TC02533

Appeal number: TC/2010/03747

INCOME TAX – self-employed consultant geriatrician with office at home where he performed significant business functions – travel between home, places of employment and private hospitals where he saw private patients – deductibility of travel expenses – whether incurred wholly and exclusively for the purpose of his self-employment – application of Newsom v Robertson, Horton v Young, Sargent v Barnes, Jackman v Powell and Mallalieu v Drummond – appeal substantially dismissed in principle

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAMAD SAMADIAN **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
KAMAL HOSSAIN FCA FCIB

Sitting in public at 45 Bedford Square, London on 22 October 2011, 23 April 2012 and 13 August 2012

Joseph Howard of Counsel, instructed by Stanbridge Associates Limited, for the Appellant

Kim Sukul, Presenting Officer of HMRC, for the Respondents

DECISION

Introduction

1. This appeal concerns the deductibility of travel expenses incurred by the Appellant, a self-employed consultant geriatrician.

2. The Appellant has an office at his home, at which he does a significant amount of work relating to his private practice, though he does not generally see patients there. He is also employed by the National Health Service, for which he works full time at a nearby hospital. In his private practice, he has regular out-patient sessions at two private hospitals and cares for in-patients admitted to one of them under his care. He also occasionally visits patients at their homes and other places.

3. Such a pattern of working is not uncommon for a senior medical practitioner these days, but there is uncertainty about the correct treatment for tax purposes of his travel expenses between the various places where he works. Hence this appeal.

The facts

General background

4. We received a witness statement from the Appellant and he gave oral evidence. We find the following facts.

5. The Appellant has been a medical practitioner since the 1970s. In 1990 he took up employment as a full time consultant geriatrician at St Helier, Nelson and Sutton hospitals in south London. He has remained there since that time (though now he works almost exclusively at St Helier hospital, holding just one NHS out-patient clinic per week at Nelson hospital in Kingston-upon-Thames). He lives in Sutton. He has a permanent NHS office with full administrative support (including a secretary, who also acts as secretary for him in his private practice during her spare time) at St Helier hospital. He carries out some teaching as part of his NHS duties.

6. In 1991 the Appellant started a private practice alongside his NHS work. From small beginnings, his private practice has grown to a significant size. He says this is because of two factors. First, two colleagues retired which created something of a gap in the market in the geographical area. Second, as he has no hobbies, family or family ties in the UK (he originates from overseas), he is able to spend as much time as he wants working in his private practice.

7. His detailed working arrangements have changed over time, but not in any way which is material for the purposes of this decision. Essentially the Appellant holds weekly out-patient sessions at two private hospitals, St Antony's in North Cheam and Parkside in Wimbledon. Where necessary, he admits patients to hospital, usually St Antony's; those patients remain under his care as in-patients and he reviews their condition at regular evening ward rounds (usually six evenings per week at St Antony's). From time to time he also has other patients under his care who are looked

after at home or other care facilities and he visits them as needed to review their condition and consider what further treatment is required.

8. The arrangements for his out-patient clinics at St Antony's and Parkside hospitals are as follows. There are out-patient consulting rooms available for hire on a sessional basis at the two hospitals, and the Appellant has a regular weekly slot at each of them. He is only permitted to use the rooms for the duration of the session (three hours), and other doctors use them for the rest of the time, on a similar basis. There is pressure on availability, and at least at St Antony's the continued availability of the room is linked to the extent of in-patient business generated for the hospital by the user in question. The room will often have the Appellant's name temporarily marked on it during his session by means of a removable name plate. A nurse is supplied by the hospital to provide general assistance and, where appropriate, a chaperone. In the room is a desk, chair, hospital computer (though the Appellant said he had no access to use the hospital's system), couch, blood pressure machine and a screen. There may occasionally be other medical instruments, but the Appellant generally uses his own (which he keeps at home).

9. The Appellant has no administrative support at the two private hospitals. They offer basic medical test/scanning/imaging facilities for patients, to which the Appellant does refer his patients (though for more sophisticated tests he will refer patients to NHS facilities). For test results or any other communication received by the hospitals for him, he shares a pigeon hole with all other doctors with surnames starting with "S". He has no office or secretarial support there, and no email account. He pays for the use of the consulting rooms, but that is the only interaction he has with the hospitals' accounting functions because he bills his patients (or their insurers) direct for his own services and the hospitals bill them direct for the tests and in-patient care they provide.

10. The Appellant will do basic examinations and take a history when he first sees his patient, generally at his out-patient clinic. Because of the nature of the field in which he practises, it is often important for him to take a "collateral history" from others, such as the patient's carer, relatives, GP, social services and the like. This helps him to build up a full picture of the case to enable him to structure his treatment plan properly. He will generally obtain any collateral history while working from his office at home, where he also does any necessary research and considers test results before deciding on the treatment plan. He then prepares the plan, generally in the form of a letter to the patient's GP, identifying what is wrong with the patient and what he considers should be done. This work is all done at home, and generally takes longer than the initial patient consultation. He does not see patients at his home (except for the odd very rare occasion when someone turns up without an appointment, for example asking him to "look at my mother's blue leg").

11. When he considers it appropriate, he will arrange for a patient to be admitted for in-patient care (usually at St Antony's). When he is dealing with in-patients under his care (and he generally has six to eight such patients in St Antony's at any one time, though the number fluctuates greatly) he does so during the course of his ward rounds – which take place every evening except Sunday. If needed, he will attend on Sunday

as well, or indeed at any other time in case of an emergency (subject to his NHS commitments). As well as assessing patients and arranging treatment, he also plans their discharge and deals with relatives. He does quite a bit of this "face to face" in the hospital, but it also requires further thought and work, which he does at home.

12. If the Appellant has patients under his care who are being looked after at home or some other location, he will visit them as necessary rather than on a regular basis. If a patient requires frequent or close monitoring, he or she will generally be admitted as an in-patient.

13. The Appellant receives referrals through various routes. If a GP or other doctor wishes to refer a patient to him, they may contact him by letter, telephone call or email. Letters may be sent to his home address, to St Helier hospital or (occasionally) to Parkside or St Antony's hospitals. Telephone calls may come through to his own mobile phone, his home telephone or his office at St Helier hospital. Emails would normally come to his private professional email address, which he receives at home.

14. In response to a referral, the Appellant arranges for his secretary to contact the patient and set up an appointment. This will usually be at Parkside or St Antony's, but may be at the patient's home or some other location where the patient is being cared for, depending on the circumstances.

15. The Appellant takes notes at the first consultation, which he subsequently has typed up by his secretary. These form the starting point for his own personal medical file on the patient, which he keeps at home. Where the patient is an in-patient at St Antony's, he will send copies of key medical documents to the hospital for retention on their clinical files, so that other medical professionals can see the full picture concerning that patient.

16. The Appellant does not discuss fees with his patients at all. That is dealt with completely by his secretary. Many of his patients are insured and his fees are met by the insurers. The Appellant's invoices are issued bearing his home address. He sends invoices to the patient, copying in the insurer where appropriate. All payments are received at home by him (whether paid by the insurer or the patient). He keeps all his business records there, and it is essentially his administrative centre as his bank statements are sent there, his professional bodies communicate with him there and the insurers with whom he is registered also correspond with him there. He has a separate office at his home which is used wholly or mainly for conducting his private practice. He has a desk, a chair, a medical library, a filing cabinet (with his business and clinical records) and computer, as well as his medical equipment and prescription pads.

17. The Appellant does not have business cards showing any business address. When sending business correspondence (e.g. relating to invoicing) he puts his home address at the top of the invoice or other correspondence. When sending clinical correspondence (i.e. correspondence with other medical professionals about patients)

he generally does so showing the St Antony's or Parkside hospital address and telephone number on the letter as well as his St Helier hospital address.

18. Whilst he is generally contacted as set out at [13] above, he can be contacted at St Antony's or Parkside by his secretary, GPs and other medical professionals who know his work routine, but only by asking the hospital switchboard or ward to "track him down".

The Appellant's travel

19. The Appellant supplied us with a series of diagrams showing his travel during a typical working week. These diagrams are based on the current arrangements, but in principle they include most or all of the possible variations and are sufficient to enable us to give a decision in principle on all relevant possible combinations of starting and finishing points for his journeys.

20. Typically, the Appellant would start his working day by travelling from his home to St Helier or Nelson hospitals (where he is employed under his NHS contract). From there, he would generally travel to one or both of St Antony's and Parkside hospitals later in the day (though on one day he travels from Nelson to St Helier first). At the end of his working day, he would travel home, possibly carrying out one or more patient home visits first. On Saturdays, he would travel from home to St Antony's and back. At any time when he was not involved on NHS business, he might be called to make an urgent patient visit, either at the patient's home, at St Antony's or elsewhere. His travel then would depend on where he was when the call came and what time of day it was.

21. Some of the picture as it emerged from the Appellant's diagrams had changed recently, and did not match the "typical weekly working schedule" that he also supplied. It is not therefore possible to be totally clear about the specific pattern of journeys that he was accustomed to make over the working week, but we do not consider it is necessary to do so for the purposes of this decision. Instead, we analyse below the various possible journeys that he made and the position on deductibility argued for by each party for each such journey.

	Journey	**Appellant's position**	**HMRC's position**
1	Between home and St Helier/Nelson hospital (NHS)	Not deductible	Not deductible
2	Between St Helier and Nelson hospitals (both NHS)	Not deductible (though could claim against employment income)	Not deductible (no view expressed on deductibility against employment income)
3	Between St Helier/Nelson hospital (NHS) and St	Deductible	Not deductible

	Antony's/Parkside hospital (private)		
4	Between St Antony's and Parkside hospitals (both private)	Deductible	Deductible
5	Between home and St Antony's or Parkside hospitals (private)	Deductible	Not deductible
6	Between St Antony's or Parkside hospital (private) and patient's home or other care location (private)	Deductible	Deductible
7	Between home and patient's home or other care location	Deductible	Deductible
8	Between St Helier/Nelson hospital (NHS) and patient's home or other care location	Deductible	Not specifically addressed

22. In relation to the travel between any two destinations as set out above, neither party argued for differential treatment depending upon the direction of travel.

23. It can readily be seen that items 3 and 5 (and possibly 8) in the above table are in dispute between the parties.

24. The Appellant delivered self-assessment tax returns for all relevant years based on his position on deductibility of the expenses as set out in the above table.

25. On 19 August 2005 HMRC wrote to the Appellant, notifying him that they were enquiring into his 2003-04 tax return. There followed voluminous correspondence, much of which is irrelevant to the outstanding issues in this appeal. We do not feel it necessary to set out the detail of the various assessments and amendments made over the course of the last seven years. Suffice it to say that there remain outstanding amendments to the Appellant's self-assessment tax returns for the years 2003-04, 2004-05, 2005-06 and 2006-07 and the scope of the disagreement on those returns is the extent of travel expenses which are deductible in calculating the Appellant's income from self-employment for those years, reflecting the disagreements set out in the above table. At the hearing, the parties did not address the amounts of the outstanding disputes in detail. They sought a decision on the principles to be applied, following which they were confident that final agreement could be reached without further reference to the Tribunal.

The legislation

26. The parties are agreed that the legislation to be applied is that set out in section 74 Income & Corporation Taxes Act 1988 ("ICTA") in respect of the period up to 2004-05:

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

27. In respect of the year 2005-06 and subsequent years, the parties are agreed that the relevant legislation is that contained in section 34 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"):

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

28. The parties are agreed that the effect of the old and new legislation is the same, and we concur. The essential requirement is to establish whether the disputed expenses (or the money paid in respect of them) were incurred (or laid out) wholly and exclusively for the purposes of the Appellant's private practice.

The case law

29. The parties referred us in argument to a number of cases. We summarise below the key features of those cases, and of one other decision (to which the parties did not refer us) which we consider to be highly pertinent to the issues we are asked to decide.

Newsom v Robertson

30. In the first of the decisions the parties invited us to consider, *Newsom v Robertson* [1952] 1 Ch 7 and (1952) 33 TC 452, the Court of Appeal considered the case of a barrister in private practice. Mr Newsom (the barrister in question) claimed to deduct the costs of travelling between his chambers in London and his home in Whipsnade. This was on the basis that he carried out a good deal of his professional work in his well-equipped study at home, especially during court vacations (when he only visited his London chambers on rare occasions for conferences).

31. The Special Commissioners found that in court vacations the basis of Mr Newsom's professional operations moved from London to Whipsnade. In the High Court, Danckwerts J held that none of the travel expenses were deductible. The basis of this decision was that the reason the expenses had been incurred was because Mr Newsom wanted to live in the country; it followed that the travel to and fro had a mixed purpose (partly professional and partly "the requirements of his existence as a person with a wife and family and a home") and the expenses of that travel therefore failed the "wholly and exclusively" test.

32. In the Court of Appeal, Sommervell LJ took the view that the expenses of travel to and fro should be aggregated and treated together. He considered that Mr Newsom's chambers in London remained his "professional base" throughout the year. This does not seem to have been his reason for dismissing the appeal however. Instead, he found that the location of Mr Newsom's house "had nothing to do with" his practice. It was simply his home, and the fact that he did a significant amount of professional work there did not change that fact. Accordingly, he doubted that there was any professional purpose to the travelling, but if there was it was certainly subsidiary to the private purpose.

33. Denning LJ followed a slightly different line of reasoning. His judgment proceeded on the tacit assumption that every trade, profession or occupation has a single "base". On that assumption, all that was necessary was to identify the base and then it was quite clear that the cost of travel between the home and that base was not deductible. It was incurred, in his view, "for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively". He found that Mr Newsom’s base was at his chambers in London and therefore he held that the commuting costs were not deductible.

34. Romer LJ approached the matter slightly differently again. He first reasserted the general proposition that normally, travel between home and work has as its object "not to enable a man to do his work but to live away from it." He then considered whether anything was changed as a result of a taxpayer doing work at home as well as at his normal place of work. He considered that it changed nothing, at least in Mr Newsom's case, essentially because if Mr Newsom had not travelled at all, he could have carried on his profession perfectly satisfactorily from his chambers in London. He dismissed any suggestion that Mr Newsom might have had two places of business, but without elaborating on his reasons for doing so.

Horton v Young

35. Second, we were referred to the case of *Horton v Young* [1972] 1 Ch 157, in which the Court of Appeal considered the situation of a self-employed bricklayer. Mr Horton was the leader of a bricklaying team of three men. He had no yard or other business premises. He simply operated from his home in Eastbourne. He worked at seven different sites during the year in question, at distances of between 5 and 55 miles from his home. Mr Page, the main contractor for whom he worked, would visit Mr Horton at his home to agree the details of each job – the site and the rate of pay. Mr Horton used to collect the rest of the team in his car and take them to the site. Sometimes he had to travel between two sites on the same day.

36. Denning LJ compared this case with *Newsom* and said:

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

37. Salmon LJ, in agreeing that Mr Horton's house was his business base, recited that Mr Horton agreed all his contracts at his home, kept his tools and business books there and did his office work there. That was where he knew his only customer would come to seek him out. In addition, crucially, the sites where he actually carried out his bricklaying work were spread across a large area. He rejected the idea that Mr Horton may have had shifting bases of business, cropping up on each site at which he worked, due to the obviously large number and uncertainty of them.

38. Stamp LJ, also agreeing, pointed out how difficult it was to draw a line between what he called "itinerant" traders, whose business actually involved travel, and persons such as the barrister Mr Newsom. The implicit finding was that Mr Horton's trade was itinerant. Each case had to be examined on its own facts and decided by reference to the statutory criteria. He rejected the general proposition that the place or places at which a man carries out the work he has contracted for must necessarily be his place or places of business. He found that Mr Horton had "no place which you could call his place of business except his home": he entered into contracts there, he kept his tools and other trading items there, and it was the only place where he was to be found.

Sargent v Barnes

39. The third case to which we were referred was *Sargent v Barnes* [1978] 1 WLR 823. This concerned a dental surgeon who travelled to his dental surgery from home

by car every day, a distance of about 11 miles. He also maintained a laboratory where a dental technician worked, about 1 mile from his home and almost directly on the route between his home and his surgery. He stopped off at the laboratory every morning and evening, to pick up or deliver dentures and to discuss matters with his technician. He claimed to deduct the cost of travel between his surgery and the laboratory. The laboratory was set up in an outbuilding of Mr Barnes' father's house.

40. Oliver J in the High Court considered *Newsom*, *Horton* and other authorities and came to the conclusion that "it would in my judgment be a travesty to say that the taxpayer was in any relevant sense carrying on his practice as a dentist at [the laboratory]". He held that Mr Barnes' "base of operations where the practice was carried on" was at the surgery. Just because the journeys to the laboratory were "necessary" (as the General Commissioners had held), that did not mean the expense of them was incurred "solely or exclusively for the purposes of the practice". The journeys were in essence journeys between his home and his "base of operations" at his surgery and he was simply using the journey to and from his home to visit the laboratory. The essential character of the journey remained unchanged and for that reason it could not be regarded as satisfying the statutory test.

Jackman v Powell

41. The above cases were examined closely by Lewison J in the High Court in *Jackman v Powell* [2004] EWHC 550 (Ch), the fourth of the cases which the parties invited us to consider.

42. *Jackman* concerned a milkman who operated a milk round under a franchise agreement with Unigate at some distance from his home.

43. Every day, Mr Powell travelled 26 miles from his home to the Unigate depot, where he picked up his milk float and then went out on his round. He bought all his milk and other goods from Unigate and he rented his float from them. He kept both at the Unigate depot. After he had completed his round and prepared things for the following day, he drove home again.

44. He was registered for VAT, giving his home address as his place of business. He did all his office work at home, and kept all the business records there.

45. Lewison J held that it was not necessary in all cases to define the base of the trading operation (it was, he said, only Denning LJ in *Newsom* who had suggested this); however, in the case of Mr Powell, he went on to make a finding that the 35 roads of Mr Powell's milk round "plainly" amounted to his "base of operation". In the decision, however, he focused at some length on the reasons why Mr Powell's home could not be his base of operation (as the Special Commissioner had found) rather than on giving any particular basis for his finding that the round itself was “plainly” the base of operation.

46. The decision in *Jackman* therefore provides little assistance, beyond a statement that it is not always necessary to find a base of operation, the finding that a geographical area (rather than a single location) can amount to a base of operation and

general observations about matters which Lewison J held to be insufficient to establish a taxpayer's home as his base of operation.

Mallalieu v Drummond

47. *Mallalieu v Drummond* [1983] STC 665, a decision of the House of Lords, was not specifically referred to by either party in argument, but it provides an important backdrop for the arguments. It was concerned with the precise interpretation of the wording of the statutory restriction in section 74(1)(a) Income and Corporation Taxes Act 1988 (which was at the time to be found in section 130(a) of the Income and Corporation Taxes Act 1970).

48. Lord Brightman (with whom three of the other Law Lords agreed) explained that the statutory words "expended for the purposes of the trade..." actually meant "expended to serve the purposes of the trade...", which in turn could be elaborated as "expended for the purpose of enabling a person to carry on and earn profits in the trade...". He went on to explain that:

> "[t]o ascertain whether the money was expended to serve the purposes of the taxpayer's business it is necessary to discover the taxpayer's 'object' in making the expenditure: see *Morgan v Tate & Lyle Ltd* [1955] AC 21 at 37 and 47. As the taxpayer's 'object' in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of s 130 except as a reflection of the taxpayer's state of mind at the time of the expenditure.
>
> If it appears that the object of the taxpayer at the time of the expenditure was to serve two purposes, the purposes of his business and other purposes, it is immaterial to the application of s 130(a) that the business purposes are the predominant purposes intended to be served.
>
> The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home of his friend and attending professionally on him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was *a* reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend on his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition in s 130."

49. *Mallalieu* was concerned with a claim for expenses of maintaining suitable clothing for wearing in court by a barrister. Her evidence (which was accepted by the General Commissioners) was that her normal choice of clothes would be entirely unsuitable for use at work and her sole conscious motive in incurring the expenditure was to ensure that she could satisfy the relevant professional rules:

> "She bought such items only because she would not have been permitted to appear in court if she did not wear, when in court, them or other clothes like them. Similarly the preservation of warmth and decency was not a consideration which crossed her mind when she bought the disputed items."

50. Lord Brightman held that even though her sole conscious motive was to comply with the professional rules, that was not sufficient:

> "... she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist. In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."

51. It followed that Ms Mallalieu's claim for a deduction failed, because although she had no conscious motive for incurring the expenditure which was not a business motive, the facts were such that there must necessarily have been a non-business motive in her mind as well.

52. *Mallalieu* is important and helpful in clarifying the distinction between "object" or "motive" on the one hand and "effect" on the other, and in making clear that a court may look behind the conscious motive of a taxpayer where the facts are such that an unconscious object should also be inferred.

Submissions of the parties

53. For simplicity, references in this decision to particular travel being "deductible" are to be taken as references to the expenses of that travel being deductible in computing the relevant taxable profits.

Appellant's submissions

54. Mr Howard argued (in summary) as follows:

(1) If a taxpayer's "business base" was located away from his home and the taxpayer had no business base at his home, he accepted that travel between the

home and the business base was not deductible, under what he referred to in shorthand as "the commuting principle" established by *Newsom*.

(2) Thus, to be precluded under the commuting principle, travel must involve, at one end, the taxpayer's home (at which the taxpayer has no business base) and, at the other end, a business base.

(3) It followed that, if St Antony's (or Parkside) was not a business base but the Appellant's home was his business base, the commuting principle could not apply to travel between either of the hospitals and the Appellant's home. He submitted that on the facts the hospitals were not business bases and therefore the commuting principle did not apply to travel between them and the Appellant's home.

(4) On the other hand, if St Antony's (or Parkside) was a business base, then:

(a) travel between such a business base and the Appellant's home would still be deductible if his home was also a business base and there was no other non-business purpose in such travel; but

(b) he accepted that travel between such a business base and the Appellant's home would not be deductible if the home was not a business base (or, by implication, if some other non-business purpose could be found for such travel).

He submitted that on the facts the Appellant's home was a business base and there was no non-business purpose in the travel between his home and Parkside or St Antony's.

(5) There was no general principle that any travel to or from the taxpayer's home must always be non-deductible as having some element of non-business purpose; that was a question of fact to be decided in each case, subject only to the commuting principle.

(6) The commuting principle had no application where travel did not involve the taxpayer's home as either its point of origin or its destination. In such cases the general “wholly and exclusively” rule must be applied.

(7) Applying that general rule, it was clear in this case that all the Appellant's travel was undertaken solely for the purposes of his business and therefore it should all be deductible.

55. Much of his argument therefore rested upon the meaning of the term "business base" and its application to the facts of this case.

56. *Newsom*, he said, did not really help on this point. *Horton* provided more assistance. The Court of Appeal referred specifically to the fact that the taxpayer entered into his contracts at home, kept his tools there and carried out his office work there. It was the place where he "was to be found" by his only customer. In *Jackman*,

in deciding that the taxpayer's business base was not at his home, Lewison J in the High Court appeared to place weight on the fact that the milkman ordered supplies at the depot, took delivery of them there and entered into contracts with his customers on the round itself. In *Sargent*, Oliver J in the High Court appeared to proceed on the basis that the dental laboratory was not made into a place of business simply because some important part of the taxpayer's overall business was carried on there.

57. Mr Howard invited us to find that the authorities drew a distinction between "the place where the core of his business is carried on" and "the location where he merely performs his services". In his submission, the place where the contracting took place (and, to a lesser extent, the place where the "vital administration" took place) was the determining factor in establishing a "business base", rather than (as he put it, by analogy with *Horton*) the "location where the bricks were laid" (equivalent in the present appeal to "the place or places where the Appellant saw his patients").

58. In the present case, he argued, the Appellant entered into his vital contracts (both with insurers and with patients) via his secretary when the first appointment was booked over the telephone and therefore the "location" of formation of contracts was elusive. However, his secretary told patients where the Appellant operated from (his office at home) and he personally dealt with his vital administration from there whilst also performing a significant part of his professional work there – the research, thinking and preparation of care plans, which takes at least as long as the initial outpatient consultation. He also carried out much of his important telephone contact with patients, other professionals and carers from there. This was sufficient to make it clear that his "business base" was his office at home and that was to be contrasted with his transient presence at St Antony's and Parkside on out-patient clinics and ward rounds.

HMRC's submissions

59. Ms Sukul argued that the travel between the Appellant's home and St Antony's/Parkside clearly fell foul of the commuting principle and was not deductible. This was on the basis that, in her submission, the Appellant's profession was "based at the private hospitals where he sees and examines his patients".

60. In addition, she argued that journeys between the NHS hospitals where he worked on the one hand and St Antony's/Parkside on the other also had "the quality of commuting" because there was no material difference between "home" and "any other non-business location" (such as a golf club) for the purposes of the commuting principle. She submitted "[i]t would be absurd to suggest that a journey from home to the private hospital is not allowable but that a journey from any other non-business location to the private hospital is". Such a journey was, in her submission, "analogous to a home to work journey and he is effectively undoing the journey undertaken for private purposes when he left the private hospital to go home".

61. When pressed, she clarified he position by saying that her primary submission was that the journeys between the NHS hospitals on the one hand and the private hospitals on the other were essentially a detour on a "home to work commute"; but if

that was not correct, then her secondary submission was that they were disqualified from deductibility in their own right, by analogy with the commuting principle, as being journeys between a "non-business" location and a "business base". Essentially she was arguing that the travel expenses were incurred not for the purposes of the Appellant's business, but for the purpose of getting him to and from the places where he carried on his business.

Discussion

Introduction

62. It is quite clear that the only statutory test we are asked to apply is the "wholly and exclusively" test set out in section 74 ICTA and section 34 ITTOIA. The principles to be derived from the case law authorities are an aid to interpretation of those sections but cannot override them. Insofar as the case law authorities lay down principles to be followed when applying the legislation to the facts of any particular case or class of cases, we are however bound by them. We must not forget, however, that any consideration of the authorities must be coloured by reference to the facts being considered in each case.

63. In the light of *Mallalieu*, it is clear we are required to determine the Appellant's object(s) in making any particular journey. If we find there was an object which was not exclusively to serve the purposes of his profession but also to serve some other purpose, then we must disallow the expenses incurred in making that journey. In considering the object, we must keep clearly in mind that a journey can have effects (even inherent and totally predictable ones) that were outside the original motive for making the journey (see Lord Brightman's medical consultant example at [48] above); on the other hand, we must also keep in mind that there may be an inescapable unconscious non-business object "hiding behind" the conscious motive (as was the case in *Mallalieu*), which will result in the disqualification of the relevant travel from relief.

64. No specific evidence was put before us as to the Appellant's actual motive or object in making any of the journeys, beyond his assertion that the travel was all wholly and exclusively for the purposes of his business, which was based at his home. We were left to infer the object from that assertion and the undisputed facts.

65. The object for each journey needs to be considered individually. However, where journeys are logically linked to each other then the factors that link them may well indicate a total or partial shared object for all of them (e.g. traditional commuting – see *Newsom*).

66. Patterns of travel whose sole or partial object is to enable a taxpayer to “live away from his work” (per Romer LJ in *Newsom*) will fail the “wholly and exclusively” test and will therefore be non-deductible under the “commuting principle”.

67. There will not generally be doubt about where a taxpayer lives, but what is the place of a taxpayer’s work for these purposes?

68. In 1970, Brightman J was able to paint a simple picture in *Horton*:

> "In the majority of cases a self-employed person has what can properly be described as his place of business or base of operations. In the case of the medical practitioner, it is his surgery or consulting rooms; in the case of the shopkeeper it is his shop; in the case of the barrister it is his chambers, and so on."

69. In each of *Newsom, Horton, Sargent and Jackman* the taxpayer was found to have a single "business base" and that was where he worked for the purposes of the commuting principle.

70. In *Horton*, the taxpayer's single business base was at his home. Thus he did not live away from his work and the commuting principle had no application. All his business travel was deductible. In the other three cases, the business base was away from the taxpayer's home and therefore in each case the commuting principle applied to deny a deduction for the travel between the home and the business base.

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

72. As *Horton* is the only case we were referred to in which the taxpayer has succeeded in achieving a deduction for travel expenses to and from his home, and is the case which the Appellant seeks primarily to rely on, it requires closer examination.

A closer examination of Horton

73. What were the decisive features in *Horton*? Mr Howard argues they were that:

> (1) Mr Horton held himself out as trading from his home address and he negotiated and entered into his contracts there. The Appellant, he says, is in a similar position. He holds himself out as practising from his home address, to his patients, the insurance companies and his professional body; the formation of his contracts is "elusive" in its location and involves little or no negotiation and therefore as a factor carries little weight in this case.
>
> (2) Mr Horton kept his tools (the essential equipment for his business) at his home. The Appellant does the same with his medical instruments.

(3) Mr Horton kept his books and records at his home. The Appellant does the same, both with his business records and his clinical records.

74. In addition, Mr Howard points to the fact that the Appellant carries out significant administrative and professional work at his home.

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

76. However we consider that Mr Howard's analysis misses an important point. Denning LJ held that Mr Horton's home was:

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

Salmon LJ held that Mr Horton's home was:

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

Stamp LJ held that Mr Horton had:

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

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

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

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

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

79. Why did the Court of Appeal not find that the building sites at which Mr Horton worked amounted to additional places of business? It was because of the lack of any fixed or regular place at which Mr Horton actually plied his trade. They were effectively holding that Mr Horton was itinerant (though only Stamp LJ used that word). In the judgment of Brightman J in the High Court (whose decision was confirmed by the Court of Appeal) a little more analysis was provided:

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

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

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

The application of Horton in the present case

81. The question then naturally follows – should this Appellant be treated in the same way as Mr Horton?

82. There are some important differences between this Appellant's case and that of Mr Horton.

83. Unlike Mr Horton, he has had a pattern of regular and predictable attendance at specific locations other than his home in order to perform significant professional functions as a clinician. He has negotiated an entitlement to avail himself of the facilities at those locations on a regular basis for the purposes of his business. His presence at St Antony's and Parkside was undoubtedly "temporary and transient" in the sense that he has only occupied consulting rooms or attended on ward rounds for comparatively short periods of time and without having any permanent base – he has never had a permanent office at either hospital with his "name on the door", so to speak. However his attendance at both locations has involved significant performance of professional functions of his clinical work (consulting with and treating patients) and has followed a pattern which, although it has changed from time to time, has been generally fixed and predictable. It is this pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor which, in our view, constitutes both Parkside and Saint Antony's as "places of business" from which he has been carrying on his profession throughout and accordingly negates any

suggestion that his profession is "itinerant" (or entirely "home based") within the ratio of *Horton* as properly understood.

84. For these reasons, we consider that this Appellant falls outside the ratio of *Horton*.

The application of general principles to the present case – travel to and from home

85. But that is not the end of the argument. It may be that, by the application of the general principles emerging from the cases, the Appellant's travel between his home and Parkside/St Antony's will still be deductible.

86. In general (where his home is not involved) it is clear that when a taxpayer travels between different places at which he carries on his business the cost of that travel will be deductible. Romer LJ in *Newsom* referred to the "man who possesses two separate places of business and, for the furtherance and in the course of his business activities, has to travel from one to another", and by way of illustration Somervell LJ in that case gave the following example:

> "A professional man, say a solicitor, has two places of business, one at Reading and one in London. He normally sees clients and does his professional work at Reading up till noon and then comes to London. He may live at Reading or in London or at neither. I would have agreed with Mr Tucker that the journeys to and fro between Reading and London were deductible... He is carrying on one profession partly in London and partly at Reading."

87. But there is no guidance whatsoever in the decided cases on the application of the principle in *Mallalieu* if one of those places of business is the taxpayer's home. Clearly there is no absolute bar on deductibility of travel to and from home, or *Horton* would have been decided differently. But should a deduction be allowed in any situation falling outside the strict ratio of *Horton* as we have found it to be?

88. First, we consider it self-evident that if the activities of a taxpayer at his home are insufficient to constitute it as a place of business, his travel between his home and his place or places of business cannot be deductible. So were the activities of this Appellant sufficient to constitute his home as a place of business?

89. In *Newsom*, the Court of Appeal were primarily concerned with establishing where Mr Newsom's "business base" was, and their comments about his activities at home must be read in that light. But the essence of their approach was to examine whether there was any particular business reason why Mr Newsom did his work at home rather than at his chambers.

90. Somervell LJ said that Mr Newsom's position was different from the Reading/London solicitor, because Whipsnade as a locality had nothing to do with Mr Newsom's practice. He could have made his home anywhere else and "everything would have gone on in precisely the same way".

91. Romer LJ's approach was similar (if a little more colourful):

> "The Appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there. It seems to me accordingly that it is almost impossible to suggest that when the Appellant travels to Whipsnade in the evenings, or at week-ends, he does so for the purpose of enabling him "to carry on and earn profits in his" profession let alone that he does so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London."

92. In our view, however, there are important differences between the situation of Mr Newsom and that of the Appellant. Whilst Mr Newsom would have been perfectly able to do all his professional work at his chambers in London, the Appellant would certainly not be able to do all his professional work at Parkside and/or St Antony's. His private practice required an office (for research, thinking, obtaining collateral histories, maintaining his clinical and business records and running his administration) and he had no office available to him at Parkside or St Antony's. No suggestion was made that he should have been able to use his NHS office at St Helier's to deal with all his private practice office work, and in any event that was not how he worked. We consider that unlike Mr Newsom the Appellant did indeed have a place of business at his home, where he carried out part of the professional work necessary to his overall professional practice as well as the majority of the administration work related to it. For sound business reasons, the way his private practice was organised required that he carry out a significant amount of professional and administration work in his office at home and that distinguishes it from Mr Newsom's study in Whipsnade.

93. As we find the Appellant does have a place of business at home, he does not fail the test mentioned at [88] above. But in our view that does not necessarily mean that his travel expenses to and from his home are deductible. The fact remains that the statutory test, when interpreted in line with *Mallalieu*, sets a very high bar for deductibility of travel involving a taxpayer's home. The only reported case of the higher courts in which this bar has been cleared is *Horton*, and we consider the present case falls short of *Horton* in the important respects we have outlined at [83] above.

94. We find that the Appellant must have a mixed object in his general pattern of travelling between his home and his places of business at Parkside/St Antony's. Part of his object in making those journeys must, inescapably in our view, be in order to maintain a private place of residence which is geographically separate from the two hospitals. It follows that even though we find he has a place of business also at his home, his travel between his home and those two locations cannot be deductible, on the basis of the reasoning in *Mallalieu*.

Application of general principles to the present case – travel between NHS employment locations and Parkside/St Antony's

95. Clearly the "commuting principle" has no application in relation to this travel and matters are therefore somewhat less complicated. The only question is whether, on general principles, the regular travel undertaken by the Appellant between his NHS places of employment and Parkside/St Antony's satisfies the "wholly and exclusively" test.

96. We are here concerned with the normal costs of travel to get to and from places where the Appellant carries on his business. In *Newsom*, Romer LJ said:

> "Mr Newsom, in a letter to the Inspector of Taxes…..conceded that 'a man's profession is not exercised until he arrives at the place at which it is carried on'. In my judgment this proposition is, in general, true."

We consider this passage highlights the important distinction between travelling in the course of a business and travelling to get to the place where the business is carried on. In the case of the Appellant's travel between his places of NHS employment and Parkside/St Antony's, we consider the object of the travel is to put the Appellant into a position where he can carry on his business away from his place of employment; the travel is not an integral part of the business itself.

97. We therefore find that the travel between St Heliers/Nelson on the one hand and Parkside/St Antony's on the other is not deductible.

Application of general principles to the present case – non-routine journeys to meet specific patient needs

98. Part of the Appellant's professional responsibility is to be generally available, outside of his normal working routine, for specific visits to patients whenever it is clinically necessary.

99. Where those callouts involve travel to Parkside or St Antony's, because they are locations at which the Appellant carries on his business, the travel is in our view not deductible, on the basis that its object is to put the Appellant into a position to start carrying on his business at one of his regular places of business.

100. On the other hand, where the Appellant is visiting patients at their homes or at some other care facility (i.e. not at one of his places of business), all travel to and from such patient callouts is an integral part of his professional activities and should be deductible. There is no element of travelling to get to an established "place of business". This applies whether he is at Parkside/St Antony's, at an NHS employment location, at home, on holiday or anywhere else when he starts his journey. The journey to the patient and back will generally share the sole common motive of discharging his professional responsibility to that patient, unless there are exceptional factors pointing to some other non-business purpose.

Summary and conclusion

101. We consider that the Appellant has places of business at Parkside, St Antony's and his home (see [83] and [92]).

102. As the Appellant has other places of business apart from his home, his travel between home and those other places of business falls outside the ratio of *Horton* (see [84]).

103. Although the Appellant's travel between his home (on the one hand) and Parkside/St Antony's (on the other) is between places of business, nonetheless on general principles in the light of *Mallalieu* no deduction can be allowed in relation to that travel (see [94]). Therefore the appeal in relation to item 5 in the table at [21] above must be dismissed.

104. The Appellant's travel between his places of employment with the NHS on the one hand and Parkside/St Antony's on the other is undertaken in order to get the Appellant to and from his place of business and not in the course of carrying on his business (see [96]). As such, no deduction can be allowed in respect of it and therefore the appeal in relation to item 3 in the table at [21] above must be dismissed.

105. So far as travel falling within item 8 of the table at [21] above is concerned, this will generally be deductible in the absence of some specific non-business object or motive in any particular case (see [99]).

106. The parties have requested a decision in principle and accordingly we grant liberty to either party to apply for a final decision in relation to any matter which it proves impossible for them to agree in the light of this decision in principle.

107. 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.

KEVIN POOLE
TRIBUNAL JUDGE

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