TC04979

Appeal Numbers:
TC/2014/06034 (Mr Johnstone v HMRC)
TC/2014/05664 (Mr Horton v HMRC)
TC/2014/01827 (Mr Wade v HMRC)
TC/2014/01825 (Mr Craig v HMRC)
TC/2014/01826 (Mr Slater v HMRC)

INCOME TAX – Moneys paid as accommodation allowances - Whether earnings? - Section 62 ITEPA 2003 - Yes - Whether exempt from charge under section 99 ITEPA? - No - Whether incurred wholly exclusively and necessarily in the performance of the duties of employment? - Section 336 ITEPA 2003 - No - Appeals against Closure Notices dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR ALEXANDER J JOHNSTONE **Appellants**
MR CHARLES JOHN HORTON
MR DARREN WADE
MR GEORGE CRAIG
MR LAURENCE SLATER

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS SHAMEEM AKHTAR

Sitting in public at Eastgate House, Newport Road, Cardiff on 13 October 2015 (with Appellants' closing submissions in writing on 11 November 2015)

Mr Martyn F Arthur of Martyn F Arthur Limited for the Appellants

Mr Matthew Mason and Mrs Linda McGuigan, Officers of HMRC, for the Respondents

DECISION

Introduction

1. The appellants are or were members of the team which, pursuant to a contract between their employer and the Maritime Coastguard Agency (MCA), maintains and operates a Search And Rescue (SAR) helicopter from Stornoway Airport on the Isle of Lewis in the Outer Hebrides. The team carries out various kinds of mountain, maritime and coastal rescues. The appellants undertook differing roles, both in terms of operating the helicopter whilst airborne, and in terms of maintaining and servicing it on the ground.

2. Their appeals were joined pursuant to an Order made on 5 February 2015. Each appeal principally concerns the tax treatment of sums of money described as accommodation allowances paid to each of them by their former and present employers, CHC Scotia Ltd. and Bristow Helicopters.

3. In broad terms, each appellant had claimed approximately £10,000 per year by way of accommodation allowances. The earliest claims were made in relation to the tax year 2008/09 and were for each successive year up to and including 2012/13.

4. The appellants made claims for overpayment relief under Schedule 1AB of the Taxes Management Act 1970 (TMA). HMRC did not contend that any of these claims were out of time.

5. Closure Notices were issued in respect of each appellant under sections 28A(1) & (2) of TMA: 27 February 2014 (Messrs Craig, Slater, and Wade); 16 April 2014 (Mr Johnstone); 10 July 2014 (Mr Horton). Pursuant to section 29(4) of TMA, further assessments were made against Mr Horton on 12 March 2014; and Mr Johnstone on 16 April 2014. A further assessment was made against Mr Wade, pursuant to section 29(5) TMA on 27 February 2014.

6. The appellants' Grounds of Appeal in their respective Notices of Appeal were extremely brief. It was said that HMRC's decision was unsustainable because HMRC had not correctly applied the legislation regarding the treatment of payments to employees for accommodation expenses "when the nature of their work requires them to reside in a particular place".

IPETA section 62

7. The first issue is whether the moneys described as accommodation allowances paid to each appellant by their employer are taxable as earnings within the meaning of section 62 of the *Income Tax (Earnings and Pensions) Act 2003* ('ITEPA').

8. It was confirmed by Mr Arthur, who appeared on behalf of all the appellants, that this issue remained in dispute.

9. HMRC's position, set out in correspondence from the very outset, was that there

is no question that these payments fall to be treated as earnings under section 62 ITEPA.

10. HMRC relied on its Employment Income Manual (EIM) 11307 ('Accommodation: rent allowance or extra salary') which reads as follows:

> "Section 62 ITEPA 2003
>
> It is common for an employee to:
>
> Own the property he lives in, or
>
> Rent the property from a third party, not his employer.
>
> In both cases, the employer may pay the employee extra salary or a rent allowance to help with the accommodation costs. This extra salary or rent allowance will count as earnings under section 62 ITEPA ... There will be no further earnings charge under Part 3 Chapter 5 ITEPA 2003 (living accommodation benefit)"

ITEPA section 99

11. The appellants claim exemption from charge by virtue of section 99 ITEPA. That section is part of Chapter 5 of ITEPA, which is headed: 'Taxable Benefits: Living Accommodation'.

12. Section 97 ('Living accommodation to which this Chapter applies') states that the chapter applies to living accommodation provided for an employee 'by reason of the employment'.

13. Section 99 is an exception to the general tax treatment of living accommodation under that Chapter. Insofar as material, section 99 reads:

> **Accommodation provided for performance of duties**
>
> (1) This Chapter does not apply to living accommodation provided for an employee if it is necessary for the proper performance of the employee's duties that the employee should reside in it.
>
> (2) This Chapter does not apply to living accommodation provided for an employee if—
>
> (a) It is provided for the better performance of the duties of the employment, and
>
> (b) The employment is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees.

14. HMRC's position is that section 99 does not engage in these appeals, on the basis that section 99 applies only to the situation where an employer provides living accommodation (as opposed to extra salary or rent allowance), the benefit of which is charged to tax under section 63 ITEPA (and not section 62).

ITEPA section 336

15. All the appellants (except for Mr Horton) also claim under section 336 of ITEPA. However, following discussion with the tribunal, we understood HMRC's position to be that we should consider Mr Horton as also making a claim under section 336, and that, if the other appeals were allowed under section 336, then Mr Horton's appeal should be treated similarly. In our view, seemed to be a pragmatic and sensible concession on the part of HMRC.

16. Section 336 ITEPA reads:

> **Deductions for expenses: the general rule**
>
> (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.

17. Put shortly, the appellants' positions are that the nature of their work required them to reside in a particular place, namely within 15 minutes drive of the base at Stornoway Airport.

18. HMRC accepted that each Appellant incurred an accommodation expense, but did not accept that expense was incurred "wholly, exclusively and necessarily in the performance of the duties of the employment". HMRC argued that the housing was dual purpose, and that the expense allows each appellant to be in a position to carry out the duties of employment, but does not actually cover the performance of the duties.

The terms of employment

19. In their witness statements (which, in very large measure, were materially identical) the appellants each referred to their terms of employment, and sought to place heavy reliance upon them.

20. Unfortunately, no such terms and conditions were before the tribunal. However, following discussion, we were provided with a redacted copy of a contract of employment, dated 18 December 2007. It is headed 'Terms and Conditions of Employment'. Although (i) the employer is a different company - CHC Scotia Limited (and not Bristow Helicopters); (ii) the employment is for a helicopter SAR pilot (and none of the present appellants occupies that role); and (iii) the contract predates the period in dispute in this case, we were given to understand, both by Mr Arthur and by HMRC's representatives, that this document could be regarded as an accurate template for the terms and conditions of each of the appellants.

21. In so far as material, those terms and conditions read as follows:

"Remuneration

Your basic salary will be [ ] per annum, plus an Accommodation Allowance of £10,000 per annum, payable monthly in arrears

Place of Work

Your normal place of work is recognised as being Stornoway. In addition, you may be required to work at any of the company's other offices/bases in the UK and overseas on a temporary or permanent basis.

Employee Duties

You are required to devote to your full time, attention and abilities to your duties during working hours and to act in the best interests of the company at all time.

Job Flexibility and Shortage of Work

It is an express condition of employment that you are prepared to transfer to alternative work locations or duties within your place of work. This flexibility is essential as the type and volume of work is always subject to change and it allows the company to operate efficiently and effectively."

22. Each appellant also sought to rely on the Local Base Instructions, issued by the Chief Pilot, dated 1 January 2009. These read:

"General Instructions

45 Minutes Readiness permitted residence

In normal weather, SAR crews may return home or to their hotel during the period of 45 minutes readiness provided that the following conditions can be met:

(a) The place of residence is within 15 minutes driving time Stornoway airport;

(b) The forecast weather does not include warnings of heavy drifting snow;

(c) The expected road conditions are not likely to increase the driving time to more than 15 minutes.

If any of the above conditions cannot be met, the Duty Commander must ensure that the crew members concerned arrange to stay closer to the airfield."

23. We do not know what Local Base Instructions were in force before 1 January 2009.

24. These Local Base Instructions apparently reflect SAR flight regulations, which include the following:

"SAR readiness.

SAR readiness states will be defined by the contracting agency and outlined in local instructions.

> In general, readiness states will fall into two categories: periods of 15 minutes notice and 45 minutes notice to launch on receipt of a formal request from the contracting agency."

25. A Local Staff Instruction was issued in February 2012 on behalf of the Chief Pilot in relation to the Stornoway "rest rooms". The purpose of that instruction was to notify the recipients that the rest rooms in the Stornoway office block did not meet certain company health and safety requirements. There were rooms provided in the office block with beds to allow for crew rest. However, it was said:

> "Background
>
> ... there is an issue over the ability of an occupant of those rooms to escape them in the event of a fire. They are therefore rest rooms and not bedrooms ....
>
> Action to be taken
>
> Nobody is permitted to sleep on the base overnight on their own.
>
> The rest rooms may be used for sleeping providing there is someone else on the base capable of raising an alarm in the event of a fire."

26. We were not provided with any Local Staff Instructions which antedated February 2012.

The oral evidence

Mr Johnstone

27. Mr Johnstone was unable to attend the hearing. We considered his witness statement, in the form of a letter, dated 6 August 2015.

28. He had been employed as an engineer. He gave his address as Stornoway. He stated as follows:

> "This position is an emergency service which requires a response time of 15 minutes to launch the aircraft during day hours (8am -10pm) and 45 minutes from 10pm to 8am when staff would be on a pager and living within 15 minutes driving time of the base to satisfy that response requirement. in view of these requirements [the employers] paid accommodation allowance to meet the proximity required to my workplace."

Mr Horton

29. Mr Horton was previously a time-served engineer in the RAF. He has lived in Stornoway since 2008. He has a house bought with the assistance of a mortgage, where he lives with his wife and teenage son. It is 3-4 miles from the base, being a 6 minute or so journey away. He bought it after he got the job at the base, and did so because he was told that he was required him to live within 15 minutes of work. He was not aware of anyone living more than 15 minutes from work.

30. When he was on-duty, but not on the base, he would be at home, and ready to be called out. Nonetheless, he would go to bed and sleep if he was tired.

Mr Wade

31. Mr Wade is a winch operator. Following service as an aircrewman in the Royal Navy, he has been at the base since 2007. He works 24-hour shifts, usually from 1pm to 1pm on the following day. He would eat a meal before coming on shift at a local hotel. Between 10pm and 8am he is at 45 minutes notice. For the remainder of his shift, he is at 15 minutes notice. He works a shift pattern of 13 days on (in which he works three shifts followed by a day's rest) and 11 days off.

32. He was living in rented accommodation in Stornoway. It was a furnished house, held on a monthly lease. He was a tenant and not a lodger. On his 11 days off, he would go home to Gateshead, and so would not be on the island at all, but was still paying rent for his house.

33. He carries a bleeper when he is on duty and at home. It would take him about five minutes to drive from his home to the base. He never really thought about living in a hotel and paying by the day. Given the amount of equipment which he had, it was more convenient for him to live in a house. He would generally leave his flying equipment at the base.

34. He had never considered living more than 15 minutes away. He lived where he did though for ease: it was a fairly busy base although he was not called every night. Living nearer to the base did give him an extra few minutes to plan sorties. He had understood the deal to be that he had to live within 15 minutes of the base.

35. If coming back from a late job, for example at 5am, he would stay at the base rather than returning home.

36. On rare occasions, people do stay at the base, and use the downstairs rooms, rather than return home.

Mr Craig

37. Mr Craig is a senior licensed helicopter engineer. During the period in question, he lived with his wife and stepson in a house about 7 miles from the base, which was about 9 minutes from it. He had bought that house, and the accommodation allowance which he received went towards the mortgage payments.

38. Before taking the job, he had spoken to the chief engineer, who had advised him that it was mandatory to live within 15 minutes of the base. When he first went to Stornoway, he already knew that the bedrooms at the base were not fit for purpose and that no-one should stay in them overnight. He was aware of some negotiations between 'Health and Safety' and 'management' to try to get the rooms fit for purpose.

39. He carried a bleeper when at home, although he could also be phoned by the chief pilot. If he was phoned, then there would be a conversation about flight

requirements, for instance the fuel status of the helicopter, the weather, and wind speed, so as to determine whether the aircraft should be moved for take-off. Once the aircraft was in the air, he would remain at the base, even if overnight.

40. His shift pattern was 2 weeks on and 2 weeks off, being from 1pm to 10pm the following day. When he is at home and on duty he regards that as the company's time and not his own. He would be in a state of readiness waiting for the phone to ring, although he would sometimes sleep during rest periods. He drew our attention to Airworthiness Notice 47 which was important legislation which made it clear that rest had to be proper rest so that one's ability to carry out maintenance is not impaired.

41. He had some work equipment at home.

Mr Slater

42. Mr Slater was a winchman (being the person lowered on the winch from the helicopter) and winch operator.

43. He has now left Stornoway, but, when he was there, he lived 4.6 miles from the base, which was a 6 to 7 minute journey. He lived in a house which he had bought, together with his wife. He was told that he had to buy a house within 15 minutes of the airfield. He was not otherwise told what to buy. He said that the main purpose of his property was for him to work, although he accepted that he had to have somewhere to live.

44. When he was off-base but on duty, he would be at home, but still in 'a mental state of readiness'. At night, he would go to bed and sleep, but would answer the call if it came. If the call came, he would have a brief review with the captain before 'jumping into the car'. He would speak for example about weather conditions, the location of the incident, and whether this was within range of the helicopter. He did not have maps in the house, but he did regard this initial briefing or discussion, before he left home, as 'not incidental, but as important preparatory work'. There would be another briefing at the base when he arrived, which would involve both pilots and both crewmen, and which would last about 5 minutes.

45. People would sleep at the base, but, when this happened, one person would sleep, and another would 'firewatch' so as to meet the Health and Safety concerns set out in the Local Staff Instructions.

46. The evidence given by all four appellants who appeared before us was given in a forthright and candid way. We have no difficulty in accepting that evidence as truthful.

The Base

47. Doing our best we can on the evidence before us, and without the benefit of any photographs or plans, we find as follows:

(1) The base at Stornoway Airport has a building which is used for the officers and crew;

(2) There is an upstairs 'ready room', which has a TV, some chairs to relax in and two couches;

(3) There are also some kitchen facilities;

(4) There are some small bedrooms downstairs. They have beds in them, but the beds are not made up. There are just mattresses.

48. A general, and consistent, pattern emerged from the oral evidence before us. We find as follows:

(1) The appellants were each paid accommodation allowances, but those sums were not 'earmarked' for accommodation. Each appellant could and did spend those sums as they liked;

(2) The appellants are required to work long shifts, which can extend overnight;

(3) Whilst on call, they are permitted to be off-base and at home, either in a state of readiness, or resting;

(4) They generally do not sleep at the base overnight, due to the health and safety concerns, and the standard of the bedrooms;

(5) However, it is nonetheless possible to sleep at the base, whether upstairs in the ready room, or downstairs in the bedrooms, so long as (in the latter case) there is a 'firewatch', in accordance with the Local Staff Instruction;

(6) All the appellants live within 15 minutes travelling time of the base;

(7) At least some of the Appellants were told, or given clearly to understand, that it was necessary for them to live within 15 minutes travelling time of the base. That is reflected in the Local Base Instructions;

(8) The common aim of all the Appellants is to get airborne as soon as they can, if called upon;

(9) When contacted at home, they begin their preparations immediately, and, by doing so, are able to fulfil the 45 minute readiness requirement;

(10) If they lived more than 15 minutes from the base, operational readiness, and the 45 minute requirement, would perhaps be compromised.

49. We also find that, whilst each of the appellants stated that their terms of employment provide that they must be at 15 minutes immediate readiness (whilst on the base) and 45 minutes readiness (when off the base) there is no such express term in the contract of employment.

50. We also find the following:

(1) The Isle of Lewis has approximately 20,000 inhabitants, or whom approximately 10,000 live in the town of Stornoway, which is the biggest settlement on the Isle;

(2) The total area of the Isle of Lewis is about 683 square miles;

(3) The airbase is located about 3 miles to the east of the centre of Stornoway;

(4) Taking an average speed of (say) 60 miles an hour, 15 minutes from the base gives a circle with a radius of 15 miles, and an area of about 707 square miles;

(5) The whole of the town of Stornoway falls (comfortably) within that circle, as well as the small settlements immediately around the airbase;

(6) Approximately half of the circle (eastwards) will be in the sea. A circle with a radius of 15 miles from the airport, landward, therefore covers about 350 square miles, or about half of the Isle.

The Law

51. We were referred to several reported decisions. We refer below to those which we regard as most useful.

52. In *Bolam (HM Inspector of Taxes) v Barlow* (1949) 31 TC 136, Mr Barlow, an employee of the water board, was required to live within a reasonable distance of his place of work. His duties continued after office hours at his home, where his employer had installed a phone. He claimed to deduct from his income tax assessment the excess cost of living near his work over the cost he would have incurred had he been free to choose accommodation elsewhere. The General Commissioners allowed his claim but Croom-Johnson J. allowed the appeal. He remarked that the taxpayer's real point was that he was not free to choose his place of residence, but went on to say:

> "I have the utmost difficulty in seeing that, in this particular case, it entitles the Respondent to say: "*I am paying more than I would otherwise pay if I had not got this job at all*", to which I suppose the answer is: "*Well, you must have known that when you applied for and obtained a job, and it does not follow that because you want to live in a particular way, therefore the additional expenses are wholly, exclusively or necessarily incurred in the performance of your duties*".

53. *Nagley v Spilsbury (HM Inspector of Taxes)* (1957) 37 TC 178 is similar. Mr Nagley was conscripted as a National Serviceman, and (having been, in civilian life, a clerk in a firm of chartered accountants) was posted to the Royal Army Pay Corps. He was allotted a civilian billet in lieu of barrack accommodation, since no Army accommodation was available, and he was paid a lodging allowance. He argued that his accommodation allowance should be an allowable deduction, on the basis that he was on call 24 hours a day in the same way as if he had been accommodated in barracks, and could be required to report for duty at any hour of the day or night. Wynn-Parry J. rejected that argument. The lodging allowance was not an amount wholly exclusively and necessarily incurred in the performance of his duties as a National Serviceman.

54. In *Langley and others v Appleby (Inspector of Taxes)* [1976] STC 368, the taxpayer was a police officer. He lived, free of rent and rates, in a succession of houses provided by the police authority. His terms of service required him to live in a

place approved by the chief constable. Refusal to live where directed would have resulted in dismissal from the police force. The Commissioners assessed his accommodation to tax on the grounds that the occupation of the premises by the taxpayer was not essential to the performance of his duties and that there was no express condition that he should occupy a particular house.

55. Fox J. (placing reliance on a passage from the speech of Lord Upjohn in *Northern Ireland Commissioner of Valuation v Fermanagh Protestant Board of Education* [1969] 3 AER 352 at p 359F-I, a case in which houses occupied by teachers were within the precincts of a school) held that the taxpayer had to show either:

> (1) That it was essential to the performance of his duties that he should occupy particular premises (*'that house and no other'*); or
>
> (2) That it was an express term of his employment that he should occupy particular premises and that by doing so he could better perform his duties to material degree.

56. In *Langley*, there was no evidence that it was essential for the performance of an officer's duties that he should live in a particular house. In the case of a sergeant who lived about 17 miles from his place of work, travelling to-and-fro by car (for which he received travel allowance) and using the house for police purposes in the sense of directing occupations from it, the judge remarked (at page 17 of the printed report):

> "There is nothing in these facts which establishes, or comes anywhere near establishing that it was essential for the officer to occupy the house which he did in order to perform the duties ... He could, it seems to me, have performed the duties if living elsewhere within a reasonable radius of the Police Station ... It seems to me that however widely one looks at the matter there are no grounds for saying that it was essential for an officer to live in any particular house to perform any relevant duties" - emphasis supplied.

57. In *Baird v Williams (HM Inspector of Taxes)* (1999) 71 TC 390, Mr Baird was the Clerk to the General Commissioners of Income Tax in Dorset. However, his home was in Malta. He owned a succession of properties in Dorset which he used both as an office and for residential purposes. He paid mortgage interest on money borrowed to purchase and improve the Dorset properties, and he sought to deduct the mortgage interest as money expended "wholly exclusively and necessarily" in the performance of his duties as a Clerk. Laddie J dismissed his appeal.

58. The Judge approved a passage from the judgment of Vaisey J. in *Lomax v Newton [1953]* 1 WLR 1123 at 1125, discussing the meaning of 'wholly exclusively and necessarily'. The expression was:

> "Notoriously rigid, narrow and restricted in its operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively, incurred in the performance of the relevant official duties ... An expenditure may be 'necessary' for the holder of an office without being necessary

> to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are, indeed, stringent and exacting. Compliance with each and every one of them is obligatory if the benefit of the rules to be claimed successfully."

59. More recently, in *HMRC v Healy* [2013] UKUT 0337 (TCC) the Upper Tribunal considered a claim by the appellant, a well-known professional actor, to deduct certain expenses relating to accommodation rented by him in London while appearing in 'Billy Elliott the Musical' there. The case raised an important point about the extent to which accommodation costs could properly be deductible for income tax purposes.

60. It was accepted that "wholly and exclusively" means that expenditure which serves both a business purpose and a private purpose cannot be allowed in full because such expenditure has a dual purpose. But the case law referred to by the Upper Tribunal establishes that where the business purpose predominates, and the personal element is merely incidental to the business purpose, then the expenditure can be held to satisfy the "wholly and exclusively" test.

61. The Upper Tribunal referred to *McClaren v Mumford (Inspector of Taxes)* (1996) 69 TC 173, in which Rimer J. considered whether expenditure incurred by a publican on residential accommodation above a pub was deductible or not. His tenancy agreement with the brewery required him to reside at the premises at all times. The Judge accepted (at p 185) HMRC's analysis that it was irrelevant that the taxpayer's motive in signing the tenancy agreement was to provide himself with a trade to earn his living, or that his expenditure was incurred in consequence of that signing. The private element of his expenditure was not incurred for the purpose of earning the receipts of the business, 'but served the non-business purpose of satisfying his ordinary business needs'.

62. The Upper Tribunal derived a number of principles (albeit in the different, but, in our view, analogous and persuasive, context) of section 34(1)(a) of the *Income Tax (Trading and Other Income) Act 2005*. One of these was that, in relation to accommodation costs, it will often be the case that, in the nature of things, one of the purposes of the taxpayer in incurring the expenditure will be their ordinary needs for warmth and shelter, and this can be the case even if it is a contractual requirement that the taxpayer reside in a property at all times: see Para. 66(6). Ultimately the matter was remitted to the FtT which concluded that there was a dual purpose, and dismissed the appeal: [2015] UKFTT 0233 (TC) at Para. [82]

Discussion and Conclusions

Section 62 ITEPA

63. Section 62 ITEPA explains what is meant by 'earnings'. It means any salary, wages, or fee, or any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth.

64. We conclude, without hesitation, that on the plain and ordinary reading of the legislation, the accommodation allowance paid to each of the appellants is properly to be regarded as earnings within the meaning of section 62 ITEPA.

65. We consider the contrary unarguable. The allowance is paid in relation to employment - that is, by an employer to an employee - and it is an 'incidental benefit' paid in money. We do not see any other interpretation which can be reasonably be placed on the accommodation allowances.

66. Although it had been asserted in correspondence that the moneys were 'earmarked' for accommodation, there was no evidence, in the case of any appellant, of the former or present employer exercising any control over the money, whether in terms of the property which any appellant chose to take, or whether the money was paid towards a mortgage, or by way or rent, or in terms of the amount actually spent. There was no evidence of any employer requiring sight (for instance) of mortgage statements or rent receipts so as to audit whether the accommodation allowance, even in part, was actually being spent on accommodation. On the contrary, the evidence was that the employees had complete control over the moneys paid as accommodation allowances, and what they did with it. Some chose to buy properties. Others chose to rent.

Section 99 ITEPA

67. We disagree agree with the appellants' submissions as to ITEPA section 99. We consider that section 99 can only be read intelligibly as referring to accommodation provided by an employer to an employee.

68. In none of the present appeals is the living accommodation provided by the employer to the employee. All the living accommodation in question was either bought, or rented on the private market.

69. We disagree with the argument that the circumstances of these appeals, and especially the condition of the bedrooms at the base, gave rise to 'a sufficient nexus' between the payments made and the requirement to take accommodation so as to bring the accommodation within section 63. In our view, that was an argument which was predicated on the false premise that the accommodation allowance was 'earmarked'. But, even if it were not, we nonetheless consider this argument to be artificial. In our view, it strains the statutory language beyond breaking point.

70. We disagree that the appropriate analysis is to equate the position of the appellants in this case with that of employees required to stay in accommodation supplied by the employer, or in respect of which the employer was paying rent directly to a third party landlord. It seems to us that analysis undermines the plain wording of section 99, and also undermines the clear statutory intent.

71. Accordingly then, in our view, there cannot be any exemption to charge under section 99 ITEPA.

Section 336 ITEPA

72. There is no express term in the contract of employment requiring residence within 15 minutes. This appears only in ancillary documents.

73. We acknowledge the local instructions, but we do not consider that any of the appellants, as employees, have shown that it was essential to the performance of their duties that any of them should occupy particular premises (*'that house and no other'*). None of the appellants was contractually required to live in the particular accommodation which they did.

74. On the contrary: it seems to us that this is a case in which it could reasonably be said that any of the appellants could have performed their duties if living elsewhere within a reasonable radius of the base.

75. Moreover, in the circumstances of these appeals, the 15 minute requirement (using that term without intending to afford it any contractual significance) does not seem to have operated as any genuine limit on any appellant's freedom to choose where they wanted to live. In practical terms, on any view, a significant part of the whole Isle of Lewis, and moreover the whole of the Isle's principal settlement (containing about half of its inhabitants) all lie within the 15 minute radius (and, in the case of Stornoway, comfortably within that radius).

76. It seems to us that this is a case which, akin to those discussed above, is one where the very nature of the job requires, in practical terms, and irrespective of any formal demand, residence near the base. It was not suggested to us by any appellant that, were it not for the 15 minute requirement, they would have chosen to live further away from the base, or indeed not to have taken up employment at all. None of them knew of anyone who did, in fact, live further from the base than 15 minutes.

77. Even if the appellants do perform some part of their duties at home (for example, in the case of Mr Wade, using maps and computers, and speaking to the captain on the phone about the mission) this does not in our view satisfy the test. No-one is required to live in a particular house.

78. We must also take into account the fact that sleeping accommodation - albeit extremely basic and far from comfortable - exists at the base, can in fact be used with a firewatch, and is in fact so used.

79. We do not consider that the occupation of any property by any of the appellants, on the evidence which we heard, could be said to be 'wholly exclusively and necessarily' for the purposes of their employment. As the courts have consistently pointed out, that is a high hurdle to overcome, and none of the appellants do so in this case. Even if there were, it is, at best, dual use, with the business purpose being ancillary. The appellants are all employed to work at the base, where the helicopter is, and the base is where they all do most of their work. In our view, being on call whilst at home, or undertaking ancillary tasks at home, do not predominate to such an extent that occupation for the purposes of warmth and shelter (a non-business use) could be said to be merely incidental. The houses accommodate them and their families, and are more comfortable and commodious than spending long shifts at the base.

80. We therefore conclude that no deduction from earnings is allowed for the accommodation allowances within the meaning and scope of section 336 of the 2003 Act. Both section 336(1)(a) and (b) must be satisfied. As to section 336(1)(a) we do not consider that the employee is obliged to incur and pay for accommodation as holder of the employment.

81. We also consider that the appellants fail to meet section 336(1)(b) insofar as the amounts are not incurred wholly exclusively and necessarily in the performance of the duties of their employment, even in the expanded sense (allowing for dual use) which we have discussed.

Decision

Mr Craig and Mr Slater

82. For the above reasons, the appeals of Mr Craig and Mr Slater against the Closure Notices for the years 2008/09, 2009/10, 2010/11, and 2011/12 are dismissed.

83. In relation to the appeals of Mr Craig and Mr Slater, this document contains full findings of fact and reasons for the decision. Any party in those appeals dissatisfied with the 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.

Mr Wade, Mr Johnstone and Mr Horton

84. For the above reasons, the appeal of Mr Wade against the Closure Notices for the years 2010/11 and 2011/12 is dismissed.

85. For the above reasons, the appeal of Mr Johnstone against the Closure Notice for the year 2011/12 is dismissed.

86. For the above reasons, the appeal of Mr Horton against the Closure Notice for the year 2012/13 is dismissed.

87. Discovery assessments under section 29(4) TMA were made against Mr Johnstone for the years 2008/9, 2009/10, and 2010/11, and against Mr Horton for the years 2008/9, 2009/10, 2010/11, and 2011/12.

88. A discovery assessment under section 29(5) TMA was made against Mr Wade for the year 2009/10.

89. Inaccuracy penalties have been imposed against Mr Johnstone and Mr Horton under Schedule 24 of the Finance Act 2007.

90. In relation to the discovery and inaccuracy aspects of the appeals by Mr Wade, Mr Johnstone and Mr Horton, we have decided, taking into account the absence of Mr Johnstone from the previous hearing, and also the overriding objective as set out in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 that we wish to convene a further one-day hearing for evidence and submissions on those issues, and we are handing down directions to this effect.

91. On that basis, the above decisions in relation to the Closure Notices issued against Mr Johnstone (year 2011/12) Mr Horton (year 2012/13) and Mr Wade (2010/11 and 2011/12) are decisions on preliminary issues.

92. Hence, in their appeals, this document contains full findings of fact and reasons for those preliminary decisions. Any party in those appeals dissatisfied with the preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2016