



[2021] UKFTT (TC)

TC08296

Keywords Employment income, whether expenditure on accommodation for a trainee maxillofacial surgeon was wholly, exclusively and necessarily for the purpose of employment. Whether penalties are payable by reason of failure to take reasonable care. Appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09118/V

BETWEEN

JAYAMTH KUNJUR

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE Gething
MICHAEL BELL**

The hearing took place on 12 July 2021. With the consent of the parties, the form of the hearing was V (video) all the parties attended remotely using the Tribunal video platform. A face-to-face hearing was not held because of covid 19 restrictions. The documents to which I was referred are a Hearing bundle of 596 pages an Authorities Bundle of 268 pages. We had the benefit of skeleton arguments from the parties.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

Mr Smith of Moss & Co (Direct Accounts) Ltd, for the Appellant

Mr Thomas Evans litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

INTRODUCTION

1. The issues in this case are:

(1) whether the following costs of accommodation incurred by Mr Kunjur in the following years:

(a)	2012-13	£4,839.80
(b)	2013-14	£8,227.40
(c)	2015-16	£16,930.73
(d)	2016-17	£9,064.80

(during which years Mr Kunjur, a qualified dental surgeon, was training as a maxillofacial surgeon in London but whose home, wife and family were in Southampton) were wholly, exclusively and necessarily incurred in the performance of the duties of Mr Kunjur's employment and therefore allowable as a deduction in computing Mr Kunjur's employment income.

(2) Whether the following penalties are due under Schedule 24 Finance Act 2009 ("Schedule 24") as a result of carelessness of Mr Kunjur in completing his returns for the following periods:

(a)	2012-13	£934.76
(b)	2013-14	£1,604.34
(c)	2015-16	£3,301.49
(d)	2016-17	£1,767.63

THE FACTS

2. The Tribunal heard evidence from Mr Kunjur and the case officer Fiona Stupans. We find the following facts:

(1) At the beginning of 2012 Mr Kunjur was a qualified dental surgeon with 17 years' experience and practiced dental surgery in Southampton where his wife was employed as a teacher and his daughters were established in school. Mr Kunjur wished to become a maxillofacial surgeon and accepted the only available position which was at St George's Hospital in South London with expected periods at Kings College also in South London.

(2) As a maxillofacial surgeon Mr Kunjur would operate as a head and neck specialist dealing with patients who had suffered major trauma and life-threatening injuries and those who had cancer. He would work alongside ear, nose and throat surgeons, neurosurgeons, and plastic surgeons. Operations could take 12 hours to complete. Much of his work was performed on those involved in traumatic accidents.

(3) As Mr Kunjur's family were established in Southampton and the period of the training was from October 2012 to October 2016 it was not possible for Mr Kunjur to move his family from Southampton to London. In the first week he tried to commute by car from Southampton. The commute was a minimum three-hour journey on the assumption that there were no incidents. Mr Kunjur had to rise at 5.30 to begin work at St George's at 7.30 am when ward rounds began, after which he would host clinics or perform operations. The day would end with a further ward round followed by the commute to Southampton. He arrived home at 11pm. By Thursday of the first week of

commuting, Mr Kunjur recognised he was becoming exhausted. He was mindful of his first duty as a doctor, licenced by the General Medical Council, to make the care of his patients his first concern and by commuting and becoming exhausted he would be in breach of that duty.

(4) The duties of a doctor registered with the GMC are set out on the GMC website, the opening section of which states as follows:

“ Patients must be able to trust doctors with their lives and health. To justify that trust you must show respect for human life and make sure your practice meets the standards expected of you in four domains

Knowledge, skills and performance

- *Make the care of your patient your first concern*
- *Provide a good standard of practice and care*
 - *Keep your professional knowledge and skills up to date*
 - *Recognise and work within the limits of your competence”*

(5) Part of Mr Kunjur’s contractual duties involved his being on-call two nights each week (not necessarily the same two nights) and one weekend in six, during which periods he would cover patients in all wards of the hospital not just the maxillofacial patients. We refer to these duties as the “**formal on-call duties**”. In addition, if any maxillofacial patient required assistance during the night, it was normal for him to be called by the official on-call team for advice on the necessary steps to be taken. We refer to this as the “**informal on-call duties**”. Mr Kunjur received calls on most nights and regarded himself as permanently on-call.

(6) Mr Kunjur had to have accommodation within 30 minutes distance from the hospital to discharge the formal on-call duties and appropriate and reliable telephone connections to be able to discharge all the on-call duties.

(7) To discharge his obligations as a doctor licenced by the General Medical Council, Mr Kunjur put the interests of his patients before those of his family and sought and obtained very modest accommodation in Colliers Wood in South London. He stayed at the accommodation during the week and the one weekend in six to discharge his formal on-call duties. He drove to Southampton on Friday and would return the following Sunday to begin work on Monday at 7.30 am.

(8) Colliers Wood was a convenient location for work but was not an attractive place to live, in Mr Kunjur’s view. Mr Kunjur was mugged the first week he spent in Colliers Wood. He never invited his family to visit him in London and never had any inclination to do so.

(9) Mr Kunjur obtained a contract for the provision of telephone and broadband to perform the on-call duties. The cheapest contract also included a sky tv package. Mr Kunjur used the broadband to get access to materials to do research and write articles he was required to undertake during his training contract.

(10) As Mr Kunjur, was a mature adult and dental surgeon of 17 years’ experience, we concluded it was unreasonable to expect him to accept the residential accommodation that was available in the hospital and used by undergraduates or to find hotel accommodation for the days on which he performed formal on-call duties or for the five nights he spent in London. Mr Kunjur’s time was precious. He needed to know it would be possible for him to sleep when he was on-call to be able to discharge his duties.

Constantly moving rooms in a hotel would not be compatible with that necessary requirement. Hotel guests, especially those on holiday are not universally considerate. He also needed facilities and quiet to be able to study in the evenings when time permitted. He needed access to his physical resources and on-line resources to be able to do the research and write the articles he was required to produce. Mr Kunjur had to devote the weekday evenings when not taking informal and formal on-call calls, to his studies as he needed to keep his weekends free, so far as was possible, to discharge his duties as father and husband. Constantly moving rooms in hotels would not provide the necessary conditions to enable Mr Kunjur to discharge his duties to the standard required as a doctor registered with the GMC.

(11) The peace, quiet and stability that were necessary for Mr Kunjur to discharge his duties as a trainee maxillofacial surgeon registered under the GMC could only be provided by his securing the modest accommodation in Colliers Wood.

(12) When Mr Kunjur answered the telephone while on-call he was using the premises and telephone in the performance of his duties for the duration of the calls.

(13) The accommodation provided a place to study and sleep.

(14) Mr Kunjur appointed agents to file his returns.

(15) The return for 2012/13 omitted some gross income although there was no loss of tax as the income concerned had been paid under deduction of tax under the PAYE system.

Relevant Legislation

3. Section 336 ITEPA provides as follows:

“(1) The general rule is that a deduction from earnings is allowed for an amount if:

- (a) The employee is obliged to incur and pay it as a holder of the employment,
- (b) The amount is incurred wholly and exclusively and necessarily in the performance of the duties of employment.”

Mr Kunjur’s Position

4. Mr Kunjur considers that the expenses of accommodation were wholly, exclusively and necessarily incurred in the performance of his duties. His professional obligations as a doctor require him to put his patients’ interests before his own, his formal on-call duties required him to be able to treat patients within 30 minutes of a call. Further as he was always informally on-call in respect of the maxillofacial patients he was always at work while in occupation of the premises at Colliers Wood. The premises were used while performing his employment duties.

5. Further Mr Kunjur had taken professional advice in the filing of his returns and had followed that advice in making the claim for a deduction for the cost of the accommodation. He should not therefore be regarded as negligent in filing his returns.

HMRC’s Position

6. HMRC assert that expenses are only deductible if the terms of section 336 Income Tax Employment and Pensions Act 2005 (“*section 336*” and “*ITEPA*”). Section 336 requires the expenses to be incurred, under an obligation under his contract as a doctor, wholly, exclusively and necessarily in the performance of his duties.

7. HMRC accept that the premises in Colliers Wood were rented to enable Mr Kumar to be nearer his place of work but HMRC consider that:

- (1) Mr Kunjur's employment contract did not require Mr Kunjur to rent premises close to the hospital.
- (2) Mr Kunjur's employment contract required him to work only 52 hours a week and he did not work from home, so there was considerable personal benefit provided to Mr Kunjur.
- (3) Mr Kunjur did not incur the expenses in the performance of his duties. and
- (4) Mr Kunjur's employer does not contribute to his living expenses.

In consequence, the terms of section 336 are not satisfied.

8. HMRC rely on the following cases:

- (1) *Bolam (Inspector of Taxes) v Barlow* [1949] EWHC 31 TC 136 where the taxpayer was employed by a water board which required him to live near his place of work to better perform his duties. He sought a deduction from his employment income for the increase in the cost of his accommodation. The General Commissioners allowed the claim but the decision was overturned on appeal.
- (2) *Collis v Hore* [1949] EWHC 931 TC 173 where the taxpayer was employed by the admiralty in Bath. He claimed a deduction for his increased costs of accommodation. This was disallowed.
- (3) *McKie (Inspector of Taxes) v Warner* [1961] EWHC 40 TC 65 where the employer considered Mr Warner should live in a flat in London to be able to better perform his duties of employment. As the flat was his home when he was not on duty there was a personal benefit to Mr Warner.
- (4) *Elderkin (Inspector of Taxes) v Hindmarsh* [1988] EWHC 60 TC 651 where the expenses had not been incurred in the performance of the taxpayer's duties. Mr Kunjur could perform his duties at the hospital no matter where he lived.
- (5) *Revenue and Customs Commissioners v Banerjee* [2009] EWHC 229 where the taxpayer sought a deduction for the fees paid to attend training courses. It was held the costs had not been incurred in the course of performance of the duties and also that they were not exclusively incurred in the performance of the duties. (We note that the case was overturned by the Court of Appeal. The Court of Appeal held that a deduction should be allowed for the training costs if the employee was employed on a training contract, where training was an intrinsic contractual duty of the employment and any personal benefit was merely incidental, see [2010] EWCA Civ 84.)
- (6) HMRC assert that the legislation is clear and is not open to interpretation and the appeal must be dismissed.

9. In relation to penalties, HMRC consider that the returns filed by Mr Kunjur contained errors which lead to an understatement of tax and the errors were caused by careless behaviour, i.e. by a failure to take reasonable care which standard is judged by reference to a prudent and reasonable taxpayer, per Judge Berner in *HMRC v David Collis* [2011] UKUT TC 01431 at [29].

10. The omission of gross income from the 2012/13 return was capable of being corrected by Mr Kunjur as he would have known his gross earnings were greater than indicated in the return. It is immaterial that tax on the missing income had been deducted under the PAYE system so there was no loss of tax.

11. HMRC note that Para 18 of Schedule 24 Finance 2007 provides that reliance on an agent will not be a reasonable excuse unless the taxpayer has taken reasonable care to avoid the error.

HMRC consider Mr Kunjur ought to have considered HMRC guidance as a result of which he would have discovered the error. He had therefore failed to take reasonable care to avoid the error.

DISCUSSION

12. There is no dispute that the sum of money said to have been paid to secure the accommodation in Colliers Wood was incurred wholly on the accommodation.

13. The issues in dispute are whether

(1) Mr Kunjur was obliged to incur the expenses as a holder of an office or employment, and

(2) The expenses were incurred wholly and exclusively and necessarily in the performance of the duties of the office or employment.

OBLIGATION AS THE HOLDER OF EMPLOYMENT TO INCUR EXPENDITURE

14. Where the individual holds an office, as opposed to an employment, it is clear that the test is objective as the office subsists irrespective of who holds it. Where the individual does not hold an office but is employed, that is invariably a personal arrangement and the test may be subjective but it is immaterial in this case as will be seen below. In this case Mr Kunjur was employed as a doctor. He was registered as a member of the General Medical Council, and once he became employed he became subject to the professional obligation to place the interests of his patients above his own. That obligation must be treated as an obligation of his employment for the purpose of section 336, because that professional obligation has to be complied with by Mr Kunjur as a doctor, and determines the standard of performance of Mr Kunjur as a doctor employed by St George's hospital. That obligation was in our view an obligation of Mr Kunjur, as employee of St George's Hospital.

15. Mr Kunjur's formal on-call duties required him to be able to treat patients within 30 minutes of being called which duty meant Mr Kunjur could not perform them from Southampton and as it was not reasonable to expect Mr Kunjur to use the undergraduate accommodation or to uproot his family for the duration of the relatively short-term training contract, it was necessary for Mr Kunjur to rent accommodation in London.

16. Mr Kunjur was obliged to live close to the St George's hospital to be able to perform his formal on-call duties. We accept Mr Kunjur's explanation that in cases of traumatic head injury which was his specialism, it is imperative to treat patients very quickly and the rule of thumb used by doctors is that they should be able to get to the hospital and be ready to treat the patients within 30 minutes of being called. The accommodation in Collier's Wood was within a 30-minute journey of the St George's hospital.

17. Mr Kunjur was obliged to incur the expenditure on accommodation in Colliers Wood, as the holder of an employment.

WHOLLY AND EXCLUSIVELY TEST

18. The wholly and exclusivity test will only be met in respect of a particular expenditure, where there is no private benefit to the holder of the employment, other than a merely incidental benefit.

19. Mr Kunjur returned to Southampton on Friday evenings and returned to Colliers Wood late on Sunday five weekends out of six. As Mr Kunjur had been mugged in his first week in Colliers Wood the accommodation was not sufficiently safe to invite his family. Mr Kunjur obtained no personal benefit from the accommodation at the weekends when he was not on formal on-call.

20. Mr Kunjur did not derive any private benefit from the accommodation when he was on formal on-call and actually in attendance at the hospital. Nor did he gain private benefit when he was on informal on-call and was actually called for the duration of the call or when he went to the hospital during informal on-call.

21. Although Mr Kunjur did undertake research and prepare articles during the week as required by his employment, there was no requirement for him to be so close to the hospital on those nights and therefore it is impossible to say that he did not obtain any private benefit from the use of the accommodation while preparing those articles.

22. We note that the expression wholly and exclusively is used in the computation of business profits in which context relief is allowed for a proportion of an item of expenditure that is in fact used for business purposes. We see no reason to adopt a different approach in the context of section 336.

IN THE PERFORMANCE OF THE DUTIES TEST

23. When Mr Kunjur was on informal on-call and gave advice over the telephone from the accommodation, the accommodation and telephone was used in the performance of the duties for the duration of the calls. When Mr Kunjur was on formal on-call and was present at the hospital the accommodation was not being used in the performance of the employment. Being present at the accommodation waiting for a call is not the performance of the duties.

24. When Mr Kunjur carried out research to prepare articles as he was required to do as part of his employment, the accommodation was used for the performance of his duties.

We therefore conclude that a proportion only of the expenditure on accommodation will satisfy all three aspects of the test laid down by section 336, and the proportion will be determined by reference to the amount of time Mr Kunjur spent giving advice from the accommodation while on informal and formal on-call.

PENALTIES

25. In relation to penalties, we consider that the omission of the gross income in 2012/13 was careless. A careful review of the return would have indicated to Mr Kunjur that he had greater earnings than was disclosed. Mr Kunjur cannot rely on para 18 of Schedule 24 because he was capable of preventing that error but did not do so.

26. In relation to the claim for relief in respect of the cost of the accommodation at Colliers Wood, only a small proportion of the expenses are capable to satisfying the conditions set out in section 336. We consider that Mr Kunjur had relied on his agent to provide advice. As to whether Mr Kunjur had taken reasonable care to avoid the error in the return, in failing to review HMRC guidance and correcting the advice of his agent, it seems to us that the statutory test is a particularly difficult one and is counter intuitive, as can be seen from our decision. We consider that Mr Kunjur was entitled to rely on advice from his advisers and was not obliged to check that advice. The penalties for inclusion of the claim in respect of his expenditure on the accommodation in Colliers Wood should be cancelled.

DECISION

27. We allow the appeal against the assessment to tax in respect of the percentage of the costs of accommodation referable to the actual duties performed at the premises in Colliers Wood. We request the parties to agree the proportion.

28. We reduce the penalties to nil to the extent that the penalties relate to potential loss of tax referable to the cost of the accommodation but not in respect of the failure to include the gross income in 2012-13.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

RELEASE DATE: 07 OCTOBER 2021