TC01843

Appeal number TC/2011/02836

Income tax – Sections 338 and 339 Income Tax (Earnings and Pensions) Act 2003 - whether the Appellant was entitled to claim relief for travel and subsistence because his employment was at a temporary workplace – appeal dismissed

FIRST-TIER TRIBUNAL
TAX

MR SIMON LONG **Appellant**

- and -

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

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
M. J. BELL ACA CTA

Sitting in public at 45 Bedford Square, London WC1 on 17 November 2011

Mr Partington of Ernst and Young and the Appellant in person for the Appellant

Mrs Carney for the Respondents

DECISION

1. The Appellant appealed against the additional tax charged as a result of his expenses for travel and subsistence being disallowed in respect of the years ended 5 April 2005, 5 April 2006 and 5 April 2007. The expenses claimed were in respect of the house he rented in London, his daily travel to and from work each day and his meals.

2. The Appellant claimed that his employment in London was at a temporary workplace in London.

Background and facts

3. In the late spring of 2004 the Appellant was approached in the United States where he was living by two Goldman Sachs ("GS") London partners and offered a position at GS in London. He accepted the position, resigned his job in the US and agreed to start at GS London in September 2004.

4. He signed an open ended contract with GS London.

5. Unfortunately by the time he commenced his employment in London the partners who had hired him had left the firm. By the time he became aware of this he had already resigned his job in the US so he decided to proceed to London anyway.

6. On commencing his employment GS offered to pay for the Appellant's tax advice from Ernst and Young ("EY") as he had no knowledge of UK tax. EY informed him that he should apply for detached duty relief as his location in London was likely to be temporary.

7. From the start the Appellant did not expect his employment in London to last for more than two years although this was not stated on his contract. He kept his house in the US unoccupied and signed a two year lease on a house in London where his family joined him in January 2005.

8. At the end of two years he had hoped to be moved elsewhere by GS, possibly to the US where he had kept all his ties. However this did not happen and he was asked to leave GS in September 2006 two years after he had joined them and finally left their employ on 9 November 2006.

9. GS paid for him to travel to London and offered to pay for his return to the US.

10. The Appellant travelled to other parts of the world from time to time for GS.

11. The Appellant provided us with a letter from Nick Burgin of GS London which stated that it was only rational that the Appellant considered himself temporarily in the UK on his employment in London as there was generally a two year window in which new employees have to prove themselves or be moved along. Additionally as GS was a global firm almost all employees in production roles were frequently rotated to business centres around the world.

12. The Appellant signed form P86 in June 2005 on which he stated that he intended to stay in the UK for two to three years.

13. On cross-examination he stated that he had done so as the options were "less than two years" or "two to three years". As he expected to stay in London for two years he had decided that the second option was the correct one.

14. From the start of his employment in London the Appellant found his new boss difficult and the Appellant confirmed that from June/July 2006 he started looking for a new job in the US so that his children could start the new school year in September 2006 at schools in the US.

15. Mr Partington of EY confirmed that each year EY asked GS employees to complete a form about their future intentions. At all times the Appellant indicated that he intended to relocate after two years. The fact that he stayed on for 26 months was as a result of losing his position without being offered a new job elsewhere. Only when he lost his job did his intention change and he decided to stay on for the extra 2 months.

16. An enquiry was opened on 10 December 2007 into the Appellant's self assessment tax return for 2005/2006.

17. A closure notice was issued on 30 November 2010 which amended the return inter alia disallowing travelling and subsistence expenses of £107,323 that had been claimed because they did not satisfy the criteria of Section 339 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA").

18. An enquiry was opened on 30 October 2008 into the Appellant's tax return for 2006/2007 and a closure notice was issued on 30 November 2010 again disallowing the expenses of £49,105 that had been claimed under Section 339 ITEPA.

19. An assessment dated 1 March 2010 was raised by HMRC in connection with the year ended 5 April 2005 in respect of a liability arising as a result of the disallowance of travelling and subsistence costs of £66,900 that had been claimed by the Appellant under Section 339 ITEPA.

20. Ernst and Young appealed on the Appellant's behalf in respect of both closure notices.

21. An independent review upholding the assessments and the closure notices was concluded on 18 March 2011.

The Legislation

22. Section 338 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") states as follows:

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

(a) the employee is obliged to incur and pay them as holder of the employment, and
(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

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

3. In this section "ordinary commuting" means travel between—

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

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

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).

23. Section 339 of ITEPA states :

Meaning of "workplace" and "permanent workplace"

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

2. In this Part "permanent workplace", in relation to an employment, means a place which—
(a) the employee regularly attends in the performance of the duties of the employment, and

(b) is not a temporary workplace.

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

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

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

(b) for some other temporary purpose.

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

4. A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if—
(a) it forms the base from which those duties are performed, or
(b) the tasks to be carried out in the performance of those duties are allocated there.

5. A place is not regarded as a temporary workplace if the employee's attendance is—
(a) in the course of a period of continuous work at that place—
(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or
(b) at a time when it is reasonable to assume that it will be in the course of such a period.

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

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

8. An employee is treated as having a permanent workplace consisting of an area if—
(a) the duties of the employment are defined by reference to an area (whether or not they also require attendance at places outside it),
(b) in the performance of those duties the employee attends different places within the area,
(c) none of the places the employee attends in the performance of those duties is a permanent workplace, and
(d) the area would be a permanent workplace if subsections (2), (3), (5), (6) and (7) referred to the area where they refer to a place.

24. We were referred to the HMRC's Employment Income Manual for further information and some examples of the legal effect of various employment scenarios.

25. EIM 32129 states :

Section 339(5) ITEPA

A period of attendance at a workplace for a limited duration does not make that place a temporary workplace if the employee attends in the course of a period of continuous work) that can be expected to last for all, or almost all, of the period for which he or she is likely to hold, or continue to hold, that employment. In these cases the 24 month rule is overridden and the workplace is a permanent workplace.

The legislation does not define almost all of the period of the employment. You should not normally challenge relief under this paragraph where the likely duration of work at a workplace is less than 80% of the likely duration of the employment.

The place where an employee works does not of itself determine who is his or her employer. Nevertheless, when someone is sent to work at a particular workplace for, say, 18 months, it is always necessary to consider whether the secondment is part of the duties of a continuing employment or whether it involves taking up a different employment.

In most cases the position will be straightforward. The secondment may be in the course of a long term employment during which the employee can expect to move from office to office for different periods in the course of the employment. Conversely, in some industries there is a pattern of casual employment, where an employee may be taken on to work at a single site for a short period. However, there are cases where the position is less clear-cut.

A secondment may amount to acceptance of a new employment but this can only be determined on a case by case basis taking into account all relevant factors. Factors in favour of the secondment being a new employment would include a separate contract with a different employer, a termination of the previous employment and a major change in employment duties from those of the previous employment.

26. EIM 32129 gives examples under the heading Travel expenses: travel for necessary attendance: fixed term appointments and agency workers: fixed term appointments:

These two examples illustrate the application of the rule on fixed term appointments to employees on secondment and deal with the evidence needed to determine whether the secondment is a separate employment:

Example 1

An accountant is employed by a French bank. To further his career he obtains a post as human resources manager for a fixed contract of 18 months with the UK subsidiary of the bank. His contract with the French parent is terminated and he is given a contract with the UK subsidiary at rates of pay and allowances determined by that company. He hopes to be re-employed by the French parent at the end of his period in the UK but he has no continuing contractual rights.

On these facts the accountant has a new employment with a UK employer for a fixed term of 18 months. The French employment has terminated and he has taken up new employment in the UK. He retains merely a hope that his former French employer may re-employ him when his employment in the UK ends.

If he works at any workplace for a period of continuous work lasting all or almost all of the period for which he will hold the UK employment, that workplace will be a permanent workplace and no deduction can be permitted under Section 338 ITEPA 2003 for the cost of travel to and from that workplace. Section 373 ITEPA 2003 provides for relief for any payments made or reimbursed by the employer for certain travel between France and the UK.

An employee of a Swedish company is seconded for 14 months to work at a UK subsidiary. She is paid by the UK subsidiary for the duration of her secondment at the same rate as she was paid in Sweden and retains some rights with the employer in Sweden. She retains membership of the Swedish pension scheme and her time in the UK counts for her pension entitlement and for seniority purposes.

On these facts the employee has only one employment and the UK secondment is at a temporary workplace in the course of a continuing employment. There is still one contract of employment even though the obligations that an employer would be expected to meet are partly being met by a different company.

As the workplace is a temporary workplace the employee is entitled to a deduction under Section 338 ITEPA 2003 for her travel costs, including costs of accommodation and subsistence for the duration of the secondment.

27. The Appellant produced the HMRC booklet entitled 490 Employee travel. In Chapter 3 under the heading "Limited Duration – the 24 Month Rule" it gave the following example:

> Earl has worked for his employer for three years. He is sent to perform full time duties at a workplace for 18 months. After 10 months the posting is extended to 28 months. Relief is available for the first 10 months (while his attendance is expected to be for less then 24 months) but not after that (once his attendance is expected to exceed 24 months).

28. At 3.17 of Chapter 3 under the heading "No requirement to return to a permanent workplace" it stated the following and provided an example:

> 3.17. An Employee does **not** need to have a permanent workplace to go back to in order to get tax relief for travel to a temporary workplace.
>
> Example
>
> Eunice starts a new job as a trainee manager for a building society. When she starts her job her employer has not decided where she will be based. As part of her induction into the building society, for the first two months Eunice is required to spend a few weeks working full time at each of a number of branches learning about the wide range of services the building society provides. After two months she is given a permanent posting to a branch in Swansea.
>
> Eunice is entitled to relief for the full cost of her journeys from home to the branches she visits in the first two months of her employment. Eunice is not entitled to relief for the cost of travelling from her home to Swansea because this is an ordinary commuting journey.

29. At 3.18 under the heading "Fixed term employments it is stated:

> 3.18 A period of attendance at a place is not regarded as of limited duration or for a temporary purpose if it is all or almost all of the period for which the employee is likely to hold, or continue to hold, the appointment.
>
> Example
>
> Everton is taken on for a fixed term employment of 18 Months to work at a particular site. No relief is available for the cost of travel to and from the site during that period.

Appellant's Submissions

30. The Appellant submitted that the letter from Mr Burgin proved that there was a tacit understanding that his employment in London was temporary. He submitted that he was a permanent employee of GS temporarily seconded to London.

31. He contended that GS always move people about and he always expected to return to the US, from where he was hired, after two years.

32. The Appellant submitted that according to EY detached duty relief was especially for US citizens. GS required him to relocate to London and because it was a temporary assignment he had continued to maintain his house in the US with its attendant large expenses.

33. The Appellant contended that HMRC had been misled by his contract with GS which had not specified that the assignment was temporary. He contended that the contract was a standard boiler plate GS contract and HMRC had only referred to the parts which suited them.

34. Mr Partington of EY referred to the HMRC booklet 490 Employee Travel at example 3.17 and likened the Appellant to Eunice in the example. He contended that just because the Appellant did not have a permanent workplace to which to return did not mean that London was not a temporary workplace for him.

35. Mr Partington also referred to the example of Earl at paragraph 27 above. He likened the Appellant to Earl contending that until the Appellant lost his job the Appellant's intention was to stay in London for only 2 years. On losing his job he stayed on for an extra 2 months as requested by GS but it was only at that point that his intention changed and so until the date of his notice he ought to have received the relief.

36. The Appellant contended that he had never argued that he was not a permanent employee of GS International just that he was not a permanent employee of GS London.

37. He contended that although he had signed a contract with GS London his base was GS New York City which was the GS head office. He was interviewed in New York and that was where he had been offered the London job.

HMRC's Submissions

38. HMRC submitted that the Appellant's contract with GS showed that the place of employment was in London.

39. HMRC did not dispute that the Appellant had always intended to return to the US but did dispute that London qualified as his temporary workplace.

40. Mrs Carney submitted that HMRC considered that to spend more than 40% of working time at one place was a significant amount.

41. HMRC contended that relief under Section 338 was not available for the costs of ordinary commuting. Ordinary commuting meant travel between home and a permanent workplace which is somewhere that an employee regularly attends in the performance of his duties and which is not a temporary workplace.

42. Mrs Carney submitted that there was no evidence that GS and the Appellant had agreed prior to the commencement of the employment that he was to perform a task of limited duration or for some other temporary purpose.

43. Mrs Carney submitted that even if the duration was agreed at some point to be 26 months it would not qualify as a temporary workplace as the duration was more than 24 Months.

44. Further she contended that if GS and the Appellant had agreed that he would attend at that workplace for a period comprising all or almost all of the duration of the employment it would be a permanent workplace.

45. Mrs Carney submitted that as relief for travel was dependent on it qualifying and it did not qualify, neither would the associated costs of subsistence.

46. She submitted that the facts that the Appellant's accommodation was leased for a limited period and his home in the US retained, provided little support for the nature of the employment being temporary.

47. The Appellant was employed for 26 months in London and almost all the duties of his employment were performed there.

48. HMRC accepted that the Appellant was returning to the US but contended that this was not relevant to the question of whether London was a temporary workplace.

49. Mrs Carney contended that even if the Appellant's employment had met the requirements of Section 339(3) of ITEPA the employment could not be temporary because it lasted until November 2006.

Findings

50. We found the Appellant to be honest and sincere in his belief that after two years in London he would be transferred somewhere else and this was supported by his evidence.

51. However we found that although the Appellant considered that he had been seconded from the US, this was not correct. In order to be seconded he would have needed to be working with GS in the US. He was recruited in the US by two GS London partners to take up a position in London and signed a contract with GS London.

52. We found that his accountants appeared to be advising him under the misapprehension that he had been seconded to the UK rather than employed by GS, London.

53. We carefully examined both the HMRC booklet (490 Employee travel) and HMRC's Employment Income Manual in particular those parts pertaining to the legislation referred to above.

54. Dealing firstly with the booklet and those sections drawn to our attention by the Appellant we found that his situation was neither that of Eunice or Earl.

55. At the time that Eunice was recruited by the building society it had not been decided where she was to be based and so until it was decided she could claim for travel from her home to a temporary workplace. In contrast GS had decided from the start that the Appellant would be based in their London office.

56. Earl had worked for his company for three years before being seconded to a temporary workplace. The Appellant was working for someone else when he was recruited by GS London.

57. We found that the example of Everton was more akin to the Appellant's position and in particular the example given in paragraph 26 above.

> "The French employment has terminated and he has taken up new employment in the UK. He retains merely a hope that his former French employer may re-employ him when his employment in the UK ends.
> If he works at any workplace for a period of continuous work lasting all or almost all of the period for which he will hold the UK employment, that workplace will be a permanent workplace and no deduction can be permitted under Section 338 ITEPA 2003 for the cost of travel to and from that workplace. Section 373 ITEPA 2003 provides for relief for any payments made or reimbursed by the employer for certain travel between France and the UK."

58. We noted the comments in EIM 32129 concerning Section 339 of ITEPA and in particular:

> Factors in favour of the secondment being a new employment would include a separate contract with a different employer, a termination of the previous employment and a major change in employment duties from those of the previous employment.

59. We found that clearly the employment in London was a new employment.

60. Relief under Section 338 is not available for the costs of ordinary commuting. Ordinary commuting meant travel between home and a permanent workplace which is somewhere that an employee regularly attends in the performance of his duties and which is not a temporary workplace. As relief for travel is dependent on the travel qualifying and as it does not qualify, neither does the associated costs of subsistence.

61. Section 339(5) of ITEPA states that 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 (ii) comprising all or almost all of the period for which the employee is likely to hold the employment.

62. We found that in respect of the Appellant's employment in London, London did not qualify as a temporary workplace and therefore the travel and subsistence expenses were not deductible.

Decision

63. The appeal is dismissed.

64. 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.

TRIBUNAL JUDGE
RELEASE DATE: 21 February 2012