[2017] UKFTT 827 (TC)

TC06222

Appeal number: TC/2010/01320

INCOME TAX – mileage allowance relief – s 231 ITEPA 2003 – s 28A TMA closure notice – s 29 TMA notice of assessment – whether burden of proof met for travel expenses to have been incurred for a claim of relief – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EAMON O'SULLIVAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON

The Tribunal determined the appeal on 4 May 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 16 January 2010 (with enclosures), and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 26 April 2010.

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DECISION

Introduction

1. The appellant, Mr Eamon O'Sullivan, appealed against:

(1) The closure notice dated 10 October 2007 issued under s 28A of the Taxes Management Act 1970 ("TMA") for the year ended 5 April 2006;

(2) The notice of assessment dated 5 February 2009 issued under s 29 TMA for the year ended 5 April 2005.

2. The matter in dispute is whether the travel expenses claimed against the appellant's PAYE income from Westley Plant Ltd are allowable.

3. The claim was brought under s 231 of Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") for Mileage Allowance Relief ("MAR").

4. For the year 2005-06, £9,914 was claimed and the closure notice disallowed the entire claim, which cancelled the repayment of £3,963.60 that had been processed.

5. In respect of the year 2004-05, HMRC raised an assessment for £4,764.80, after disallowing £11,912 travel expenses claimed in the tax return.

6. The documents made available for determining this appeal on the papers included the following:

(1) A bundle of documents of 175 pages.

(2) A supplementary bundle of 34 pages containing the Notice of Appeal, HMRC's Statement of Case, the appellant's representations and medical certificates, and HMRC's response to the appellant's representations.

(3) A bundle of 35 pages of additional documents in relation to the procedural events that had taken place in respect of the appeal and as outlined below under the heading of "Procedural history".

(4) Tribunal case file papers measuring 35 mm in thickness.

Procedural history

7. The Notice of Appeal was dated 16 January 2010 and received by the Tribunal on 19 January 2010. The appeal has had a protracted history before it came to be listed on 4 May 2017 as a case to be determined on the papers.

8. A number of hearings had been listed for the appeal, but were postponed for various reasons due to the circumstances of the appellant and his father, Mr Cyril O'Sullivan, as his representative. Some of the key dates in the history of the appeal are as follows:

(1) Directions were issued on 17 May 2010 to case manage the appeal.

(2) The first (it would seem) listing of hearing was for 24 January 2011 and was postponed by a phone call to the Tribunal by Mr O'Sullivan Snr on 18 January 2011, followed by his letter dated 24 January 2011.

(3) The second hearing was listed for 11 July 2011 and was again postponed on the ground of ill health of the appellant and his father.

(4) On 25 July 2011, directions were issued by the Tribunal for the appellant to set out "his written representations which together with his notice of appeal will set out his appeal, answer the Respondent's Statement of Case dated 26 April 2010 and provided his arguments in support of his case along with copies of any documents which he wishes the Tribunal to consider in evidence".

(5) On 12 August 2011, Mr Cyril O'Sullivan wrote to the Tribunal; this would seem to be the reply in response to the directions; (contents related under the heading of the appellant's grounds of appeal).

(6) On 8 September 2011, HMRC responded to the representations; (contents related under the heading of HMRC's case).

(7) The third (it would seem) listing of hearing was for 24 August 2013 and postponed due to the appellant being unwell.

(8) The fourth listing was for 1 July 2014 for a hearing via telephone conference; a postponement application dated 18 June 2014 was made due to the father's hospital appointments.

(9) The fifth listing was for 26 November 2014 for a hearing via telephone conference; the appellant did not attend and there was no postponement application made.

9. The hearing on 26 November 2014 proceeded in the appellant's absence under rule 33 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the appellant had been notified of the hearing; a summary decision was released on 20 January 2015.

10. On 11 March 2015, the appellant made an application for permission to appeal, and this was treated as an application for full written findings and reasons. The application was late, and the appellant stated that the request was late due to the fact that he was in hospital when the decision was released.

11. On 20 April 2015, the full decision was issued.

12. On 6 July 2015, an application for permission to appeal to the Upper Tribunal against the decision released of 20 April 2015 was received from the appellant's father as his representative. The grounds stated in the application were: (a) that Mr O'Sullivan Snr had advised that he as the representative would be in hospital on the date of the hearing yet the hearing still went ahead; (b) that HMRC were using "false evidence given by [the appellant's] former employer".

13. On 20 June 2016, the decision following the hearing of 11 December 2014 was set aside by Judge Morgan and the appeal was directed to be relisted for a hearing.

14. The sixth listing of a hearing was for 28 November 2016, to be heard via telephone conference.

5 15. On 2 November 2016, Mr O'Sullivan Snr applied to postpone the hearing on the ground that the appellant was ill, and of himself being a victim of crime in a burglary.

16. On 24 November 2016, the postponement application was granted by Judge Jones; directions were issued for a new hearing to be listed between February and May 2017.

10 17. On 7 February 2017, the directions to list an oral hearing by telephone conference was reviewed by Judge Kempster. In view of the appellant's ill health and previous delays in this matter, it was directed that the appeal is to be determined on the papers without an oral hearing.

The applicable legislation

15 18. The relevant provisions are from ITEPA 2003, Part 5 entitled "Employment Income: Deductions Allowed from Earnings".

19. The relevant provisions in relation to transport expenses are under Chapter 2 of Part 5, and s 231 provides for Mileage Allowance Relief as follows:

> (1) An employee is entitled to mileage allowance relief for a tax year –
>
> 20 (a) if he employee uses a vehicle to which this Chapter applies for business travel, and
>
> (b) the total amount of all mileage allowance payments, if any, made to the employee for the kind of vehicle in question for the tax year is less than the approved amount for such payment applicable 25 to that kind of vehicle.
>
> […]

20. Section 235 defines "vehicles" for the purposes of the Chapter as follows:

> (1) This Chapter applies to cars, vans, motor cycles and cycles.
>
> (2) "Car" means a mechanically propelled road vehicle which is not –
>
> 30 (a) a goods vehicle,
>
> (b) a motor cycle, or
>
> (c) a vehicle of a type not commonly used as private vehicle and unsuitable to be so used.
>
> […]

35 21. Section 337(1) defines conditions for travel expenses to qualify for deduction:

> (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 expense are necessarily incurred on travelling in the performance of the duties of the employment.

5 […]

22. Section 338 defines "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

10 (b) the expense 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 practically

15 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.

[…]

20 23. Section 339 defines "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,

25 means a place at which –

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

(b) is not a temporary workplace.

24. Sub-sections 339(4)-(8) continues by defining what "a temporary workplace" is:

30 (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.

35 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.
>
> This is subject to subsections (4) and (5)
>
> (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.
>
> […]

25. The Tribunal's jurisdiction in the current appeal is under s 50 TMA, which provides at sub-s 50(6) as follows:

> (6) If, on an appeal notified to the tribunal, the tribunal decides –
>
> […]
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

Factual background

Entries on 2005-06 return and repayment

26. On 27 July 2006, the appellant's 2005-06 self-assessment return ("SA return") was submitted online.

27. For the year 2005-06, Mr O'Sullivan's SA return recorded his only source of income as from his employment with Westley Plant Ltd, for which he received gross total of £65,652, after tax deducted under PAYE of £18,218.

28. The SA return also recorded under box 1.32 for "travel subsistence" of £9,914.

29. On 10 August 2006, an amendment was made via the internet to the submitted return. The amendment was to box 1.40 (entitled "Additional information"), and the following information was stated in white box for "Additional information":

> "Box 1.32 represents the cost of travel to temporary workplaces using privately owned vehicles – please see the additional information attached to this tax return for details of mileages/sites/vehicles used etc. Box 1.23 represents non taxed expenses supplied by the employer for deduction from the claim. Please DO NOT include these expenses in subsequent tax codes as I may not be eligible to made [sic] a claim for a refund of expenses in subsequent years, please also do not send

me further tax returns as I remain a PAYE employee and again I may not be making a claim for a refund of expenses. Please send copies of any PAYE coding notice to my agent – Rift Ltd."

30. The tax return was processed and Mr O'Sullivan received a tax refund of £3,963.60, being £9,914 at 40%.

HMRC opened s 9A enquiry into 2005-06 return

31. On 11 April 2007, HMRC opened an enquiry under s 9A TMA into the 2005-06 tax return. Officer Bains issued a s 19A TMA notice to the appellant's agent, by name RIFT Tax Refund Specialists ("Rift") dated 11 April 2007, requesting a list of information in respect of the travel and subsistence claimed of £9,914 as follows:

(1) Itemised breakdown and calculation of the travel and subsistence costs claimed.

(2) Details of all journeys for which relief has been claimed, confirming the addresses visited, purpose of the visit and supported by a copy of the mileage log for the period in question, if mileage costs have been claimed.

(3) Any evidence available confirming that Mr O'Sullivan travelled in his car, for example, two MOT certificates for the period or mileage details between servicing for the period.

(4) A copy of Mr O'Sullivan's employment contract or similar document, setting out the terms of his employment with Westley Plant Limited.

(5) Details of all amounts reimbursed to Mr O'Sullivan by his employer, whether paid tax free or not.

32. On 16 May 2007, Officer Bains telephoned the agent to request a reply to the s 9A letter of 11 April 2007. The agent confirmed that he had most of the information but was awaiting for one MOT certificate, and a reply letter would be sent out in the following week.

33. On 30 May 2007, HMRC issued a s 19A Notice directly to Mr O'Sullivan, requesting the same items of information that had been sent to the agent, and advising the agent on the same day that such a letter had been sent to his client.

34. On 14 June 2007, Rift Ltd replied to HMRC's information requests, attaching a schedule with the following details:

"**Employer**: Westley Plant from 22 March 2004 to present ("as at 17 July 2006 still there")

Nature of employment: Groundworker

Transport Avail: No

Copy Contract: N/A

P11D: N/A

Vehicle: Ford Mondeo 1800cc; 2003 to 5 April 2006; registration number given.

Travel details: TURC, Milton Keynes, 6 April 2005 to 5 April 2006, 237 days worked; total mileage from Home to Site 33654; mileage allowance £9,913.50."

35. In reply to question 4, Rift also advised that "Mr O'Sullivan has never signed a contract of employment with Westley Plant and so is unable to provide a copy." Further, that Mr O'Sullivan "has been employed since 22 March 2004 on an open ended and continuous contract with the expectation of moving from site to site." For question 5, Rift advised that no taxable expenses were provided by his employer" and enclosed copies of "all pay slips held for this tax year".

36. The description of "*all* payslips held for this tax year" is not accurate. In all, the following weekly payslips were provided to HMRC, and included in the bundle, and the various pay periods covered are as follows:

(1) In the tax year 2005-06: weeks ending 11/02/2006; 25/02/2006; 11/03/2006; 25/03/2006; 01/04/2006.

(2) In the tax year 2006-07: weeks ending 08/04/2006; 15/04/2006; 27/05/2006; 03/06/2006; 17/06/2006; 25/06/2006; 08/07/2006.

(3) 5 more payslips were also included in the photocopies, but the pay periods had "come off the page" of the photocopy.

37. With the exception of one week being 5 days, and one week being 7 days, the payslips all show uniformly a working week of 6 days, and a uniform rate of £227 per day. The weekly gross pay, the PAYE and National Insurance contributions deducted therefrom, were the operative entries for each payslip.

38. On 19 June 2007, HMRC wrote to Rift in response and requested confirmation by 19 July 2007, of the following:

(1) Full address of the Milton Keynes site.

(2) That Mr O'Sullivan was not engaged to work at specific sites which included TURC Milton Keynes.

(3) Sight of daily/weekly time sheets which may have been submitted to the employer confirming travel to the site.

(4) That Mr O'Sullivan travelled to the TURC Milton Keynes site on a daily basis and lodgings were not provided for him.

(5) That company transportation was not provided for Mr O'Sullivan to travel to the TURC Milton Keynes site.

(6) Confirmation that a mileage allowance or reimbursements were not made for the business mileage travelled to the work sites.

39. On 19 July 2007, Officer Bains telephoned Rift for a reply regarding the letter of 19 June 2007. According to the note of telephone call, a Mr Brogan of Rift said a letter had been sent requesting further time to reply. Officer Bains said that he could not justify allowing additional time to reply, and would have to issue a s 19A notice to

give a further 30 days. Mr Brogan said that his client worked away and did not have the time to chase up the employer.

40. On 20 July 2007, Rift's letter dated 18 July 2007 for extended time to respond was received by HMRC.

5 41. On 23 July 2007, Officer Bains issued another s 19A notice (to Mr O'Sullivan directly) to give a further 30 days for obtaining the confirmation from the employer.

42. On 27 July 2007, Mr O'Sullivan replied to Officer Bains in a hand-written letter in respect of the re-issued s 19A notice. His reply to the six points in the s 19A notice were as follows:

10 (1) The company is TORC Milton Kenyes, (not TURC) and at Chippenham Drive, Kingston, Milton Keynes.

(2) Since his employment with Westley Plant, he had worked at sites in: (a) Hemel Hempstead in Milton Keynes; (b) Fast Lake (possible spelling) Telford Wolverhampton; (c) L– R–ich in Stratford; that he would move to
15 the next site when one site was finished.

(3) "Westley Plant never issued time sheets. Times were phoned in Monday AM."

(4) "I was unfairly dismissed by WPL on 30.3.07. I cannot contact WPL on my solicitors and ACAS advice. They would not tell the truth in any
20 case. A Site Log in Register was kept by Main Contractor UKGSE of Loughborough."

(5) There was a van going to the TORC site but it was sometimes full plus I am a non-smoker and there were people smoking in the van.

(6) No mileage was paid.

25 43. By letter dated 20 August 2007, Rift wrote to HMRC and advised as follows:

(1) The site address for TORC MK, Chippenham Drive, MK10 0AE.

(2) Mr O'Sullivan had been employed by Westley Plant Ltd "since March 2004 on an open ended and continuous contract with the expectation of moving from site to site"; that the Milton Keynes site was his third site
30 since the start of his employment. (Rift was wrong here; TORC was actually the fourth site according to Mr O'Sullivan's own letter.)

(3) That Mr O'Sullivan does not submit any daily/weekly time sheets to his employer, and is unable to provide any copies.

(4) That Mr O'Sullivan confirmed that he travelled daily to the Milton
35 Keynes site and that his employer did not provide him with lodgings or lodging expenses.

(5) That no company transport was available for Mr O'Sullivan; he was obliged to use his own vehicle to travel to each site at his own expense.

(6) The payslips already provided do not show any non taxable expenses being paid to Mr O'Sullivan, who confirmed that he was not reimbursed in any way for the cost of these business journeys.

44. In respect of obtaining a response from Westley Plant, the reply from Rift concluded with the following paragraph:

> "Although Mr O'Sullivan has requested confirmation from his employer of the above facts they seem unwilling to become involved in the case. However our client has indicated that he would be willing, if necessary, to swear under oath before a commissioners [sic] hearing to the statements made above. Whist [sic] your request for this confirmation from his employer is not unreasonable, and we would always look to provided it when possible, Mr O'Sullivan is not able to force Westley Plant Ltd to do so."

45. On 28 August 2007, Officer Bains advised Rift that he had written to Mr O'Sullivan requesting further information regarding the travel and subsistence costs claimed. A copy of the letter was enclosed for Rift, though not included in the bundle.

46. On 3 September 2007, Mr Brogan of Rift telephoned Office Bains, stating that Mr O'Sullivan was taking his employer to an appeals tribunal; hence the employer would not co-operate in supplying the travel and subsistence information requested.

47. Officer Bains advised Rift over the phone that "the mileage claim seemed excessive"; that "the taxpayer travelled long distances on a daily basis, which did not seem possible"; that "there was no circumstantial evidence held confirming the T&S costs have been incurred", that he requested documentary evidence that Mr O'Sullivan was taking Westley Plant to an appeals tribunal.

48. On 5 October 2007, Mr Brogan wrote to Officer Bains, enclosing a copy of a letter from a Ms Massey of ACAS to Mr O'Sullivan. (ACAS is a UK-wide HR consultancy.) The letter stated the following:

> "The Employment Tribunal has sent a copy of your claim to Acas, as our conciliators have a legal duty to try and help the parties in tribunal cases settle their differences without the need for a tribunal hearing. The service is confidential and free of charge.
>
> I am the conciliator for this claim. As you have appointed a representative, they will deal with me on your behalf and so I will not speak to you direct. As your representative may negotiate a binding agreement on your behalf it is important for you to ensure that they fully understand your requirements."

49. Mr Brogan also explained that Mr O'Sullivan was unable to produce the MOT certificate for the Mondeo for November 2006 and was approaching the garage to obtain a copy from the electronic records. He also asked if the Revenue could contact Westley Plant and asked for confirmation that Mr O'Sullivan used his own vehicle to travel to the sites.

Closure notice issued on 10 October 2007 regarding 2005-06 return

50. On 10 October 2007, Officer Bains wrote to Mr O'Sullivan with the issue of a closure notice under s 28A (1) & (2) of TMA in connection with the enquiry into Mr O'Sullivan's 2005-06 return. The conclusion of the enquiry was stated as:

> "Tax relief claimed on travel and subsistence costs has been disallowed, as there is no evidence that the amount claimed was incurred."

51. The amendment to the 2005-06 return resulted in an additional £2.00 of tax being due, together with the £3,963.60 repayment that had been paid out to Mr O'Sullivan already, the total amount of tax owed by Mr O'Sullivan in relation to 2005-06 was therefore £3,965.60 following the issue of the closure notice.

52. The letter also advised that interest charge was accruing on a daily basis, and as at 9 October 2007, the total amount outstanding was £4,176.96.

53. On 17 October 2007, Mr Brogan telephoned Officer Bains acknowledging receipt of the closure notice, but reiterated that Mr O'Sullivan was in conflict with the employer and had had difficulty obtaining the details. Officer Bains said that he was "missing an appeal form and an authority from the taxpayer to contact the employer"; that when the two documents were sent, he would contact the employer for the details.

HMRC's contact with Westley Plant

54. On 24 January 2008, Officer Bains contacted Westley Plant by telephone to confirm in respect of Mr O'Sullivan's Travel and Subsistence ("T&S") costs incurred. The employer confirmed that Mr O'Sullivan did not incur any T&S costs; that he used the company van for transportation to the sites where he was contracted to work; that the work sites were within daily travel distances and none of the employees were required to stay overnight and subsequently no overnight expenses were paid.

55. On 25 January 2008, Officer Bains followed up his telephone call to Westley Plant with a letter for confirmation of details in respect of Mr O'Sullivan's T&S costs.

56. On 8 February 2008, Westley Plant replied, and the headed paper of the reply gave some details of the company: established in 1984; a "groundwork and civil engineering" contractor; website address was www.westleyplant.com; postal address was Wythal in Birmingham B47 6DB.

57. The first paragraph of the letter gave the following details:

> "Mr E O'Sullivan worked as part of a team comprising of his father Cyril, brothers Michael and Paul, along with Mr Joe Chester and Mr Terry Kelly. They were provided with a customised transit van registration number [registration number]; all fuel paid for by ourselves by the provision of a total petrol card for travelling to our various sites."

58. The letter continued by answering point by point Officer Bains' specific questions as follows:

> (1) During tax year 2005-06 Mr O'Sullivan worked:
> April 05 to May 05 Hemel Hemstead
> June 05 to July 05 Local various
> August 05 to Jan 06 Stone Staffordshire
> Feb 06 to April 06 Crick Junction 18 M1
>
> (2) A van was provided and he was part of the group as detailed above.
>
> (3) That Mr O'Sullivan's transport was provided by ourselves.
>
> (4) That he did not use his own transportation, and no expense sheets were applicable.
>
> (5) No accommodation costs were due or paid. The group travelled each day from Birmingham. The incentive for working on jobs classed as out of town would be that they would work five days (Monday to Friday) but would be paid for six days. On the odd occasion that they worked on a Saturday morning then they would be paid for seven days although they actually worked five and a half days.
>
> (6) No mileage reimbursements were made. If on occasion he used his own vehicle it would have been his choice meaning he either missed the company transport or intended to return early from the workplace. We are not aware that he ever used his own vehicle.
>
> (7) That Mr O'Sullivan, like all other employees, was provided with tools, hi-vis jacket or vest, wellingtons where required, ear defenders and eye protection goggles, hard hat and gloves. The only item that may be claimable that he would have provided himself would have been steel toe-capped boots.
>
> (8) The foregoing information also applied to tax year 2004-05.

59. In June 2008, Officer Bains spoke to Westley Plant about Mr O'Sullivan's pending appeal and whether the Westley Plant would be willing to serve as a witness. Against the initial hesitation to assist HMRC as a witness, Westley Plant did give the undertaking eventually that it would serve as a witness in the event of a hearing.

60. In the course of the discussion, Westley Plant also confirmed that the case brought by Mr O'Sullivan, his father and his brother against the company at the Employment Tribunal was settled out of court, not because the company thought they would not win, but to avoid the the protraction of a litigation, Officer Bains was informed that at the preliminary hearing at the Employment Tribunal, the O'Sullivan family members had sworn on oath that they were not aware of any harassment.

Further requests for evidence and supporting documents

61. Officer Bains wrote to Mr O'Sullivan on 27 March 2008 in respect of the possibility of raising a penalty assessment as his enquiry had showed that he was "negligent by claiming £9,914 travel and subsistence costs" which were not incurred.

5 62. On 1 May 2008, a Mr R J Jones, who acted as a consultant for Rift and was associated with the branch office of Rift in Chester. Mr Jones stated that:

> "Mr O'Sullivan for a number of reasons did not use the transport provided and as such a claim is relevant. The fact that the employer provided transport does not prevent a claim being made. Mileage
> 10 Allowance Relief is granted by virtue of S231 ITEPA 2003 and is due in respect of qualifying journeys. A claim is not prevented simply because the claimant chose not to use the transport provided. I understand that the van was very often full, there were smokers on board and as a result Mr O'Sullivan chose to make his own way."

15 63. In response to Mr Jones' submission, Officer Bains wrote to Rift at its Chester office on 4 June 2008 requesting the following:

> (1) Documentary evidence confirming your client travelled in his own vehicle, with details of the annual mileage for 2005-06.
>
> (2) Daily mileage log confirming the site visited and the business miles
> 20 travelled.
>
> (3) Your client has stated he worked at the TORC Milton Keynes site during 2005-06 while his ex-employer has said he worked at various sites. Please confirm why your client thinks he worked at the Milton Keynes site continuously during 2005-06.

25 64. On 8 July 2008, Mr Jones replied to Officer Bains' letter of 4 June, citing s 231 and s 235 of ITEPA that "ownership of the vehicle is not a legal requirement" for bringing a claim of MAR. For the other questions, Mr Jones reiterated that there was no daily mileage log but the miles travelled were the same each day, and Mr O'Sullivan worked 237 days on the Milton Keynes site.

30 65. On 21 July 2008, Officer Bains wrote to Mr Jones, referring to Employment Income Manual EIM 31335 and asked for documents to establish the following:

> (1) That the mileage allowance is to cover the running costs and depreciation of the vehicle, which is a personal cost and not payable if a company vehicle was used. For this reason, HMRC will need sight of
> 35 documentary evidence confirming Mr O'Sullivan used his own vehicle for business travel.
>
> (2) Please confirm why your client thinks he travelled to Milton Keynes site for 237 days during 2005-06 when the employer has confirmed that he worked at various sites during the tax year.

66. On 23 July 2008, Mr Jones replied, stating that HMRC Manual is not the law; that "the law is at Sec 229 et seq ITEPA 2003 and nowhere within those sections is the requirement that the vehicle is owned by the claimant".

67. Turning to the production of documentary proof, Mr Jones confirmed that it was proving difficult and that the file back to Rift's Ashford office to deal in that respect. As regards the number of days travelled to Milton Keynes site, Mr Jones referred to "the version of events provided by the former employer is, in the opinion of Mr Sullivan [sic], completely false".

68. On 2 September 2008, Officer Bains wrote to Rift's Ashford office to request documentary evidence confirming Mr O'Sullivan's use of the Ford Mondeo with registration number BF–etc for business travel during the 2005-06 tax year as follows:

> (1) All supporting evidence confirming Mr O'Sullivan was in the Ford Mondeo and he personally drove the business miles claimed.
>
> (2) Sight of two MOT certificates covering the period of the business mileage. If the MOT certificates are no longer available, please confirm the name and address of the centres where the MOTs were carried out and the dates of the tests.

69. On 2 September 2008, Officer Bains also wrote to Westley Plant to request supporting documents of Mr O'Sullivan's employment contract, of the sites he travelled to work during 2005-06, and of evidence that he travelled in the transit van provided by the company.

70. On 11 September 2008, an enquiry was carried out into the DVLA records and the Mondeo with the car registration was owned by Cyril O'Sullivan (the appellant's father) at the material times.

71. On 1 October 2008, Westley Plant replied in writing, confirming that:

> (1) there was no contract of employment signed by Mr O'Sullivan, and that he was employed as a labourer from 22 March 2004 to March 2007 as a "P11 employee".
>
> (2) That Eamon O'Sullivan travelled to work at all times of his employment in a company vehicle Ford Transit van along with his father Cyril O'Sullivan (site foreman) and brothers Michael O'Sullivan (machine operative) and Paul O'Sullivan (labourer) and others.
>
> (3) That on the rare occasions when an employee uses his own vehicle to travel to work, the company would have been asked to pay fuel costs incurred but that had never happened during Mr O'Sullivan's time of employment with Westley Plant.

72. On 3 October 2008, Officer Bains wrote again to Westley Plant to request "all documents that may be in your possession linking Mr O'Sullivan to the company van he used for work purposes, during 2004-05 and 2005-06". Officer Bains detailed the types of documents required: fuel receipts, company fuel card documents signed by

Mr O'Sullivan confirming purchase of fuel for the van; drivers' rotas detailing the days the van was taken home by the employees, and so on.

73. Officer Bains followed up his requests with phone calls to Westley Plant on four occasions: 11 and 12 November 2008, 7 and 17 December 2008. The employer confirmed that they were in the process of obtaining the documentation requested but the items were in storage and proving difficult to get hold of.

74. On 3 October 2008, Officer Bains also wrote to Rift at its Ashford office to request the following by 3 November 2008:

> "I have received confirmation that the Ford Mondeo BF53 LKP claimed by Mr O'Sullivan to have been used for business purposes was not owned by him. Would you please forward copies of the vehicle insurance documents for 2004-05 and 2005-06, confirming Mr Eamon O'Sullivan was insured to drive the vehicle."

75. No reply was received from Rift to provide the proof as requested.

Notice of assessment dated 5 February 2009 for the year 2004-05

76. On 5 February 2009, Officer Bains wrote to Mr O'Sullivan in respect of the travel and subsistence costs of £11,912 claimed for 2004-05 and £9,914 for 2005-06. The letter referred to the confirmation received from Westley Plant, and of Officer Bains' intention to bring the enquiry to a conclusion by negotiating a contract settlement to include the tax, interest and penalty. On the same day, Officer Bains also wrote to Rift, advising the same.

77. The letter to Mr O'Sullivan was one and a half page long, and enclosed various documents: revised tax calculations for 2004-05 and 2005-06; an advice sheet explaining rights under Human Rights Act; and leaflet IR160.

78. There was no response from either Mr O'Sullivan or Rift on file to the offer to negotiate a contract settlement.

79. On 17 April 2009, Officer Bains wrote to both Mr O'Sullivan and Rift again about the negotiation of a settlement contract. In the letter to Mr O'Sullivan, Officer Bains set out the figures and the range of penalty charge in connection with the contract settlement:

(1) £4,765 being the tax repayment made for 2004-05;

(2) £3,965 being the claim for 2005-06;

(3) £1,713 being the interest accrued on the total tax involved of £8,730;

(4) £8,730 to £1,746 being the range of penalty for negotiation.

80. A Schedule of Penalties, which formed page 2 of the letter, explained how the range of penalty was arrived at. Officer Bains concluded the letter as follows:

> "If you have any queries please do not hesitate to contact me on the telephone number stated above. I am usually available from 7:00am to 3:30pm if you need to speak to me personally."

81. The contact number given by Officer Bains would seem to be a direct dial number, and not a centralised switch board number. Indeed, Officer Bains had consistently concluded all his letters for information requests with the same paragraph, by inviting the recipient to contact him by telephone for convenience.

The appellant's response and HMRC's offer of review

82. On 9 May 2009, Mr O'Sullivan wrote to lodge a complaint against Officer Bains. The letter was sent to Debt Management by recorded delivery. He referred to the three occasions he had appealed to Officer Bains, who had failed to reply on any occasion and had continued with his "bullying tactics" Referring to Officer Bains' confirmation from Westley Plant that he used the company's transport to sites, Mr O'Sullivan said "this is clearly a LIE and we all know why they are saying this I have told Mr Baines [sic] this yet he ignores the reason". Mr O'Sullivan also mentioned that he had spoken to his MP, who advised him to write to lodge the complaint.

83. On 4 June 2009, Inspector Regan who was Officer Bains' manager, responded to Mr O'Sullivan's complaint letter, which had been passed from Debt Management. In respect of the complaint against Officer Bains' conduct, Inspector Regan wrote:

> "I have reviewed the enquiry papers and I can find no evidence Mr Bains has not acted within the Code of Practice. Before any assessments or any other action have been taken you and your agent have been kept fully informed. Mr Bains has also allowed you time to provide evidence in support of your claim. To date no documentary evidence such as MOT certificates, motor insurance certificates etc have been sent to Mr Bains. […]
>
> Mr Bains has not received any correspondence form you or your agent since writing to them on 3 October 2008."

84. In respect of the allegation against the evidence provided by Westley Plant, Inspector Regan wrote as follows:

> "The evidence provided by your ex-employer contradicts your claim. Should the appeal against the 2005-06 liability not be settled by agreement and you elect to have the appeal heard by the Appeals tribunal, you would need to supply evidence in support of your claim. Your allegations about the information the company has provided may not be sufficient."

85. On 6 June 2009, Officer Bains wrote to Mr O'Sullivan and Rift again to follow up his letter of 17 April 2009.

86. On 7 September 2009, another round of follow-up letters to both the appellant and Rift were sent.

87. On 15 October 2009, Officer Bains wrote to Mr O'Sullivan to offer a review of his decision as there had been no agreement reached. A copy of the offer of review letter was sent to Rift. The offer of review letter summarised the conclusions reached by Officer Bains under 3 bullet points, and clearly stated that:

> "If you do not agree with my view, you can either
>
> - ask to have my decision reviewed, or
> - notify your appeal to an independent tribunal
>
> by 18 November 2009."

88. On 27 November 2009, Officer Bains contacted the Appeals Services for tax appeals to ascertain if an appeal had been lodged by Mr O'Sullivan by the time limit of 18 November 2009.

89. In the absence of an appeal having been lodged, Officer Bains wrote to Mr O'Sullivan on 30 November 2009 to state the following:

> "I have not received a reply to my letter of 15 October 2009.
>
> Your appeal is now treated as being settled by agreement under section 54(1) Taxes Management Act 1970.
>
> Action will continue to collect the £8,732.10 plus interest due outlined in my letter of 15 October 2009."

90. On 12 December 2009, Mr O'Sullivan replied to state that: "This appeal is not settled by agreement."

91. On 16 January 2010, the Notice of Appeal was lodged with the Tribunal.

92. On 9 July 2010, Mr O'Sullivan notified Mr Webster of HMRC Appeals Unit based in Coventry that he wished Mr Jones of Internet Taxation Limited to act as his agent in this appeal. (It would seem that Mr Jones worked for Internet Taxation Ltd, and was associated with Rift in a consultant capacity, and his correspondence previously with HMRC was under the auspices of Rift.)

Appeal to the Tribunal and agent's withdrawal

93. On 13 July 2010, Mr Jones wrote to Mr Webster regarding his representations for the appeal as follows:

> "If I remember correctly Mr O'Sullivan use a number of vehicles during the period in question. HMRC had asked for some form of documentary evidence in support of the mileage claim. I seem to remember that Mr O'Sullivan had been asked by Rift for MOT certificates but did not produce them. I was asked to take a look at it and my view was that HMRC were being entirely reasonable in their request and as Mr O'Sullivan did not produce any supporting evidence my adive to Rift was to leave him to his own devices."

94. On 18 August 2010, Mr Jones wrote to the Tribunals Service in Birmingham. The letter was in effect a statement of case for the appellant and was nearly two pages long in small letter font (probably size 9). The letter stated that "the point at issue was one of evidence in support".

5 95. The letter continued by stating that:

> "Unfortunately, Mr O'Sullivan was unable to comply with that request and the only advice I could provide to Rift was that in the absence of information in support there was nothing further that either they or I could do on behalf of Mr O'Sullivan."

10 96. Mr Jones also stated that he noted "at the foot of the [Tribunal's] letter of 3 August 2010 that "Mr O'Sullivan Snr called [the Tribunal's] office on 2 July 2010 stating the appeal was to be withdrawn". Mr Jones said he had written to Mr O'Sullivan setting out his view on the prospect of the appeal and awaited his reply.

97. By letter dated 20 October 2010, Mr Jones confirmed to HMRC that since he 15 had not heard from Mr O'Sullivan, and stated that: "[I] can only assume that I am no longer acting in this case."

98. A letter from Mr O'Sullivan Snr informed the Tribunal that due to the fee level charged by Mr Jones (at £1,000 plus VAT per day), he would "try to act for Eamon" but that he was not in good health and was awaiting hospital appointments.

20 The appellant's grounds of appeal

99. The grounds of appeal as stated on the Notice of Appeal are stated as follows:

> "The decision is wrong because I did use my own transport to go [sic] work the company I was working for (Westley Plant Ltd) have told the Revenue lies because they unfairly dismissed me and I went to tribunal 25 and the [sic] paid me a settlement as the [sic] acted unlawfully. This is there [sic] way of getting back at me. I have appealed on a number of occasions every time Mr Baines ignored my appeals."

100. On 24 January 2011, Mr O'Sullivan Snr wrote to the Tribunal enclosing a letter of his own hospital appointment and informing the Tribunal that his family had an 30 "infectious disease at the moment"; that his wife had been treated for TB in the past six months; that the appellant would be treated for TB from 31 January 2011, and so would his two other sons.

101. On 12 August 2011, Mr O'Sullivan Snr responded to the Tribunal's directions of 25 July 2011. He made representations that HMRC had been given incorrect 35 information and that due to two of the employees having tuberculosis ("TB") the appellant had chosen not to use the van provided by the employer.

102. On 28 April 2012, Mr O'Sullivan Snr wrote to the Tribunal to state that he "did agree to [sic] paper hearing but reserve the right to stop" if his wife's health was to deteriorate. He stated that the appellant was awaiting to start a course of further

treatment for TB, and that his own TB was dormant; that he was "prepare to go to Tribunal if required" and so would the appellant.

103. In a letter received by the Tribunal on 30 August 2012, Mr O'Sullivan Snr stated that "Eamon tells me the Revenue paid Rift Ltd the rebate. They took their fees and sent him the balance."

HMRC's case

104. HMRC's Statement of Case of 26 April 2010 stated the following:

> (1) The business records maintained by the appellant that formed the basis of the figures reported in his SA returns were inadequate, which means that the claim for travel and subsistence costs could not be substantiated.
>
> (2) No objection has been raised to the making of the assessments that the Inspector had not ceased to be entitled to give notice to enquire into the returns that have been subject to such assessments.
>
> (3) The assessments under the "Discovery" provisions of s 29 of TMA and penalty determination under s 96 of TMA are competent. No objection has been made against the assessments on the grounds that he Inspector could reasonably have been expected to infer the situation from information provided within the meaning of paras (a) to (c) of s 29(6) TMA. Theer as no notification to any officer of the Board of the position within the meaning of s 29(6)(d)(ii) of TMA.

105. In response to Mr O'Sullivan Snr's representations of 12 August 2011 that two of the employees of Westley Plant travelling in the company provided van having TB, HMRC submitted that there was no evidence provided to show these employees had TB, and no evidence that another employee was a carrier of TB.

106. Even if it is accepted that the two employees and the parents of the appellant had TB, it does not prove conclusively that the appellant used a private vehicle to travel to work.

107. As the appellant's father owned the car, would he not have travelled to work also in the car and if he did, why did Mr O'Sullivan Snr not claim for the expenses? Would the appellant, his father and two brothers not all be travelling in the private vehicle if the father's car was indeed used to travel to the worksites?

108. HMRC further submit that the alleged travel was not to a "temporary workplace" under ss 337- 338 ITEPA to be eligible for deduction as expenses incurred in employment.

Discussion

The issues for determination

109. For the appeal to succeed, the issues for determination are as follows:

(1) As a matter of fact, whether there had been travel expenses incurred by the appellant in the performance of his duties of the employment.

(2) As a matter of law, whether the conditions are met for those expenses to be eligible for mileage allowance relief under s 231 of ITEPA.

5 110. If the appeal fails at the first hurdle, in that it cannot be found as a fact that there had been expenses incurred in the quantum so claimed, then there is no need to determine the matter as a point of law whether those expenses are eligible for MAR.

The burden of proof

111. The burden of proof in the claim of the mileage allowance relief ("MAR") rests 10 squarely on the appellant as the claimant. The evidential proof required is that the travel expenses had indeed been incurred as a matter of fact. The standard of proof is on the balance of probabilities.

The appellant's main ground of appeal

112. The main ground of appeal as stated by the appellant in the Notice of Appeal is 15 that his ex-employer had lied and provided false information.

113. It is to be emphatically noted that HMRC approached Westley Plant for provision of information because the appellant's representative acting for him at the time, Mr Brogan of Rift, had requested HMRC to do so.

114. As detailed under §§46-51, Westley Plant seemed "unwilling to become 20 involved in the case" according to Mr Brogan, who had then asked Officer Bains to approach Westley Plant with the hope of obtaining information from the appellant's ex-employer, from whom Mr Borgan had failed to get a response.

115. It should also be emphatically noted that the reason Mr Brogan approached Westley Plant for information was due to the fact that the appellant had failed to 25 provide the necessary information to prove the expenses having been incurred to travel to the work site(s).

116. In approaching Westley Plant for information, HMRC were trying to corroborate evidence to assess the appellant's claims. Had the appellant provided positive evidence to support his claims, there would have been no need for resorting 30 to the employer.

117. For completeness, I have set out the requests made by HMRC to Westley Plant and of the assistance that Westley Plant had offered to HMRC to chart the course of enquiry. In doing so, I am able to conclude that Officer Bains had demonstrated great tenacity and fairness in conducting his enquiry. There had been a lengthy, meticulous 35 and thorough process in gathering evidence before he reached his conclusion in respect of the closure notice for 2005-06 and the assessment for 2004-05.

118. However, since it is the appellant's main ground of appeal that Westley Plant had lied and provided false information, I have decided the only way to dispose of his main ground of appeal is by setting aside any information provided by Westley Plant in the course of the enquiry.

119. The decision that follows is reached on examining the evidence provided by the appellant alone in the course of the enquiry, and the subsequent representations after the lodgement of the notice of appeal.

The fact in issue and evidence related thereto

120. The fact in issue as the first matter for determination is whether the expenses alleged to have been incurred in the course of employment for travelling to worksites had indeed been incurred.

121. The fact in issue needs to be proved by concrete evidence, which as a starting point, concerns the following:

> (1) The mileage claimed to have been travelled was supported by MOT certificates for the relevant periods;
>
> (2) Fuel purchases needed to be proved by the relevant means of purchase, for example, credit card statements, and receipts from fuelling stations for the relevant periods;
>
> (3) Insurance policy documents certifying that the appellant was insured to drive the vehicle that was claimed to have been used for business travel but owned by his father.

122. These minimum facts are required to establish the veracity of whether the alleged expenses had been incurred. Only when the fact that these expenses had been incurred in the first place, can the fact-finding progress to the next stage of establishing if all mileage so claimed was related to travel in the course of employment.

123. The second stage of fact-finding would relate therefore to whether these expenses, if indeed were incurred, had been incurred for the sole purpose of business travel; (and if not, apportionment of the expenses would be required to disallow the non-business element).

124. Considering the nature of the matter in dispute, the documents and papers associated with this appeal are voluminous in scale. I have examined the documentary evidence in front of me in detail in order to make any relevant findings of fact that may assist the appellant's case.

125. The appellant had been given many opportunities over a protracted period. From the documents made available, no MOT certificates for the Mondeo have been produced to vouch for the mileage claimed to have been travelled (let alone whether the mileage was business related); no fuel purchases have been substantiated by receipts or card statements; no insurance policy documents have been produced to

confirm that the appellant was insured to drive the vehicle claimed to have been used but not owned by him.

The fact in issue to be determined by burden of proof

126. In the absence of evidence to establish these minimum facts, the fact in issue remains in doubt. The doubt is resolved by the legal rule with reference to the burden of proof, which is aptly described by Lord Hoffmann in *Re B (Children)* [2008] UKHL 35 as follows:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

127. Given the unsatisfactory state of the evidence as provided by the appellant in this appeal, I am unable to make a finding of fact that there had been travel expenses incurred as claimed. The first issue therefore has to be decided on the burden of proof.

128. The appellant has failed to meet the burden of proof at the minimum level to produce evidence that the expenses so claimed had in fact been incurred. The only conclusion that can be drawn is that the Tribunal is not satisfied that on the balance of probabilities, the expenses so claimed as for business travel had been incurred.

129. Given that it cannot be established that these travel expenses so claimed had been incurred as a matter of fact, the claim of mileage allowance relief has no factual basis and can only be rejected.

130. The appellant's former representative, Mr Jones, who advised Rift and was asked to act for the appellant, arrived at the same conclusion that in the absence of concrete evidence to support the claims, the appeal has no prospect of success.

Assertions do not amount to being facts

131. The appellant has asserted that he used his own transport to go to work. At each juncture when he was asked for supporting evidence for his claims, assertions were made instead of production of evidence.

132. At times, the assertions were followed by a declaration to go to court and to swear on oath as if to bolster the assertions. It seems that the appellant thought the searing on oath had the possibility of elevating his assertions to the status of facts.

133. In the absence of relevant supporting evidence, the appellant's assertions that he used private transport to go to worksites remain only as assertions, unproved, unsubstantiated, and unquantifiable.

The relevance of the appellant's preference for private transport

5 134. The argument was advanced that the appellant had chosen to use private transport because of the "smokers" in the team who used the company van. The argument was developed by Mr O'Sullivan's Snr in his representations that the other employees using the company van were either a carrier or a sufferer of tuberculosis.

135. This factor would only be of relevance for consideration if the appellant's 10 appeal had overcome the first hurdle in discharging the burden of proof that the alleged travel expenses had indeed been incurred.

136. As related earlier, the appellant has failed to discharge this burden of proof. His preference for private transport on the ground of health has no context to be taken into account since even the minimum facts cannot be established.

15 137. The representations from Mr O'Sullivan Snr contain chiefly of allegations against Westley Plant or letters of medical appointments for himself and his wife, neither of which are of relevance to the fact in issue and are not addressed here.

The second issue on the application of law

138. Based on the determination of the first issue, it is unnecessary to address the 20 second issue on the point of law whether the expenses (had it been proved to have been incurred) qualify for relief under s 231 ITEPA.

139. I note the submission from HMRC contending that the worksites did not fall within the definition of "temporary workplace" under ss 338-339 ITEPA. I consider that HMRC's position may have a valid statutory basis. However, the determination 25 of this matter will need to draw on the evidence provided by the employer.

140. For the reasons stated earlier, I have decided to dispose of the appellant's main ground of appeal by making no reference to the employer's evidence. In any event, the appeal fails at the first hurdle; there is no need to consider the second issue concerning the qualifying conditions for the claim of MAR as a matter of law.

30 *The notice of assessment in relation to 2004-05*

141. The mileage allowance relief was claimed in the sum of £9,914 for the year 2005-06, which resulted in a tax repayment being made to the appellant of £3,963.60. The closure notice seeking the sum of £3,963.60 is confirmed on the cancellation of the tax repayment.

35 142. The mileage allowance relief claimed for 2004-05 of £11,912 in the amended self-assessment return did not have equivalent documents from HMRC to confirm if

the MAR deduction had been processed, and that a tax repayment had been made to the appellant. If the claim had not yet been processed for repayment, then the tax position on disallowing the relief claim would have been no tax repayment was due.

143. The appellant should have met his correct tax liability (without any MAR deduction) through PAYE for the year. If the MAR had not been processed for repayment for 2004-05, then no additional tax liability should have arisen on disallowing the claim. If the MAR for 2004-05 had been processed for repayment, then the sum sought by the notice of assessment of £4,764.80 is correct as is the case with the closure notice for 2005-06.

144. While the Tribunal confirms that the claim for the MAR is to be rejected, the consequence of such a claim being rejected in the present case is no tax repayment would have been due. The Tribunal's confirmation of the notice of assessment for 2004-05 is subject to a repayment having been made for 2004-05 in relation to the MAR claimed of £11,912.

Decision

145. For the reasons stated, the appeal is dismissed.

146. The claims for mileage relief allowance under s 231 ITEPA of £9,914 for the year 2005-06, and of £11,912 for the year 2004-05, are disallowed.

147. The closure notice for 2005-06 in the sum of £3,967, (which has been processed as a repayment), is confirmed.

148. The notice of assessment for 2004-05 in the sum of £4,764 is confirmed, but subject to a repayment having been made in relation to the claim of £11,912.

149. Directions are issued for confirmation from the respondents as respects the processing of the tax repayment claim for 2004-05, and for the appeal period to be extended for compliance with the directions.

150. 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 HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 17 NOVEMBER 2017