[2016] UKFTT 15 (TC)

TC04821

Appeal number: TC/2012/06427

INCOME TAX – appeal against closure notice – exemptions and reliefs – whether travel expenses for "ordinary commuting" – whether workplace a "temporary workplace" – ss 338-339 ITEPA – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

T A GOSSET **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR ALBAN HOLDEN

Sitting in public at Llandudno on 13 November 2015

Mr Goronwy Hughes for the Appellant

Mrs H Roberts, counsel, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

Introduction

1. The Appellant appeals against a closure notice dated 23 September 2011 in respect of tax year 2008-09. The effect of the closure notice was to disallow relief for travel and subsistence expenses claimed in his tax return.

Background facts

2. The Appellant lives in Gwynedd, North Wales.

3. From April to August 2007, he was employed by Spraycon Ltd ("Spraycon"). During this period he worked in Newcastle.

4. From August 2007 to January 2008 he worked for another company as a labourer and forklift driver.

5. From 21 January 2008 to 31 January 2010 he again worked for Spraycon. During this period, he worked at Hindhead in Surrey, where Spraycon was a contractor on a Crossrail tunnel site.

6. In June 2010, HMRC opened an enquiry into his 2008-09 tax return. In the enquiry, HMRC looked at benefits received by the Appellant from his employer, as well as certain expenses claimed by the Appellant, including travel and subsistence. Agreement was reached between HMRC and the Appellant, with the exception of the expenses claimed for travel and subsistence.

7. On 23 September 2011, HMRC issued the closure notice against which the Appellant now appeals. The appeal was rejected by HMRC in a decision dated 13 January 2012, which was upheld in a review decision dated 30 March 2012. The Appellant now appeals to the Tribunal.

Applicable legislation

8. Section 338 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides:

> (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.

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

(5) In subsection (4) *"private travel"* means travel between—

(a) the employee's home and a place that is not a workplace, or

(b) two places neither of which is a workplace.

(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

9. Section 339 ITEPA provides:

(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.

The Appellant's case

10. The Appellant's case is as follows.

11. Spraycon offered the Appellant work at the Newcastle site in 2007 on a week to week basis, on the understanding that the employment could be terminated at any time by either party and no formal employment contract was made. The Appellant's subsequent employment at the Hindhead site was on the same basis.

12. When the Appellant first undertook employment with Spraycon, he understood that the company had various sites around the country and that he should be fully prepared to work at any one of them at any time, as and when he was required to do so. He did not know whether he would be at a particular site for 2 weeks or 6 months. When he began working for Spraycon again in January 2008, he was initially sent to the Hindhead site on a temporary basis. His presence at that site was requested on a week to week basis. Unfortunately, due to a downturn in the economy, no further work was available, and he was subsequently laid off.

13. The Appellant was not employed on the normal basis. The managing director of Spraycon is a former colleague of the Appellant's father, both of whom have resided in the Arfon area of Gwynedd for many years. The Appellant obtained the job with Spraycon through his father, as a way to learn new skills at a time when he needed such an opportunity. All changes in the duties required by Spraycon were communicated to the Appellant via his father. The Appellant was given 3 days' notice of termination of his employment in 2010, when further training opportunities

with Spraycon failed to materialise. Had he been employed under Spraycon's standard contract of employment, he would have been entitled to 12 weeks' notice.

14. While working at Hindhead, the Appellant returned to his home in Wales on a weekly basis. There was no point in him moving home from Wales to Hindhead as he expected to be at Hindhead only for a relatively short period before having to move again. However, travelling to Hindhead from Wales on a daily basis would have been impossible as he was having to work 12 hour shifts.

15. The Appellant was employed by Spraycon at Hindhead for only 3 days in excess of a 24 month period, so that the "24 month rule" in s 339(5)(a)(i) ITEPA should not apply to him.

The HMRC case

16. The HMRC case is as follows.

17. The onus of proof is on the Appellant to show that HMRC was wrong to disallow the travel and subsistence. The burden of proof is the balance of probability.

18. The Appellant must have had a contract of employment with Spraycon, whether oral or written. Given that Spraycon appeared to have a substantive contract with their client at the Hindhead site, and given that the Appellant performed a number of different functions at that site, it is reasonable to assume that work would be at one site continuously over the period of employment. There is no evidence that the Appellant was sent to Hindhead for a self-contained purpose or for a limited duration.

19. HMRC invite the Tribunal to find that during the course of his employment with Spraycon from January 2008 to January 2010, the Appellant had fore knowledge that the engagement was in relation to work entirely at Hindhead. His attendance at Hindhead comprised the total duration of that employment, such that the circumstances fall within s 339(5)(a)(ii) ITEPA. Hindhead therefore was not a "temporary workplace". HMRC also rely on the "24 month rule" in s 339(5)(a)(i) and (6) ITEPA.

20. Additionally, HMRC submit that no invoices or receipts or other acceptable evidence of the expenses has been provided.

The Tribunal's findings

21. The Appellant gave oral evidence at the hearing, but there is little documentary evidence in relation to the core questions in this appeal.

22. There is a letter from Spraycon to the Appellant dated 19 July 2010, confirming that "you were employed on a weekly basis with a notice of one week for either party". The letter does not state whether this term was part of an oral or a written contract.

23. There is a further exchange of correspondence between HMRC and Spraycon that is relevant to the issues. In a letter dated 1 April 2011, HMRC addressed Spraycon as follows:

> I understand above named employed with you from April 2007 until August 2007 at Newcastle and again from 21 January 2008 to 31 January 2010 and was recruited to work at Hindhead.
>
> I would be obliged if you could now confirm what was the expectation of where the above named employee was or would be employed at the time of taking his employment with you.
>
> Can you also please forward a copy of his Contract of Employment with you?

24. Spraycon responded to this letter in a letter dated 12 May 2011 as follows:

> Further to your letter of 1st April 2011, I can confirm the dates and locations of Mr Goset's employment. He would have been aware of the location of each site before commencement of employment. I enclose a standard contact of employment with ourselves. Should you have any further information, please do not hesitate to contact me at this office.

25. The standard contract of employment enclosed with that letter included the following terms:

> 1. Commencement of Employment
>
> Your continuous employment with the Company commenced on ….
>
> …
>
> 5. Place of work
>
> Your normal place of work is the Crossrail tunnel site. You may be required to work at other locations within the UK.
>
> …
>
> 9. Termination of Employment
>
> You are required to give 2 weeks notice to terminate your employment after the probationary period.
>
> Thereafter you are entitled to receive from the Company 12 weeks notice up to 4 years completed service and one additional week for each year following up to a maximum of 12 weeks or as denoted under statute. These periods of notice may be waived or reduced by agreement.

26. There has not been produced to the Tribunal any written contract actually signed by the Appellant, and the 12 May 2011 letter from Spraycon does not say in terms that the Appellant ever did sign one. However, this is clearly implicit, given that the letter is responding to HMRC's request for a copy of the Appellant's contract of employment.

27. There is an apparent inconsistency between clause 9 of the standard form contract, under which the Appellant would have been entitled to 12 weeks' notice of termination, and the 19 July 2010 letter from Spraycon, which states that "you were employed on a weekly basis with a notice of one week for either party".

28. However, neither letter from Spraycon suggests that it was ever contemplated that the Appellant might work at more than one site.

29. The 19 July 2010 letter says nothing about that subject at all. It says that the Appellant was employed on a weekly basis with a one-week notice period. This suggests that Spraycon decided on a weekly basis whether to continue the Appellant's employment or whether to terminate it. It does not suggests that Spraycon decided on a weekly basis whether to keep the Appellant working at the Hindhead site or whether to move him to another site.

30. The 12 May 2011 letter confirms that the Appellant worked for Spraycon during 2 separate periods identified in HMRC's letter, and then states that "He would have been aware of the location of each site before commencement of employment". This very clearly suggests that during each of the two periods of employment with Spraycon, it was envisaged that the Appellant would work at only one site.

31. The standard form contract is evidently specific to the Appellant's work at the Hindhead site, since Clause 5 of the standard form contract states that "Your normal place of work is the Crossrail tunnel site". That clause adds that "You may be required to work at other locations within the UK". The words "within the UK" suggest that a person employed under this contract might be required to work anywhere in the UK. However, the second sentence is not expressed as detracting from the first. The wording suggests that even if the employee may be required to work at other locations, the Hindhead site would still remain the "normal" place of work.

32. The fact that Spraycon has not produced an employment contract signed by the Appellant, and the inconsistency between the two Spraycon letters, lends some support to the Appellant's contention that he never entered into a written employment contract. However, the Spraycon letters very strongly suggest that even if the Appellant had no written contract, it was understood that he was employed on the same terms as the standard employment contract, save perhaps that it was agreed that he would waive the 12 week notice period. This would mean that the Appellant was in continuous employment with Spraycon until terminated, and that Hindhead was his normal place of work. The reason why the Appellant was treated differently to other employees is explained in paragraph 13 above.

33. The Tribunal has taken into account the letters and submissions of the Appellant's representatives, but these are based on the Appellant's instructions, and are not evidence of the matters in issue. The Appellant's representatives do not have independent knowledge of the Appellant's terms of employment with Spraycon.

34. The Tribunal has taken into account and given what weight it can to the Appellant's oral evidence. The Appellant said that Spraycon had many sites in the UK, but no further evidence was submitted of that. If it was envisaged that the Appellant might move site at any time, it seems odd that two years passed without him moving site even once. The explanation for the Appellant's termination was that due to the recession there was no suitable work for him on any other site. This appears to contradict the suggestion that Spraycon had various sites in the UK to which he might be moved at any time. Rather, the impression is that the Appellant was expected to work at Hindhead, and that there was a prospect that he might get work at a different site when his work at Hindhead was finished, if work elsewhere became available. Ultimately it did not.

35. On its consideration of the evidence as a whole, the Tribunal finds on a balance of probability that in the period January 2008 to January 2010, the expectation was that the Appellant would work at Hindhead. There was a prospect, rather than an expectation, that he might at some point be moved to another site.

36. In the circumstances, the Tribunal finds that Hindhead was not a temporary workplace, by virtue of s 339(3) ITEPA. The Appellant did not attend Hindhead for the purpose of performing a task of limited duration or for some other temporary purpose. During the period of the employment it was his normal place of work, and indeed, his only place of work unless and until another site materialised which it never did. Accordingly, his travel was ordinary commuting within the meaning of s 338(3) ITEPA, which he cannot claim due to s 338(2) ITEPA.

Conclusion

37. For the reasons above, the appeal is dismissed.

38. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 14 JANUARY 2016