TC02957

Appeal number: TC/2013/04842

INCOME TAX — closure notices disallowing bulk of expenses claimed — whether further expenses allowable — no — closure notices upheld and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KINGSLEY OKEKE **Appellant**

- and –

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

TRIBUNAL: JUDGE COLIN BISHOPP
MR DAVID BATTEN

Sitting in public in London on 5 September 2013

The appellant appeared in person

Ms Karen Weare, presenting officer, for the Respondents

DECISION

1. The appellant, Mr Kingsley Okeke, is a nurse. During the period with which we are concerned, namely the tax years 2003-04 to 2008-09 inclusive and 2010-11, he has had a number of contracts of employment. It seems that most, if not all, have been of a part-time nature; some were for short periods only. Typically, Mr Okeke has had four or more employments in any tax year. He has not worked as a self-employed person during the relevant time. He has also been a student at two universities, undertaking courses which, we understand, are aimed at enhancing or maintaining his nursing qualifications.

2. Mr Okeke, who represented himself at the hearing of his appeal, told us that his contracts of employment fell into one of two basic categories. In one, he was engaged to work at a hospital or residential care home, commonly undertaking shifts to fulfil the hospital's or care home's needs as they arose. In these cases he attended the hospital or care home, and was required to work only at those premises. In the other, he attended patients in their own homes, travelling by car from his home or from the university, depending on his studies, to the first patient's home, then to the other patients' homes in turn, before driving home or to the university.

3. In his tax returns for the relevant years Mr Okeke claimed deductions for various expenses he said he had incurred during the course of his several employments and which had not been reimbursed to him by the employers. They were for travelling and subsistence expenses, for the cost of acquiring and laundering his working clothes, for the use of a room at his home as an office, for telephone charges, for accountancy fees, for professional subscriptions and for university fees. Enquiries were opened into each of the relevant returns in accordance with section 9A of the Taxes Management Act 1970 ("TMA") and completed when closure notices were issued in February and March 2012, in accordance with section 28A of TMA. The effect of the closure notices was to amend the returns by, in essence, reducing the allowable expenses to relatively small sums, much less than Mr Okeke had claimed. He has now appealed to this tribunal against the closure notices. He challenges the extent of the reductions HMRC have effected.

4. Although the claims were compiled with the assistance of tax advisers, we are bound to say they are somewhat unstructured. They were also, in many if not most respects, unsupported by evidence; the advisers explained that as the claims related to periods some years in the past Mr Okeke had not retained the receipts and other supporting documentation relevant to his claims. Most of the returns were submitted late, some very late, but nothing turns on that fact for present purposes. The claim for 2004-05 can be taken as an illustrative example; the employers and the figures differ for other years, but the pattern is in every case the same:

Employer	Remuneration	Expenses	
Nursing Home	5934	Travel	800
		Fees and subs	1500
		Other	400
		Total	2700
Nursing service	1329	Travel	800
		Fees and subs	1800
		Other	400
		Total	3000
Nursing Home	72	Travel	800
		Fees and subs	1500
		Other	400
		Total	2700
Nursing service	18766	Travel	800
		Fees and subs	1800
		Other	400
		Total	3000
Total remuneration	26101	Total expenses	11400
		Expenses claimed	7101

5. The calculation submitted explained that the claim had been limited to the extent of the remuneration in each employment, thus the amounts claimed for the second and third of the employments were limited to £1329 and £72 respectively. Although the base figures claimed were not itemised in the returns as submitted, the tax agents did provide some additional detail in correspondence. Nevertheless, the claims are not supported by precise calculations; they are simply estimates.

6. The closure notices and the reasons for reduction or rejection of the claims, too, were similar in every case. The principal legislative provision relied on by HMRC was section 336 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), which is entitled "Deductions for expenses: the general rule". It is in these terms:

> "(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 holder of the employment, and
>
> (b the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.

> (2) The following provisions of this Chapter contain additional rules allowing deductions for particular kinds of expenses and rules preventing particular kinds of deductions.
>
> (3) No deduction is allowed under this section for an amount that is deductible under sections 337 to 342 (travel expenses)."

7. The rule was previously to be found in section 198(1) of the Income and Corporation Taxes Act 1988 and it reproduces what has been the law for a very long time. In the context of travelling expenses, with which it is convenient to begin, it is well illustrated, relevantly to this case, by the decision of the House of Lords in *Ricketts v Colquhoun* [1926] AC 1. The taxpayer in that case was a barrister who lived and had his chambers in London. He was appointed Recorder of Portsmouth, and in order to perform his duties as recorder was required to sit in Portsmouth. He claimed the cost of travel between London and Portsmouth and certain hotel expenses as a deduction for tax purposes against his salary as recorder; but the claim was disallowed because they were not expenses incurred by him in performing the duties, but in putting himself in a position to perform them. Travelling expenses necessarily incurred in actually performing the work, by contrast, are allowable, as section 337(1) of ITEPA makes clear:

> "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 necessarily incurred on travelling in the performance of the duties of the employment."

8. Mr Okeke's claims for travelling expenses, as he explained them to us, include the cost of travelling from his home or the university to the hospital or care home at which he is to work, and for the return journey. It is perfectly clear from what we have said that these expenses are not allowable against his income for tax purposes as they are not incurred in performing the duties of his employment, but in putting Mr Okeke in a position to perform them. They are, in short, ordinary commuting expenses which are never allowable against tax. On the other hand the cost to Mr Okeke of travelling from the home of one patient to the home of another in order to undertake the home visits he described are allowable, as section 337 makes clear (and as HMRC have already accepted in principle). Whether he can claim in addition the cost of travelling from his home or university to the first patient's home, and from the last patient's home to his home or the university, depends upon the nature of his contract: if Mr Okeke is obliged to visit the employer's premises at the beginning or end of his shift travel between those premises and Mr Okeke's home or the university would again not be allowable. Only the cost of travel necessarily incurred in performing the work, which includes travel from an ordinary working base to a temporary workplace, may legitimately be claimed.

9. We should add two points in respect of the claimed travelling expenses. First, Mr Okeke must justify the extent of those expenses he has incurred which are allowable. It is for him to make a claim supported by reliable evidence; a tax deduction cannot be given on assertion alone. Hitherto he has not provided any evidence: there was nothing before HMRC, and there is nothing before us, which

shows that Mr Okeke was in fact required to travel between the homes of patients or, if he was so required, which demonstrates the extent to which travel expenses were incurred in discharging that requirement. All we had was his contention that typically he would travel about 15 miles, but that was no more than his estimate and he was in addition unable to tell us on how many occasions such travel had been required. Second, the claim, if justified in principle, must be confined to the cost of travel. Mr Okeke indicated to us that he had included items such as repairs to his car. Expenses of that kind could never be allowable as they have been incurred, not in performing the duties of his employment, but in providing Mr Okeke with a roadworthy vehicle.

10. Similar principles govern the other claims Mr Okeke has made. A claim for subsistence may be made only when an employee has incurred expenditure he would not otherwise have incurred by reason of performing his duties. Mr Okeke's claim as he explained it to us, however, related merely to the cost of eating. There was nothing before us to indicate that he had incurred any additional expenditure, and HMRC were right to reject this element of the claim. Mr Okeke told us that he used a room at his home to keep records of his engagements but it does not seem to us that his doing so represented a necessary part of the performance of any of his duties. No doubt he was better able to keep track of where he should be at any given time, but again he was merely putting himself in a position to perform his duties, and not actually performing them. Likewise his use of his telephone, as we understand the matter, consisted in his receiving calls inviting him to undertake a shift or some other engagement, but did not relate to the performance of the duties themselves.

11. HMRC have accepted, in principle, that Mr Okeke may legitimately claim some expenses in respect of purchasing and laundering the clothing he is required to wear when working, on the footing that some special clothing is required by a nurse and that hygiene demands more frequent than usual laundering, and they have proposed the standard allowances agreed with representative bodies of the nursing profession. Those are, as HMRC accept, guideline figures which may be varied in the individual case where good reason is shown. Mr Okeke may accept the standard figures, or he may seek to justify more; but in the latter case he will need to produce evidence of the expenditure he has incurred and of his need to incur it which, to date, he has not done. Similarly, HMRC have accepted as an allowable expense the subscriptions paid by Mr Okeke to the professional bodies of which he is a member, and we understand there is no further issue in relation to those elements of the claim.

12. The claim in respect of accountancy fees was withdrawn in correspondence between the tax advisers and HMRC. In our view that claim could never succeed; the fees were incurred in dealing with Mr Okeke's tax liabilities, and had nothing to do with the performance of his employment duties.

13. We are left with the claim for university fees. Mr Okeke's case is that he needs to obtain qualifications, and maintain his existing qualifications, in order to remain eligible to work as a nurse and thus secure engagements. We are quite willing to accept that proposition. It does not, however, render the tuition and other fees charged by the universities allowable against tax; the fees are, again,

paid in order that Mr Okeke may put himself in a position to obtain or perform the work of a nurse, but they cannot be regarded as an expense of performing that work.

14. It is possible, as we have indicated, that Mr Okeke does have allowable claims beyond those already accepted by HMRC. It is, however, well-established that it is for a taxpayer seeking an allowance against his income to produce the evidence supporting his claim, for the obvious reason that it is the taxpayer who has, or should have, that evidence. The difficulty Mr Okeke faces is that he has produced no evidence. We had a large amount of documentation relating to his expenditure on various items which could never form the basis of an allowable claim, such as his mortgage and his council tax, but almost nothing in respect of those claims which, if supported by reliable evidence, might be allowable.

15. We are satisfied that HMRC were correct to disallow Mr Okeke's claims, save to the limited extent that we have identified, and that the closure notices must be upheld. The appeal is therefore dismissed. For the future, Mr Okeke would be well advised to keep documentary evidence of the expenses he necessarily incurs in the performance of his duties. We add the hope that if he is able to produce acceptable evidence of any such expenses he has incurred in the past HMRC will, despite this decision, allow his claims subject of course to any applicable time limits.

16. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply, pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for permission to appeal against it on a point of law to the Upper Tribunal. 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.

COLIN BISHOPP

TRIBUNAL JUDGE

RELEASE DATE: 15 October 2013