC made a discovery which entitled them to make an assessment under section 29(1) TMA and that the condition in section 29(5) was satisfied. Accordingly, we hold that the assessments for the years 2003-04, 2004-05, 2005-06 and 2008-09 were properly made as discovery assessments.

## Decision

80. For the reasons set out above, our decision is that

(1) Mr White was not entitled to deduct the expenses of travelling between his home and the airports at Bournemouth and Shoreham because the expenses were not incurred wholly and exclusively for the purposes of his trade, profession or vocation;

(2) the closure notice and assessments in relation to the telephone expenses claimed by Mr White were not excessive; and

(3) the discovery assessments were properly made.

Accordingly, Mr White's appeal is dismissed.

## Right to apply for permission to appeal

81. 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.

**GREG SINFIELD**

**TRIBUNAL JUDGE**

**RELEASE DATE: 20 February 2014**