[2016] UKFTT 454 (TC)

TC05207

Appeal number: TC/2015/03217

INCOME TAX – whether enquiries opened within time limit – whether Appellant within agency rules – whether agency rules deem a single employment for all assignments – whether each assignment deemed to be a separate employment – position if two or more consecutive assignments to the same client – interaction between agency rules and employee travel rules – meaning of "holder of the employment" – whether agency workers entitled to tax relief on journeys from home to first location and from last location back home – correct tax treatment of other expenses and capital expenditure – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOERG THOENE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR NIGEL COLLARD

Sitting in public at the Tribunals Service, Ashford, Kent on 6 May 2016

The Appellant in person

Ms Hellie Lai and Mr Jeremy Taylor, of HM Revenue and Customs' Appeals and Reviews Unit, for the Respondents

DECISION

Introduction and summary

1. Mr Thoene appealed against amendments made by HM Revenue & Customs ("HMRC") to his self-assessment ("SA") returns for the four years ending 5 April 2011. The extra tax payable totalled £9,055.14.

2. The substantive issue was whether Mr Thoene should be allowed tax relief for his costs, which included travel, telephone charges, clothing and the purchase of a computer and other equipment. Mr Thoene's main submission was that he should be entitled to the tax reliefs because he was a self-employed nurse and his base was at home.

3. We decided that the services Mr Thoene had provided came within the agency rules at Income Tax (Earnings and Pensions) Act 2013 ("ITEPA"), s 44. This required that his services be treated for income tax purposes as the duties of an employment.

4. We also decided that each assignment was deemed to be a separate employment and went on to consider the interaction between ITEPA s 44 and the travel rules at ITEPA s 337-9. Having done so, we decided that Mr Thoene was entitled to tax relief on travel between his home and his patients' houses, contrary to the view expressed in HMRC's Employment Income Manual ("EIM") at EIM32130. However, Mr Thoene had not quantified that part of his claim. We also found that daily travel allowances paid tax free by one of the agencies for which Mr Thoene worked were in fact taxable, again contrary to the position taken by HMRC.

5. Taking both into account, we decided it was not appropriate to adjust HMRC's amendments to his SA returns to either increase or decrease the tax chargeable following HMRC's amendments to Mr Thoene's returns.

6. We also found that Mr Thoene was not entitled to deductions for his other claimed expenses or to capital allowances on his computer and other equipment.

7. We dismissed Mr Thoene's appeal and upheld HMRC's amendments to his SA returns. We gave our decision, with summary reasons, orally at the hearing. Mr Thoene expressed his dissatisfaction and asked for this full decision.

The late appeal

8. On 3 March 2015 Mr Thoene appealed against HMRC's amendments to his SA returns. HMRC refused the appeal by letter dated 25 March 2015 and offered Mr Thoene a statutory review under Taxes Management Act 1970 ("TMA") s 49C. The letter also stated that Mr Thoene could, in the alternative, notify his appeal directly to the Tribunal within 30 days of the date on the HMRC letter.

9. Mr Thoene received HMRC's letter on 28 March 2015. He completed a Notice of Appeal to the Tribunal. Although dated 24 April 2015, the Notice was sent by email on 27 April 2015. Mr Thoene did not attach HMRC's letter of 25 March 2015

to his Notice, and so failed to comply with Rule 20(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"); the requirement to attach the HMRC decision under appeal is highlighted on the Notice and in the relevant guidance.

10. The Tribunals Service therefore returned the Notice to Mr Thoene with a covering email stating in bold type that the original time limit still applied and that if Mr Thoene resubmitted the Notice, he must include an explanation as to why it was late.

11. On 30 April 2015 Mr Thoene re-sent the Notice to the Tribunal with the HMRC letter attached. On 12 May 2015 the Notice was again returned to him, because he had not given reasons why the appeal was late. On the following day he advised the Tribunal by email that the original Notice had been submitted on time, within 30 days of receipt of HMRC's letter, and this was taken to be his explanation as to why the appeal was late.

12. TMA s 49H provides that a person who is offered but refuses a review must appeal to the Tribunal within the "acceptance period". This is defined in TMA s 49C as follows (emphasis added):

> "the period of 30 days beginning with the date of the document by which HMRC notify the appellant of the offer to review the matter in question

13. Mr Thoene's original Notice of Appeal was therefore late, because HMRC's letter was dated 25 March 2015 and the Notice was not received by the Tribunal until 27 April 2015. The Notice was then further delayed because of Mr Thoene's failures to comply with the Tribunal Rules.

14. We considered the tests set out by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that judgment. We also considered the recent Court of Appeal decision in *BPP Holdings v HMRC* [2016] EWCA Civ 131, which found at [11] that "the stricter approach to compliance with rules and directions made under the [Civil Procedure Rules] …applies to cases in the tax tribunals".

15. We found that the reason for the delay was that Mr Thoene did not carefully read the appeal requirements, despite these being explained to him by HMRC and the Tribunals Service. However, the period of delay was relatively short; HMRC did not object to the late appeal and the prejudice to Mr Thoene in not being able to appeal was significant.

16. Having considered and balanced these factors in the light of the guidance given by *Data Select* and *BPP,* we decided it was in the interests of justice to allow Mr Thoene to appeal to the Tribunal.

The evidence

17. HMRC provided the Tribunal and Mr Thoene with a helpful bundle of documents. This included the correspondence between the parties and between the parties and the Tribunal, with attachments. It also contained:

(1) HMRC's notes of various phone calls made between Mr Thoene and HMRC;

(2) various HMRC internal documents relating to Mr Thoene;

(3) Mr Thoene's contracts with Superior Care Limited ("SCL") and Ambition Recruitment Services Limited ("ARSL") during the relevant period; and

(4) SCL payslips from 2 July 2010 to 26 November 2010.

18. Mr Thoene gave oral evidence, was cross-examined by Mr Taylor and answered questions from the Tribunal. We found him to be generally honest and straightforward, although his evidence on some issues was unreliable, notably in relation to his travel when working in the community and his use of capital equipment, see §§77-79 and §§229-230.

19. Mr Stephen Warwick was the HMRC Officer who amended Mr Thoene's SA returns and issued the related closure notices. He provided a witness statement, gave oral evidence and was cross-examined by Mr Thoene. We found him to be an honest and credible witness.

20. During the hearing HMRC also provided us with an email exchange between Mr Warwick and SCL about Mr Thoene's travel, together with a schedule of payments made to Mr Thoene from 16 January 2010 to 16 March 2011. Mr Thoene did not object to these documents being admitted into evidence and we accepted them.

Whether the enquiries were opened within the statutory time limit

21. The Tribunal next considered whether HMRC's enquiries had been opened within the statutory time limits. We begin by setting out findings of fact on that issue.

The facts

22. At some point in November 2010, Mr Thoene completed one or more form(s) P87 (copies were not provided to the Tribunal). That form is headed "Tax relief for expenses of employment" and can be used to reclaim allowable employment expenses of up to £2,500 per annum. Because Mr Thoene's claims exceeded that maximum, on 25 November 2010 HMRC issued him with SA forms for the tax years 2007-08, 2008-09 and 2009-10.

23. HMRC received Mr Thoene's completed SA forms on 23 December 2010, but the tax reliefs referred to in the P87(s) had been omitted. On 17 January 2011, Mr Thoene spoke to HMRC by telephone and advised that he would be amending the returns. On 28 January 2011, he called again to ask for the address to which the amended returns should be sent, and posted them the same day.

24. On 2 February 2011, Mr Thoene called HMRC to ask whether the returns had been received, and was told that HMRC log SA returns on receipt, and that those he had sent had not yet been logged as received. The SA Notes record that this conversation happened at 13.02.

25. However, on 18 February 2011, HMRC wrote to Mr Thoene saying that the returns had in fact been received on 2 February 2011. The letter went on to say that Mr Thoene was out of time to amend his returns and had to claim overpayment relief under TMA Sch 1AB. On 7 March 2011, Mr Thoene formally claimed overpayment relief.

26. On 14 April 2011 HMRC realised this was incorrect. Under TMA s 9ZA a taxpayer has twelve months from the filing date to amend an SA return, and Mr Thoene was within that time limit. HMRC's SA Notes record that the amendments were processed on 14 April 2011. The Statement of Case gives that as the date on which the returns were amended by Mr Thoene.

27. On 7 November 2011, Mr Thoene submitted his SA return for the 2010-11 tax year. HMRC opened an enquiry into all four returns on 24 April 2012.

Discussion

28. TMA s 9ZA(1) provides that "a person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board". It follows that the date on which a return is amended is not the date on which HMRC process an amendment, but the date on which notice of the amendment is given to HMRC: in other words, when it receives, or is deemed to receive, the amended return.

29. TMA s 9(2)(c) provides that HMRC can only open an SA enquiry into an amended return "up to and including the quarter day next following the first anniversary of the day on which the amendment was made". The quarter days are defined by TMA s 9A(2) as 31st January, 30th April, 31st July and 31st October.

30. If Mr Thoene's amended returns had reached HMRC on or before 31 January 2011, the time limit for opening enquiries into those amended returns would have been 31 January 2012, so the enquiries opened on 24 April 2012 would be out of time. However, if the returns reached HMRC in February 2011, the enquiry time limit would be 30 April 2011, so the enquiries would have been opened in time.

31. We considered the Interpretation Act 1978, s 7, which reads:

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

32. Mr Thoene posted the returns on 28 January 2011. We took judicial notice of the fact that this was a Friday. If posted first class, the returns would be deemed to have been served in the ordinary course of post on Saturday 29 January or at least by Monday 31 January 2011.

33. However, this is not the position if "the contrary is proved". In *Calladine-Smith v SaveOrder Ltd* [2011] EWHC 2501 at [33], Morgan J said:

> "my interpretation of Section 7 when it uses the phrase 'unless the contrary is proved' is that this requires a court to make findings of fact on the balance of probabilities on all of the evidence before it".

34. Here, we have contemporaneous evidence that on Tuesday 2 February 2011 at 13.02, a check was made to see if Mr Thoene's returns had been logged as received, but they had not yet been logged. However, the later letter of 18 February 2011 states that they were in fact logged on 2 February. We find as a fact that the returns were logged after the check was made by the HMRC officer at 13.02 on 2 February 2011.

35. In reliance on the contemporaneous evidence that self-assessment returns are logged on receipt, we further find that Mr Thoene's returns were not only logged on 2 February 2011, but received on that day.

36. It follows that Mr Thoene gave HMRC notice of his amendments on 2 February 2011. As a result, the enquiry deadline was 30 April 2012. HMRC opened enquiries on 24 April 2012, within that time limit.

37. No similar issue arose with the 2010-11 SA return, which was submitted on 7 November 2011, so the enquiry time limit was 31 January 2013. The enquiry was opened on 24 April 2012 and was therefore clearly in time.

38. We went on to consider the facts and submissions on the substantive issues.

The facts

39. On the basis of the evidence provided to us, we find the following facts. We make further findings of fact later in our decision.

Mr Thoene's skills and the contracts

40. Mr Thoene is a qualified nurse who provided his services in hospitals, care homes and similar locations; he also worked in community-based nursing teams. His assignments were usually at Band 5, although they were sometimes at Band 6. Nurses in these Bands are often called "staff nurses".

41. Mr Thoene's services were provided under two contracts, one with SCL and one with ARSL (together, "the agencies").

42. The contract with SCL was signed on 14 December 2009 and was headed "Contract for Services for temporary workers". The contract defined Mr Thoene as "the temporary worker" and included the following terms:

(1) Clause 2.2 provides that the temporary worker is self-employed, but SCL will make "statutory deductions" from his pay.

(2) Clauses 3.1-3.3 provide that SCL will endeavour to find appropriate assignments for the temporary worker, but cannot guarantee work. The temporary worker has the right to refuse any assignment offered to him. If there is no assignment, he is not entitled to be paid.

(3) Clause 3.4 provides that SCL will provide the temporary worker with "any key information when offering an assignment" so he "may have reasonable insight prior to accepting any such engagement". This includes the identity of the "service user", defined as "the person or establishment receiving care or services from [SCL]" as well as the care that is to be delivered "together with any other specific expectations of the temporary worker", the date, time and location of the assignment, the rate of pay and expenses and "details of any risks or hazards" which might affect either the temporary worker or the service user.

(4) Clause 4 provides that the parties are required to comply with the working time directive.

(5) Clauses 5-7 provide that the temporary worker is entitled to annual leave pro-rata to the hours worked; to the minimum wage and to statutory sick pay, providing the "relevant statutory criteria" are met.

(6) Clause 8.1 provides that the temporary worker "is required to complete a timesheet" at the end of each assignment. This must be signed by the service user or by "the person in charge of the establishment" to "certify that the details of the Assignment given on the timesheet are correct".

43. The contract with ARSL is headed "Terms of engagement for temporary workers". Its terms mirror those at §42(2), (4) and (5). It also specifically provides as follows:

(1) Clause 2.2 reads: "for the avoidance of doubt, these terms shall not give rise to a contract of employment between [ARSL] and the Temporary Worker. The Temporary Worker is engaged as a self-employed worker, although [ARSL] may be required to make statutory deductions from his remuneration in accordance with clause 4.1".

(2) Clause 4.1 provides that the temporary worker will be paid subject to PAYE and National Insurance and any other deductions which ARSL is required by law to make.

(3) Clause 3.5 provides that the temporary worker "may not under any circumstances introduce any other person to supply services in place of the Temporary Worker".

(4) Clause 7.1 provides that the temporary worker "shall deliver" a "duly completed" timesheet to ARSL, which must be "signed by an authorised representative of the client".

(5) Clause 8.1(a) and (i) provide that the temporary worker must "accept the direction, supervision and control of any responsible person in the Client's

home or organisation", and that he shall also accept "the direction, supervision and control" of ARSL staff members.

(6) Clause 8.1(h) provides that the temporary worker shall "be responsible for the provision of a uniform and any necessary equipment".

44. As can be seen, both contracts state that "statutory deductions" will be made from Mr Thoene's earnings. It was common ground that these included Pay As You Earn ("PAYE") and National Insurance Contributions and that each agency provided Mr Thoene with a P60 at the end of the year.

The work carried out

45. When Mr Thoene accepted an assignment to work in a hospital, he invariably worked only at a single location, although he might be moved to a different ward or unit within the hospital if there was a more pressing need for extra staff. He parked at the hospital and returned home at the end of his shift.

46. When Mr Thoene accepted a new hospital assignment he arrived a little early and asked the charge nurse to talk him through the patients' files, so he could become familiar with the case load. The charge nurse also told him the procedures to follow when giving drugs, filling in charts, collecting medicines, writing up notes etc. Mr Thoene told the Tribunal that "nurses have to follow guidelines in hospital". When the wards were busy, he was sometimes not informed of all the procedures, so had to find them out for himself.

47. Mr Thoene also provided nursing services at places other than hospitals, such as care homes. He worked his shift at that location and then returned home.

48. For simplicity when drafting this decision we have referred to all single location assignments, including those at care homes, as being at a hospital, unless otherwise indicated by the context.

49. Some of Mr Thoene's assignments were as part of community nurse teams. Each team covered a particular area, and each had an office ("Office"), which might be within a GP practice. Equipment and supplies, such as medicine, blood bottles, bandages, dressings etc were kept in that Office. When Mr Thoene began a community assignment, the agency gave him the telephone number and contact details for the relevant Office.

50. The agency also regularly contacted him by phone and to tell him which patients to visit and their addresses. He was provided with a code for each patient; the code told him about the patient's medical requirements. For example, there was a code for diabetes, another for dressing a venous wound, and a third for an injection following a thrombosis. This detailed information was sometimes provided the evening before the following day's shift. Although Mr Thoene was given his patient lists by the agencies, they originated from the community care team based at the relevant Office.

51. If an emergency occurred when Mr Thoene was visiting a patient in the community, he was required to identify as far as possible what was wrong, call an ambulance with that information, and wait with the patient until the ambulance arrived. He was also required to call "the manager or the person in charge of the [community care] team" and tell them he was running late.

52. The team leader was a full time employee at a more senior grade than Mr Thoene, based at the relevant Office. If Mr Thoene had a question about a medical issue he would ask the team leader for advice; if that person was unavailable, he would call another full-time long-serving nurse on the team.

53. Whether Mr Thoene was working in a hospital or in the community, he was able to use the paper, pens etc which were available to nurses in the hospitals and Offices. The hospitals and Offices also had fax machines and other office equipment such as copiers which Mr Thoene was able to use.

54. Until around 2011 Mr Thoene had two mobile phones, both supplied under contracts rather than purchased. He used one of these phones personally; the other was only for work-related purposes. Subsequently Mr Thoene found he could manage with one mobile phone.

55. Although in his written correspondence Mr Thoene said that the agencies "required me to complete all mandatory training online" he told the Tribunal, and we accepted, that the mandatory training was in first aid and manual handling; that this was not delivered online, and that he was paid for his attendance. Other non-mandatory training was provided free by the agencies, completed on his laptop computer and helped him obtain work.

56. Mr Thoene used his own fax to send timesheets and occasionally other relevant material to the agencies. Latterly he scanned the timesheets into his computer and submitted them that way, although that was not the position for most of the relevant period. He used his photocopier from time to time for documents relating to his work.

Evidence and findings of fact on Mr Thoene's travel costs

57. Mr Thoene's travel costs form the bulk of his claims. We first summarise the correspondence between the parties and then make findings of fact.

The correspondence

58. As we have already noted, on 24 April 2012, HMRC opened enquiries into all four of Mr Thoene's SA returns. Attached to the opening letters was a list of information required in relation to each year, which included the following:

> "Your records showing details of all journeys for which business travel expenses (subsistence) have been claimed. These should show, for each journey:
>
> (a) The date on which the travel occurred
>
> (b) The start point for each trip
>
> (c) The site at which work was performed

(d) The distance (in miles) travelled to each site."

59. Mr Thoene was also asked to provide details of any non-taxable travel and subsistence expenses paid by the agencies.

60. On 9 May 2012 Mr Thoene called HMRC and said he would forward the details; on 29 May 2012 he called again, and said he travelled "mainly to either Tenterden or Ashford". Ms Lancaster, the HMRC officer then dealing with the enquiries, said HMRC needed "the number of journeys made to each location each year; the mileage for each and the reason for the journey." No information was forthcoming from Mr Thoene.

61. On 3 July 2012 Ms Lancaster issued a Notice under Finance Act 2008, Schedule 36 ("Sch 36 Notice"), which formally required Mr Thoene to provide the information already requested.

62. On 30 July 2012, Mr Thoene provided a list of nine towns and cities where he had worked, along with the distance from his home to each. In relation to 2009-10 only, he provided the number of days on which he made each journey; he also attached some SCL payslips and certain timesheets. The latter were not available for the Tribunal as they appear to have been accidentally destroyed by HMRC during the course of the enquiry. The payslips show that he received tax-free expenses most weeks, and that the great majority of payments were either £7 or a multiple thereof.

63. On 1 October 2012, Ms Lancaster wrote to Mr Thoene, saying that the payslips showed that he had received expense reimbursements, and asking for details of why these amounts were paid, how they were calculated and whether they had been included in his claim. She also asked if he had received expenses from ARSL.

64. On 9 October 2012, Mr Thoene replied. In relation to SCL he said that it paid a flat rate of £7 a day when he travelled to work at Martha's Trust. This is located in Sandwich, near Deal in Kent. Mr Thoene confirmed he had not claimed for those journeys and said SCL did not pay mileage for travel to other locations.

65. He said that ARSL only reimbursed the costs of travel "from the workplace to community places". By "community places" we understand Mr Thoene to mean the patients' houses. He went on to say:

> "please take note that as a community nurse, my work involves working with different clients and in different communities throughout the day. I am not based at the work place. This job involves driving from one place to another throughout to the end of a day's shift and back to the work place before going home. I only claimed mileage to [ARSL] work place and from my home. [ARSL] never paid me any money towards mileage to and from my work place, hence I claimed it. It is their company policy that any Agency worker is not paid mileage to cover travel costs to and from work place, therefore I have not received any money as travel allowance/s."

66. On 21 November 2012, Ms Lancaster wrote to Mr Thoene, saying:

> "you advise you are a community nurse and work in different locations throughout the day. The records you have forwarded to me do not give any details of this. Would you please therefore forward details of the daily visits you have made for the year ended 5 April 2011, and the mileage done in the course of these visits, as the mileage details you have previously provided do not appear to relate to this. If details are available for the earlier years, please also let me have them."

67. Mr Thoene called HMRC on 5 December 2012. Ms Lancaster's telephone conversation note says "he confirmed that the details he gave me in the first response are from his home in Dover to the location etc"; that he also does community work and that when he does so "sometimes he just goes from home to the first patient". Ms Lancaster told Mr Thoene that HMRC needed the mileage details of his travel from patient to patient, and Mr Thoene said he would provide this.

68. On 10 December 2012 Mr Thoene wrote to HMRC and said "I do not go to the Base. I go straight from Home [sic] to my first visit therefore you should not deduct any mileage." He provided a list of locations where his assignments were based; these included some of the same places as those on the original list, sent to HMRC on 30 July 2012, but with a further five towns added. On 3 April 2013, he wrote again, and said "as I have already explained, I go direct to the client for my assignments…" It was common ground that by "client", Mr Thoene meant "patient".

69. In March or April 2013, responsibility for Mr Thoene's case was transferred from Ms Lancaster to Mr Warwick.

70. On 9 October 2015, after the closure notices had been issued, Mr Warwick contacted SCL to ask for more information about the expenses paid to Mr Thoene. The schedule subsequently provided ("the Schedule") covered all payments made between January 2010 and 16 March 2011. It shows that Mr Thoene:

(1) received £86.40 of expenses in the three months ending 5 April 2010 and £1,208 between 6 April 2010 and 16 March 2011;

(2) was always paid £7 a day when he travelled to Deal in Kent, and that he made this journey 120 times, receiving £840;

(3) was also paid £7 a day on two days when he travelled to Sevenoaks and for three days when he travelled to Hawkhurst; and

(4) was paid for travel to other locations, such as Gravesend and Swanley, on 21 days; all of these payments are exact multiples of 40 pence.

71. SCL's covering email states that it cannot provide more information, as none of the staff employed at that time remain with the company.

The oral evidence

72. At the hearing, Mr Thoene initially stated that he worked "predominantly" at fixed single locations, such as hospitals, but later that he "probably did more

community work than hospital." When it was pointed out that he had changed his evidence, he said "Sorry, I got that mixed up".

73. He told the Tribunal that if it would take too long to go to an Office before he began his visits, he collected the necessary equipment or medicine etc from the Office beforehand, perhaps the evening before, and stored it in his car.

74. When asked why he had not provided details of his community journeys despite HMRC's requests, Mr Thoene said that "I did not give more detail because £7 was paid to me for this".

Assessment of the evidence and findings of fact

75. Mr Thoene said that ARSL reimbursed the costs of his travel from an Office to patients' houses and not between his home and an Office, and we find this to be a fact. It was however common ground that the ARSL reimbursements also covered mileage between one patient's house and another, and we so find.

76. Both parties also accepted that the ARSL reimbursements were paid tax free at the HMRC approved mileage rate, which was 40p per mile until April 2012, and then 45p per mile, and again we find this to be a fact.

77. In relation to SCL, we find on the basis of the evidence that:

(1) Most of the £7 fixed payments were for Mr Thoene's journeys to work at Martha's Trust at Deal in Kent; this is not community work.

(2) None of the £7 fixed payments were made for community work. We base this finding on Mr Thoene's letter of 9 October 2012 which said that the payments were only made for travel to Martha's Trust. Although this was not entirely accurate (as he was also paid the same amount for travel on five other days when travelling to Sevenoaks and Hawkhurst) we know that Martha's Trust was not a community assignment and we infer that the same is true for the journeys to these two other locations. We find Mr Thoene's evidence given at the hearing that the £7 payments were for travel between community assignments to be unreliable.

(3) SCL also reimbursed some other travel. Since all these sums are multiples of 40 pence, and as 40 pence per mile was the HMRC approved rate in that period, we find that these payments were for Mr Thoene's travel between patients' houses, and between an Office and patient's houses, when he was working in the community. We prefer the Schedule, being independent evidence provided by a third party, to Mr Thoene's statement on 9 October 2012 that SCL paid no expenses other than the £7 fixed allowance.

78. In relation to his community work for both agencies, we find that Mr Thoene sometimes travelled from his home to the first patient, but only if he first stocked up with the relevant equipment and/or materials from an Office. In making this finding, we rely on his evidence to the Tribunal, together with his telephone conversation with Ms Lancaster on 5 December 2012; we find both of to be more reliable than his subsequent statements on 10 December 2012 and 3 April 2013 that he invariably went

straight to patients' houses. It is not credible that he would always have had the right equipment and materials to go directly to patients' houses, particularly as he was sometimes given his instructions on the evening before the day in question.

79. We also find that the majority of Mr Thoene's work was carried out at fixed locations, rather than in the community. Here, we rely on the fact that he did not mention community assignments until 9 October 2012, as he confirmed in his call to Ms Lancaster on 5 December 2012; if the majority of his work had been in the community, it is not credible that he would have overlooked any mention of that work in his earlier correspondence. Our finding is also consistent both with the Schedule (which gives a clear majority of days worked at fixed locations for SCL) and with Mr Thoene's initial oral evidence to the Tribunal before he changed his position.

The claims and the appeal

80. After extensive correspondence, the parties agreed that Mr Thoene was claiming for the following:

(1) Mileage costs to and from the places where he worked, other than amounts already reimbursed by the agencies.

(2) Professional subscriptions to the Nursing and Midwifery Council.

(3) Telephone costs for his mobile phones and for the land line at his house.

(4) The purchase, laundering and mending of uniforms and other work-related clothing.

(5) The purchase, laundering and mending of work-related shoes.

(6) The costs of annual Criminal Records Bureau ("CRB") checks.

(7) The purchase costs of his fax machine, scanner, copier and computer.

(8) The cost of stationery, including that used in his fax machine and copier.

81. On 19 August 2013 HMRC issued closure notices under TMA s 28A in respect of the 2009-10 and 2010-11 tax years and on 10 February 2015 issued closure notices in respect of the 2007-08 and 2008-09 tax years. The reason for the delayed issuance of those two years is not material to the issues under appeal.

82. The amended assessment for 2008-09 also included earnings of £16,291.48 and tax deducted of £2,403.14 arising from Mr Thoene's employment for part of that year with Singleton Nursing Home, which he had not included on his SA return, but which was subsequently identified by HMRC. That issue, too, is not relevant to this appeal.

83. When Mr Warwick amended the 2009-10 and 2010-11 returns, he allowed a deduction for professional subscriptions, because Mr Thoene had provided supporting evidence for the payments made. Mr Warwick also allowed a standard flat rate deduction for uniform and related laundry costs for all four years, being £70 for the year ending 5 April 2008 and £100 for the three following years. All other claimed deductions were denied.

84. HMRC subsequently agreed, in the course of an Alternative Dispute Resolution ("ADR") process, that relief should be given for Mr Thoene's professional subscriptions for the 2007-08 and 2008-09 tax years. It is the assessments as amended following ADR which are under appeal to the Tribunal.

Mr Thoene's submissions

85. Mr Thoene said that he was a temporary agency worker. He was not employed either by the agencies or by the clients to which he provided his services. That this was the position was clear from the terms of his contracts with SCL and ARSL. In particular, the agencies were not obliged to offer him work and he was not obliged to accept assignments offered to him. The contracts also explicitly describe him as self-employed.

86. He told the Tribunal that he regarded the terms of the two contracts as "the same". He also said that once he accepted an assignment, he was required to carry it out himself, but if he was unable to accept, he could suggest another nurse, but it was up to the agency whether they engaged that nurse or someone else.

87. In relation to the supervision, direction and control referred to in Clause 8.1(a) of the ARSL contract, he stated in correspondence with HMRC that "in any job you accept reasonable supervision or advise [sic]".

88. When he was unable to work through sickness for a two month period, he had tried to claim benefits but been told he was not entitled to claim as he was self-employed.

89. He submitted that as a self-employed worker, his base was at home; this was where he accepted his assignments and received instructions. He should therefore be entitled to claim tax relief on travel from home to the places where he worked. Although he had had some reimbursement of travel costs from the agencies, these sums were very limited. He had not been paid for most of his journeys, including those from home to patients' houses when he worked in the community.

90. He said in his written correspondence that his "laptop, scanner, photocopier, telephone etc are used wholly for business purposes" and that the agencies required him to own a computer. In another letter he said he purchased the computer (text as in original):

> "to use for my self-employment as an agency worker is wholly for my business, we live in a Time where the computer is now a part of our life and Performance without it I would be out of work."

91. In relation to his mobile phones, he said that one was used only for work purposes until 2011 and was "wholly and exclusively" for his job. In his grounds of appeal he also stated that "telephone is a very important communication tool to book shifts in the last minute without it I would lose out on work or would have no work". He told the Tribunal that it was essential that he was able to contact the agencies, hospital staff and the community nurse teams. He said he also used the landline at home for business calls, and for his fax machine.

92. He submitted that without CRB checks he would not be offered any assignments and that he should therefore be allowed tax relief on those costs.

93. In relation to clothing, he said that his job "requires [him] to wear smart uniforms and safety shoes at all times"; that each agency had its own uniform requirements, so the uniforms were not identical and that neither agency provided allowances to cover uniforms, laundry or mending expenses.

Submissions on behalf of HMRC

94. Ms Lai relied on HMRC's Statement of Case, which in turn referred to the decision letter issued by Mr Warwick and to his extensive correspondence with Mr Thoene. In setting out HMRC's position, we have relied both on the Statement of Case and that underlying correspondence.

95. HMRC accepted that Mr Thoene was not an employee of the agencies or of the clients, but submitted that he was an agency worker within ITEPA s 44. As a result, he was deemed to be employed by the agencies. Section 44 reads, so far as relevant to this decision:

> "**Treatment of workers supplied by agencies**
>
> (1) This section applies if–
>
> (a) an individual ('the worker') personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ('the client'),
>
> (b) the services are supplied by or through a third person ('the agency') under the terms of an agency contract,
>
> (c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and
>
> (d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter.
>
> (2) If this section applies–
>
> (a) the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency, and
>
> (b) all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment".

96. HMRC said that Mr Thoene had signed agency contracts with both agencies. He was therefore supplying his services under the terms of those contracts. It was clear that once Mr Thoene accepted an assignment, he had to provide his services personally, and was subject to, or to the right of, supervision, direction or control as to the manner in which he carried out his services. Because he was not an employee of

the agencies or the clients, the money he received for his work would not be employment income, were this section not to apply to him.

97. As a result, all the conditions in ITEPA s 44(1) were satisfied. Section 44(2)(a) therefore deems Mr Thoene to be providing his services as an employee of the agency, and s 44(2)(b) provides that all the remuneration received for those services is treated as employment income. It follows that the rules set out in ITEPA relating to employment costs apply to Mr Thoene rather than those relating to the self-employed.

98. HMRC said travel expenses are not allowable if they relate to "ordinary commuting", defined by ITEPA s 338(3) as travel between (a) home and a permanent workplace, or (b) a place which is not a workplace and a permanent workplace. Mr Thoene had claimed the costs of journeys to and from the hospitals where he carried out his agency work. These were permanent workplaces, so his related travel costs were not deductible.

99. Mr Thoene had also claimed the costs of travel between his home and the first and last journeys each day when he was working in the community. Mr Warwick had denied that claim in accordance with EIM32130, the relevant part of which reads:

> "…some agency workers undertake a number of different jobs on the same day. Examples include nurses or domestic workers. In these cases you can accept a deduction for the cost of travel between different jobs on the same day. You should not accept a deduction for the cost of travel from home to the first job of the day or to home from the last job of the day".

100. Mr Warwick had, on several occasions, sought details of Mr Thoene's community based journeys, and been provided with neither dates nor locations. Despite this, he had not sought to tax the expenses already reimbursed by the agencies, but had instead treated them as being payment for allowable travel between engagements, as provided for by EIM32130. In relation to SCL, his witness statement says:

> "…although travel between workplaces was allowable, no detail of this type of mileage had been provide to obtain any actual allowable expenses and evidence had been provided to show that [SCL] had reimbursed some mileage expenses. Thus my view was to, in effect, allow theoretical workplace to workplace mileage equal to the level of mileage reimbursements made by [SCL] at the HMRC approved rates."

101. Most of the other claims fall to be considered under ITEPA s 336, headed "Deductions for expenses: the general rule". Subsection 1 provides:

> "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".

102. HMRC said that Mr Thoene's claims did not satisfy that test for the following reasons:

(1) Although the costs of uniforms are allowable, no evidence had been provided as to the amount of expense Mr Thoene incurred. HMRC had allowed a fixed rate deduction for uniforms, which had been agreed with the relevant trade bodies as applicable to nurses.

(2) Ordinary clothing and shoes do not meet the "wholly and exclusively" test.

(3) Although HMRC accepted that the cost of specific necessary work-related calls on a mobile or landline would be allowable, Mr Thoene had not provided any evidence as to the costs of any such calls; furthermore, the use of the phones to accept engagements was not "in the performance of the duties" but put him in a position to carry out the duties.

(4) Similarly, the CRB checks put him in a position to carry out the work, and were not "in the performance of the duties". As a result, those costs, too, could not be allowed.

103. In relation to the capital expenditure on the fax machine, copier, scanner and computer, HMRC said that the Capital Allowances Act 2001 ("CAA"), s 36(1)(b) provides that:

> "…expenditure is qualifying expenditure only if the plant or machinery is necessarily provided for use in the performance of the duties of the employment or office".

104. HMRC refused a deduction for capital allowances because Mr Thoene "has not shown that the computer and IT equipment had been used to facilitate his duties as a nurse...[but] has merely shown that the computer and IT equipment have been used as tools in meeting his administrative and training obligations".

105. Mr Thoene was therefore not entitled to any tax reliefs other than those which had already been accepted as due by HMRC, namely professional subscriptions, the fixed rate deductions for uniforms/laundry, and the travel reimbursed by the agencies.

Discussion

106. It is clear from Mr Thoene's correspondence and his representations at the hearing that he considers HMRC to be wrong because they have failed to treat him as a self-employed person.

107. HMRC has, however, accepted that as a matter of law Mr Thoene is self-employed. Its case rests instead on ITEPA s 44. If services provided by an agency worker come within that section, they are treated for income tax purposes as duties of an employment. In other words, the normal legal tests which apply to determine employment and self-employment are displaced. Indeed, s 44 only applies where the remuneration received would not otherwise be taxable as employment income, see s 44(1)(c), so self-evidently encompasses the self-employed.

108. We therefore begin by considering whether ITEPA s 44 applied to the services supplied by Mr Thoene.

Whether ITEPA s 44 applied to Mr Thoene

109. To come within ITEPA s 44, a person must satisfy subsections (1) (a) to (d); we have referred to these as Conditions (a) to (d) and taken each in turn, in the light of the facts already found.

Personal service

110. Condition (a) is that "an individual ('the worker') personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ('the client')".

111. Excluded services are defined in ITEPA s 47(2) as "services as an actor, singer, musician or other entertainer or as a fashion, photographic or artist's model"; services provided wholly in the worker's own home, or "at other premises which are neither controlled or managed by the client nor prescribed by the nature of the services". Mr Thoene did not provide "excluded services". Instead, he provided nursing services for other persons, such as NHS trusts: these are "clients" as defined in the subsection.

112. Clause 3.5 of the ARSL contract explicitly provides that Mr Thoene "may not under any circumstances introduce any other person to supply services in [his] place". There is no equivalent clause in the SCL contract, but Mr Thoene said that both contracts were "the same". We take this to mean that he understood himself to be working under essentially identical terms and conditions for both agencies. He also acknowledged that once he accepted an assignment, he was required to carry it out himself, and that if he was offered an assignment he did not wish to accept, he could suggest that the agency send another particular worker, but it was up to that agency whether it did so.

113. We find as a fact that Mr Thoene had no right of substitution. Instead, once he had accepted an assignment he was obliged to carry it out personally.

Third party agency

114. Condition (b) is that "the services are supplied by or through a third person ('the agency') under the terms of an agency contract". This is not in dispute: Mr Thoene accepts that the he was providing services as an agency nurse under his contracts with SCL and ARSL.

Supervision, direction or control

115. Condition (c) is that "the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided". Clause 8.1(a) makes this an explicit condition of the ARSL contract.

116. We decided that it was also a condition of the SCL contract, because Mr Thoene had to comply with the procedures as to how he carried out his work, whether in the hospitals or in the community. In the hospital, he worked under the supervision of a charge nurse; in the community, he worked under the supervision of the senior full-

time nurse running that team. It would be surprising if this were otherwise, given that Mr Thoene is working as a Band 5 or 6 staff nurse within a hospital or community-based team.

117. It follows that we do not agree with his submission that "in any job you accept reasonable supervision or advi[c]e". The nursing services he provides can be distinguished, say, from the work of a qualified freelance plumber called in when a pipe has burst. The plumber decides for himself how to mend the leak and is not subject to supervision, direction or control as to the manner of carrying out his work.

118. That is sufficient to decide this point, because Condition (c) refers to "supervision, direction or control", so it is only necessary for one of these requirements to be satisfied.

119. We add, however, that Mr Thoene was also subject to control when working at a hospital because he could be moved from the ward on which he was originally required to work, in order to fill a gap in another part of the nursing team in a different ward or unit. There was also control, or a right of control, over his community work: if an emergency occurred when he was visiting a patient, he was required to call "the manager or the person in charge of the [community care] team" and say he was running late. He was therefore required to follow a particular specified schedule of visits.

120. For the above reasons, Mr Thoene comes within ITEPA s 44(1)(c).

Remuneration

121. Mr Thoene also fulfils Condition (d): the remuneration receivable under or in consequence of his agency contracts does not otherwise constitute employment income. In other words, he is not an employee of the agencies or the clients for which he works.

Conclusion on agency worker status

122. Mr Thoene therefore meets the four conditions in ITEPA s 44(1). In consequence, s 44(2) provides that his services are "to be treated for income tax purposes as duties of an employment held by the worker with the agency" and the remuneration therefrom "is to be treated for income tax purposes as earnings from that employment".

123. When deciding on Mr Thoene's claims for expenses and capital expenditure, we must therefore apply the legislation relevant to employees, not that relevant to the self-employed.

124. We have begun with Mr Thoene's claims for travel costs. Because he is an agency worker, we first need to understand what is meant by the deemed employment which exists by virtue of ITEPA s 44.

How does the deemed employment operate?

125. ITEPA s 44(2)(a) deems "the services" provided to "the client" to be "duties of an employment held by the worker with the agency". Where a worker has only a single assignment, the position is clear: he is deemed to have a single employment contract with the agency, under which he provides his services to his single client.

126. However, Mr Thoene has a succession of different assignments. Does the legislation mean that he has separate deemed employment contracts for each assignment, albeit with the same agency, or is there is a single deemed employment contract with each agency, encompassing all the assignments?

127. We considered the following fact patterns:

(1) assignments in different locations, where each assignment was for a different client ("Scenario 1");

(2) assignments in the same location, for the same client, but for sequential periods: for instance, a one week hospital assignment, followed by a further assignment at the same hospital ("Scenario 2"); and

(3) assignments for the same client but at different locations ("Scenario 3").

128. In relation to Scenario 1, assignments in different locations, with each assignment being for a different client, we find that each is a separate deemed employment contract, because the legislation refers to "the services" provided to "the client".

129. In coming to that conclusion, we have not overlooked the fact that s 6(c) of the Interpretation Act provides that in any Act, unless the contrary intention appears, "words in the singular include the plural and words in the plural include the singular". It seems to us that the contrary intention does appear here. For example, the supervision, direction and control which applies to one assignment is unlikely to be identical to that which applies to another.

130. In Scenario 2, namely a one week assignment followed by a second assignment at the same location for the same client, we find that the deemed employment contract has simply been extended into a second week at the request of the client and with the agreement of the worker.

131. Scenario 3 is more difficult. Here, the client is the same, but the location is different. Are these assignments each a separate deemed employment or are they the same employment, carried out at different locations? The answer to that question has implications for the operation of the travel rules at ITEPA s 338, as we discuss at §§212ff below.

132. We find our answer in s 44(2)(a), which states that "the services which the worker provides…to the client under the agency contract are to be treated…as duties of an employment." Although the agency contract is the same and the client is the same, the services which the worker provides to the client in one location will not be identical to those provided in another location. There will be local procedures,

different shift patterns, specific written and unwritten rules for each site. We therefore conclude that there is a separate deemed employment contract for each assignment.

133. To summarise, each assignment is a separate deemed employment contract between the worker and the agency, unless all that is happening is that the original assignment has been extended in time.

Is this analysis consistent with the PAYE provisions?

134. We noted, however, that each agency provided Mr Thoene with a P60; he did not receive a multiplicity of P45s, signalling the ending of lots of separate contracts with the same agency. We therefore asked ourselves whether our conclusion that each assignment was deemed to be a separate employment was consistent with the PAYE Regulations.

135. Regulation 10 provides as follows:

> **"Application to agencies and agency workers**
>
> (1) For the purposes of these Regulations
>
> (a) agencies are treated as employers; and
>
> (b) agency workers are treated as employees.
>
> (2) For the purposes of the regulations listed in paragraph (3), an agency ceases to employ an agency worker at the earlier of
>
> (a) the end of the relationship between the agency and agency worker, or
>
> (b) the end of a period of 3 months during which the agency makes no relevant payments to the agency worker,
>
> and not each time the agency worker stops providing services to a client of the agency".

136. The regulations listed at Reg 10(3) are Reg 36 (cessation of employment: form P45); Reg 37 (PAYE income paid after employment ceased); Reg 46(6) (employer to ignore code relating to employment which has ceased); Reg 51(5)-(7) (effects of employment ceasing on Form P45 procedure) and Reg 94(3)-(7) (information to former employees of other earnings).

137. In relation to Scenarios 1 and 2, Reg 10 is consistent with our understanding of ITEPA s 44. Because each assignment is a separate deemed contract of employment, the end of each assignment would normally trigger the issuance of a P45. This is prevented by Reg 10, which treats the separate small contracts as effectively joined together for the purposes of applying the PAYE regulations there listed – but only for those purposes. Were we to be wrong in our conclusion, so that all assignments with an agency were part of the same deemed employment contract, there would be no need for Reg 10.

138. However, the position is less clear in Scenario 3, where the client is the same but the location of the assignments is different. Reg 10 ends by stating, in effect, that

it prevents the issuance of P45s etc which would otherwise take effect "each time the agency worker stops providing services to a client of the agency" (our emphasis). That phrasing could be read as supporting the view, contrary to our finding above, that where the client is the same, but the second assignment is carried out at a different location from the first, there is a single deemed employment, carried out at two successive locations.

139. It nevertheless seems to us that the better reading of ITEPA s 44 is that it operates on an assignment by assignment basis, so that in Scenario (3) there are two deemed employment contracts. But in case we are wrong in this, we have considered both possibilities in the context of the travel rules, see §§212ff.

The travel expenses: structure of the decision

140. We move on to consider the statutory provisions which give tax relief for employees' travel. This part of our decision is structured as follows:

(1) The legislation on travel expenses at ITEPA ss 337-9 and s 359.

(2) On the assumption that each assignment is a separate deemed employment:

(a) whether Mr Thoene's home was a workplace;

(b) whether a hospital was a permanent workplace;

(c) whether, when carrying out community based work, Mr Thoene was travelling in the performance of the duties, so that s 337 applied; and

(d) if not, which of his journeys satisfied s 338.

(3) Mr Thoene's claims and HMRC's amendments to the assessments;

(4) If we were wrong in our analysis above, so that two or more assignments for the same client are a single deemed employment, whether this would have changed our answers to (2) and/or (3) above.

The legislation

141. ITEPA s 337 reads:

> **"Travel in performance of duties**
>
> (1) A deduction from earnings is allowed for travel expenses if
>
> (a) the employee is obliged to incur and pay them as holder of the employment, and
>
> (b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.
>
> (2) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs)."

142. ITEPA s 338 reads:

> **"Travel for necessary attendance**
>
> (1) A deduction from earnings is allowed for travel expenses if

(a) the employee is obliged to incur and pay them as holder of the employment, and

(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

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

(3) In this section 'ordinary commuting' means travel between

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

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

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

(5) In subsection (4) 'private travel' means travel between

(a) the employee's home and a place that is not a workplace, or

(b) two places neither of which is a workplace.

(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs)."

143. ITEPA s 339 reads:

"**339 Meaning of 'workplace' and 'permanent workplace'**

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

(2) In this Part 'permanent workplace', in relation to an employment, means a place which

(a) the employee regularly attends in the performance of the duties of the employment, and

(b) is not a temporary workplace.

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

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

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

(b) for some other temporary purpose.

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

(4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if

(a) it forms the base from which those duties are performed, or

(b) the tasks to be carried out in the performance of those duties are allocated there.

(5) A place is not regarded as a temporary workplace if the employee's attendance is

(a) in the course of a period of continuous work at that place

(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

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

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

(8) An employee is treated as having a permanent workplace consisting of an area if

(a) the duties of the employment are defined by reference to an area (whether or not they also require attendance at places outside it),

(b) in the performance of those duties the employee attends different places within the area,

(c) none of the places the employee attends in the performance of those duties is a permanent workplace, and

(d) the area would be a permanent workplace if subsections (2), (3), (5), (6) and (7) referred to the area where they refer to a place".

144. ITEPA s 359 is referred to in both ss 337 and s 338. It reads:

"**Disallowance of travel expenses: mileage allowances and reliefs**

(1) No deduction may be made under the travel deductions provisions in respect of travel expenses incurred in connection with the use by the employee of a vehicle that is not a company vehicle if condition A or B is met.

(2) Condition A is that mileage allowance payments are made to the employee in respect of the use of the vehicle.

(3) Condition B is that mileage allowance relief is available in respect of the use of the vehicle by the employee (see section 231).

(4) In this section

> ‘company vehicle’ has the meaning given by section 236(2),
>
> ‘mileage allowance payments’ has the meaning given by section 229(2), and
>
> ‘the travel deductions provisions’ means sections 337 to 342, 370, 371, 373 and 374 (travel expenses) and section 351 (expenses of ministers of religion).”

Whether Mr Thoene’s home is a workplace

145. Mr Thoene argued that his home was a workplace, because he performed various administrative tasks there, such as submitting timesheets, accepting assignments and receiving instructions.

146. ITEPA s 339(1) defines a “workplace” as “a place at which the employee's attendance is necessary in the performance of the duties of the employment”. HMRC submitted that Mr Thoene’s “duties” were only his nursing duties, and that sending timesheets to the agencies is not a duty. We do not agree: Mr Thoene was deemed to be employed by the agencies, not by his clients. His contracts with those agencies required him to complete and submit timesheets, so doing so was a duty of his employment. Furthermore, Clause 3.4 of the ARSL contract provides that the agency has a duty to tell Mr Thoene about the location of his next assignment and the addresses of his patients. Arguably, therefore, receiving this information is also “in the performance of the duties” and certainly that is the position when it comes to information about the patients’ medical conditions.

147. However, it was not a “necessary” requirement of these duties that they be carried out at Mr Thoene’s home. As long as the agency received the timesheets and was able to communicate with him, that was sufficient. In other words, the duties were not location-specific.

148. We therefore find that Mr Thoene’s home was not a workplace as defined by ITEPA s 339(1), because his attendance there was not necessary in the performance of the duties of the employment.

149. We also note that Mr Thoene could have sent his timesheets from a hospital or similar location, or from an Office, as he had access to the fax machines. Furthermore, as he normally contacted the agencies via his mobile phone, he could have received information about his assignments and the medical requirements of patients when at any location, not only when he was at home.

Whether a hospital was a permanent workplace

150. We agreed with HMRC that when Mr Thoene worked on an assignment at a hospital, the hospital was a permanent workplace, because the tests in ITEPA s 339(2) are satisfied. This can be seen from the following:

(1) Section 339(2)(a) is met, because the hospital is a place Mr Thoene “regularly attends in the performance of the duties of the employment”.

(2) Section 339(2)(b) is also met: the hospital is not a temporary workplace because:

(a) although s 339(3) provides that a "temporary workplace" is one which a person attends "for the purpose of performing a task of limited duration" and Mr Thoene's assignments were tasks of limited duration because each was for a fixed term; nevertheless

(b) the hospital is prevented from being a temporary workplace, because it comprised "all or almost all of the period for which [Mr Thoene] is likely to hold the employment" (s 339(5)(a)(ii)); the deemed employment is coterminous with the assignment, as we have already found from our analysis of s 44(2).

151. If an assignment was extended in time, perhaps for a further week or month, the hospital would remain a permanent workplace, even though the first assignment was now known not to be "all or almost all of the period for which the employee is likely to hold the employment". This is because, at the time, it was reasonable to assume that this would be the position, see s 339(5)(b).

152. As a result, Mr Thoene cannot claim for the costs of travel between his home and the hospitals where he worked.

Whether Mr Thoene's work in the community came within ITEPA s 337(1)

153. We next considered whether, when working in the community, Mr Thoene was travelling in the performance of the duties of the employment from the time he left his home until he returned. Were this to be the position, all his travel costs for that type of assignment would be deductible under s 337(1)(b).

154. We considered *Owen v Pook* [1970] AC 244. The facts are set out in the headnote.

> "The taxpayer carried on practice as a general medical practitioner in Fishguard. He also held two part-time appointments with the South Wales Hospital Management Committee as obstetrician and anaesthetist at a hospital in Haverfordwest,15 miles from Fishguard. Under those appointments the taxpayer was on stand-by duty at certain specified times, to deal with emergency cases at the hospital, and at such times was required to be accessible by telephone. On receipt of a telephone call from the hospital the taxpayer gave instructions to the hospital staff, and then either advised and awaited a further report or set out immediately for the hospital. His responsibility for a patient began as soon as he received a telephone call, but not every such call resulted in his going to the hospital."

155. The House of Lords found, by a majority, that Mr Owen's travelling expenses to and from the hospitals were "necessarily incurred in the performance of the duties of his office", see for example Lord Reid's statement to that effect at p 347.

156. However, Mr Owen's position can be distinguished from that of Mr Thoene because:

(1) although Mr Thoene receives his instructions by telephone before he leaves his home, he does not have responsibility for the patient from that point, but only when he arrives at the patients' houses. He is therefore not travelling in the performance of his duties, but travelling in order to perform that duty on arrival at the location; and

(2) Mr Owen's home was a workplace, unlike Mr Thoene's, so he was travelling between two workplaces: see the discussion of *Owen v Pook* by the House of Lords in the later case of *Taylor v Provan* [1974] STC 168, as helpfully summarised and discussed in *Reed Employment v HMRC* [2014] UKUT 0160 (TCC) ("*Reed*") at [265]-[268].

157. We therefore find that when Mr Thoene travelled between his home and his patients' houses, those journeys were not "in the performance of the duties of the employment". As a result, his travel expenses are not deductible under s 337.

Whether some or all of the journeys met the tests in ITEPA s 338

158. We therefore turn to s 338. Mr Thoene made the following journeys, each of which needs to be considered:

(1) between the house of one patient and the house of another;

(2) from his home to the house of the first patient and from the house of the last patient back to his home;

(3) from his home to an Office and from an Office to his home; and

(4) from an Office to patients' houses and from patients' houses back to an Office.

From one patient's house to the next

159. It is common ground that Mr Thoene's travel between patients' houses is allowable and we agree. Patients' houses are temporary workplaces because each is a place Mr Thoene "attends in the performance of the duties of the employment…for the purpose of performing a task of limited duration", namely to dress a wound, take blood etc. The locations therefore come within s 339(3) and are unaffected by subsections (4) or (5).

Between home and patients' houses

160. Since patients' houses are temporary workplaces, s 338(3) provides that these journeys are not "ordinary commuting" because they are not:

> "…travel between
>
> (a) the employee's home and a permanent workplace, or
>
> (b) a place that is not a workplace and a permanent workplace."

161. However, for the travel expense to be allowable, the requirements in s 338(1) must also be met, namely that:

> "(a) the employee is obliged to incur and pay [the expenses] as holder of the employment, and

> (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment."

162. Dealing first with (b), Mr Thoene's journey to a patient's house from his home is both "necessary attendance" and also "in the performance of the duties of the employment." Subsection (b) is therefore satisfied.

163. Subsection (a) is more difficult. It states that the employee must obliged to incur and pay the expenses "as holder of the employment". In *Ricketts v Colquhoun* [1926] AC 1 ("*Ricketts*") the House of Lords considered Rule 9 of Schedule E contained in the Income Tax Act 1918, which read:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment…there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

164. The underlined words are almost identical to those in s 338(1)(a), namely that "the employee is obliged to incur and pay [the travel expenses] as holder of the employment", apart from the fact that the word "necessarily" appears in Rule 9 but is absent from s 338(1)(a).

165. In *Ricketts* Lord Blanesburgh, giving one of two reasoned judgments in the case, said at pp7-8:

> "…the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties - to expenses imposed upon each holder *ex necessitate* of his office, and to such expenses only. It says: 'If the holder of an office' - the words, be it observed, are not 'If any holder of an office' - 'is obliged to incur expenses in the performance of the duties of the office' - the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition."

166. Rule 9 therefore contained two separate requirements: that the expense be incurred by "each and every occupant" of the office or employment and that it be "necessary" that the expense be incurred in that capacity. Because they are separate, the omission of the word "necessarily" from s 338(1) does not prevent Lord Blanesburgh's analysis from being relevant to s 338(1)(a).

167. If we were to apply Lord Blanesburgh's analysis to s 338(1)(a), travel expenses would only be deductible if the same expenses would be incurred by each and every

holder of the particular employment. The cost of journeys from Mr Thoene's home to patients' houses would not be allowable, because he is not obliged to incur and pay those expenses "as holder of the employment" but instead because of the place where he has his home; that is "personal to himself" and different for each employee.

168. That outcome would be consistent with HMRC's guidance at EIM32130, which advises its staff "you should not accept a deduction for the cost of travel from home to the first job of the day or to home from the last job of the day". Each agency worker has his home at a different place, so it cannot be the case that the costs of that journey have to be incurred by each and every holder of the deemed employment.

169. However, reading s 338(1)(a) in that way not only prevents agency workers claiming tax relief on the costs of travel to and from patients' houses. It also prevents any employee claiming the costs of travel between home and a temporary workplace.

170. That would be a surprising outcome, because section 338(1) is followed by subsection (2), which says:

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

171. That subsection is therefore predicated on the assumption that ordinary commuting would otherwise fall within s 337(1). But ordinary commuting is the paradigm example of travel which is not objectively necessary to the holder of the employment; it is personal to each employee because it starts from his home. If the *Ricketts* reading of s 338(1)(a) were correct, there would be no need for subsection (2).

172. Section 338(3) then goes on to define "ordinary commuting" as being travel between (i) the employee's home or another place which is not a workplace, and (ii) a permanent workplace. Reading s 338(2) and (3) together, it is reasonable to infer that tax relief is allowed on travel between home and a temporary workplace, but the costs of travel between home and a permanent workplace are blocked. But if the *Ricketts* reading of s 338(1)(a) applies, that inference would be wrong.

173. Sections 337ff are derived from the Income and Corporation Taxes Act 1988 ("ICTA"), s 198, as amended by Finance Act 1998 ("FA98"), s 61, together with ICTA Sch 12A, introduced by FA98, s 61 as Schedule 10 to that Act. Section 198(1A)(b) provided that "qualifying travelling expenses" included :

> "other expenses of travelling which-
>
> (i) are attributable to the necessary attendance at any place of the holder of the officer or employment in the performance of the duties of the office or employment, and
>
> (ii) are not expenses of 'ordinary commuting' or 'private travel'."

174. When those provisions were rewritten as part of ITEPA, the wording was essentially unchanged: s 198(1A)(b)(i) is almost identical to the current s 338(1)(a).

175. We therefore considered the Notes on Clauses to FA98 s 61, noting that in *R* (*oao Westminster City Council*) *v National Asylum Support Service* [2002] UKHL 38, Lord Steyn said at [5] that Notes on Clauses were "always admissible aids to construction". Paragraph 1 of the relevant Note begins (emphasis added both here and in the next paragraph):

> "This Clause and Schedule simplify the tax treatment of employees' travelling and subsistence expenses. The changes mean that, from 6 April 1998, employees will be able to get tax relief on the full cost incurred in travelling in the performance of their duties, or to get to or from a temporary workplace.

176. The Notes also say that the purpose of s 198(1A)(b) is to include within qualifying travelling expenses:

> "amounts necessarily expended on travelling in the performance of the duties of the employment, or other expenses of travelling attributable to the employee's necessary attendance at any place in the performance of those duties, provided they are not expenses of 'ordinary commuting' or 'private travel'."

177. The Notes therefore treat the phrase "holder of…the employment" as synonymous with "employee".

178. Because s 338(2) and (3) are inconsistent with a *Ricketts* reading, and because the Notes on Clauses both (a) clearly state that travel from home to a temporary workplace was now to be allowed and (b) treat "holder of…the employment" as synonymous with employee, we find that the *Ricketts* reading of s 338(1)(a) is not correct. Instead, as the Notes say, s 338(1)(a) should be read as if "the holder of the employment" means simply "the employee".

179. It follows the statutory basis for EIM32130 cannot be found in s 338(1)(a). In other words, that guidance cannot be explained by relying on the phrase "the holder of the employment" as the reason why agency workers are prevented from obtaining tax relief on their travel from home to their first temporary workplace of the day, and back from the last.

180. EIM32130 does not refer to any statutory provisions as forming the basis for its guidance, and the same is true of the similar passage in paragraph 3.2 of IR490, HMRC's more detailed booklet on the travel rules.

181. We were ourselves unable to identify any provision which prevented tax relief being available for agency workers' costs of travelling "from home to the first job of the day or to home from the last job of the day".

182. We therefore decided that the guidance in EIM32130 was not correct, and that the costs of Mr Thoene's travel between home to patients' houses was allowable, because those journeys were between home and temporary workplaces, and because we identified no provision preventing that tax relief being given.

Between home and an Office

183. Mr Thoene had to visit the relevant Office to collect essential equipment and supplies, and his attendance was necessary in the performance of the duties of the employment. Each Office therefore constituted a workplace (s 339(1));

184. For the same reason, each Office was a place Mr Thoene regularly attended in the performance of the duties of the employment. He was also required, on a weekly basis, to have his timesheet signed by the senior nurse who was based at the Office; as we have already found, that was a duty of his employment. Section 339(2)(a) is therefore met.

185. As each assignment was for a fixed term, Mr Thoene attended the relevant Office "for the purpose of performing a task of limited duration". However, in order to know whether the Office was a temporary workplace, we must also consider subsections (4) and (5).

186. Subsection (4) states that a location is not a temporary workplace if it "forms the base from which those duties are performed" or if "the tasks to be carried out in the performance of those duties are allocated there."

187. Although Mr Thoene's schedule of visits was provided to him by the agencies, it originated from the community team based in an Office, and thus could be said to have been "allocated" there. In any event, we also found that each Office formed the base from which Mr Thoene's duties were performed, because:

(1) the equipment and supplies which were essential for him to carry out his duties were kept at that Office;

(2) he could not begin visiting his patients without first going to the Office, unless he had first stocked up with the relevant equipment and supplies; and

(3) his schedule was overseen and controlled by the senior nursing staff at the Office.

188. In coming to this conclusion we also considered *Jackman v Powell* [2004] EWHC 550, in which Lewison J considered whether a depot owned by Dairy Crest was a "base" for Mr Powell, a milkman. The facts were set out at [61] of the decision:

> "At the relevant time the taxpayer was an independent contractor and ran his own business; he was not an employee. His business was the sale of milk and other products to his customers. He did not have a shop and the sales to his customers were made on his round. He ran his business from his home but the nature of his business meant that he had to travel to his customers to deliver the milk and other goods. Because milk and dairy products have to be kept refrigerated he had to collect them each day from the depot together with the electric float. The milk, goods and float were kept at the depot and the taxpayer had to pay a weekly service charge for a licence to use the depot."

189. Lewison J decided that the depot was not Mr Powell's "base". However, Mr Powell's position was different in many ways from Mr Thoene's. Mr Powell was self-employed and not deemed to be employed, so different rules applied; he had a base at home and that area where he worked constituted a further base, because he contracted with customers when on his rounds. In Mr Thoene's case, the Office was the community nursing hub from which Mr Thoene's work originated and to which he reported.

190. We also note that Mr Thoene himself also referred to each Office as his "Base" albeit in the context of a denial: in his letter of 10 December 2012, he said "I do not go to the Base. I go straight from Home [sic] to my first visit".

191. We find that each Office was a permanent workplace. Travel from Mr Thoene's home to an Office was therefore "ordinary commuting" as defined by s 339(3)(a) and so not allowable.

192. We note for completeness that:

(1) section 339(5) does not apply, because that subsection is only met if the person has carried out "continuous work" at the place. This is the position if "the duties of the employment are performed to a significant extent at [that] place", see s 339(6). Mr Thoene performed the great majority of his work at patients' houses, and not at an Office; and

(2) although each community nurse team covered a particular geographical area, that area cannot be Mr Thoene's permanent workplace. This is because the area provisions only apply if "none of the places the employee attends in the performance of those duties is a permanent workplace" (s 339(8)(c)); in other words, the existence of a base takes priority over the area rules.

From an Office to patients' houses

193. We have found that Mr Thoene's travel from an Office to patients' houses was travel from a permanent workplace to temporary workplaces.

194. Mr Thoene was obliged to incur and pay the travel costs as holder of the employment, so s 338(1)(a) is met, and the costs are attributable to his necessary attendance at a place in the performance of the duties of his employment, so s 338(1)(b) is also satisfied. The costs are not excluded by s 338(2) or (4) as either ordinary commuting or private travel. As a result, the costs of this travel are allowable.

Conclusions on community assignments and s 338

195. In relation to Mr Thoene's community assignments, tax relief is available under s 338 for the costs of his travel:

(1) between patients' houses;

(2) between his home and patients' houses; and

(3) between an Office and patients' houses.

196. However, tax relief is not available for the costs of travel between his home and an Office.

Application of our findings to the claims and assessments

197. We have found that Mr Thoene is not able to claim for his travel to and from the hospitals, because these are permanent workplaces; he is also unable to claim for travel costs between home and the Offices, because these too are permanent workplaces.

198. However, as set out at the end of the immediately preceding part of this decision, tax relief is allowable on some of the journeys Mr Thoene makes when he is on a community assignment. We move on to considering whether to adjust the assessments.

199. In relation to travel between patients' houses and between an Office and patients' houses, both ARSL and SCL reimbursed the related costs, see our findings of fact at §76 and §78. As a result, s 359 read with s 338 prevents any further tax relief being given.

200. The costs of travel between Mr Thoene's home and patients' houses were not reimbursed. However, we had no evidential basis on which to allow tax relief for those journeys. On 21 November 2012, HMRC asked specifically for "details of the daily visits you have made for the year ended 5 April 2011, and the mileage done in the course of these visits" and for the equivalent details for earlier years if still available. On 5 December 2012, Ms Lancaster reiterated the need for this information, and Mr Thoene promised that it would be provided, but he has never complied. HMRC also made three more general requests for Mr Thoene to provide the date, start point, site and distance of each journey, namely in the opening letter of 24 April 2012; in the phone call of 9 May 2012 and in the Sch 36 Notice of 3 July 2012.

201. We considered whether we should adjourn the hearing to allow Mr Thoene to provide further information relating to this part of his claims. We considered Rule 2 of the Tribunal Rules, which requires us to deal with the case fairly and justly; this includes "avoiding delay, so far as compatible with proper consideration of the issues" and acting "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties."

202. We took into account the fact that it had repeatedly been made clear to Mr Thoene that he had to provide detailed evidence of his community journeys in order to substantiate his claims for travel costs. In our judgment, it would not be in the interests of justice to adjourn the case to allow Mr Thoene to provide further evidence. He has already had abundant opportunities to put that evidence to HMRC and to the Tribunal.

203. We have also found that SCL paid Mr Thoene tax-free mileage of £7 a day for journeys to fixed locations, which are permanent workplaces. We know that £840 was paid for the period from 16 January 2010 to 16 March 2011, so 2010-11 is the

only year for which we have sufficient detail. These £7 payments were not included on Mr Thoene's SA returns; he also did not provide details of tax-free travel allowances, despite this being specifically requested both in the opening letter and the Sch 36 Notice. It was only Ms Lancaster's scrutiny of the SCL payslips which identified that payments had been made, and it was Mr Warwick who obtained the Schedule.

204. However, HMRC did not amend Mr Thoene's SA returns so as to charge tax on these amounts, because Mr Warwick treated them as payment for allowable travel between engagements, as provided for by EIM32130: Mr Warwick said they were "in effect…theoretical workplace to workplace mileage". We have found this to be factually incorrect: the £7 payments were made for travel to fixed locations, particularly to Martha's Trust in Deal.

205. TMA s 50(7) provides that if the Tribunal decides that "the appellant is undercharged to tax by a self-assessment" then "the assessment…shall be increased accordingly." Mr Thoene's self-assessments did not include the £7 payments, so he was undercharged to tax.

206. However, we also have to consider TMA s 50(7A), which provides:

> "If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good."

207. Here, Mr Thoene claimed that his travel costs should be allowed, and those costs were "the subject of a decision contained in a closure notice" for each of the tax years in question. When making his decisions on the travel costs, Mr Warwick took into account the payments made by SCL.

208. We decided that we could treat both (a) Mr Thoene's unquantified claim for tax relief on the costs of travel between his home and patients' houses, and (b) the omission from his return of the £7 payments made by SCL, as coming within TMA s 50(7A). That subsection gives us the jurisdiction to allow or disallow a claim to the extent that we decide is appropriate.

209. We also decided that it is inappropriate to increase Mr Thoene's assessments so as to include any tax on the £7 payments made by SCL, because of the degree of uncertainty about the sums involved, taken together with his unquantified but genuine claim for travel between home and patients' houses.

210. As a result, we have come to the same outcome as HMRC, but for different reasons. Mr Thoene is not allowed any further tax reliefs on his travel costs in addition to the amounts already paid to him tax free by the agencies.

211. Before moving away from travel costs, we return briefly to Scenario 3, see §§131ff.

If two or more sequential assignments in different locations for the same client are a single deemed employment

212. As already explained, we decided that each of two sequential assignments for the same client in different locations constituted a separate deemed employment. Since the second assignment was either at a hospital or in the community, and both hospitals and Offices are permanent workplaces, travel to a different hospital or Office is also not allowable.

213. However, as there is no case law authority on this point, and because the contrary was arguable, we considered what the positon would be if two sequential assignments for the same client in different locations constituted a single deemed employment. In doing so, we have assumed that the second location is not to be disregarded under s 338(7) as being "an actual…modification of the place at which duties are performed" which had no "substantial effect" on the journey or the travel expenses.

214. The first assignment would be a permanent workplace, as already explained at §§150ff. The second would be a permanent workplace if the conditions in s 339(2) were satisfied. We analyse this as follows:

(1) The condition in s 339(2)(a) is met, because the second location or area is a place the person "regularly attends in the performance of the duties of the employment".

(2) The condition in s 339(2)(b) is only met if the second location is not a temporary workplace. To find out whether or not that is the case, we need to consider s 339(3).

(3) That subsection provides that a "temporary workplace" is one which the person attends "for the purpose of performing a task of limited duration". The second assignment is also for a fixed term, so is a task of limited duration.

(4) However, the second location is prevented from being a temporary workplace if it comprises "almost all of the period for which the employee is likely to hold the employment" (s 339(5)(a)(ii)). This is a question of fact, which depends on the particular circumstances of the two assignments taken together.

(5) The second location is also prevented from being a temporary workplace if the travel is undertaken at a time when it is reasonable to assume that it will be in the course of a period for which the employee is likely to hold the employment (s 339(5)(b)). That will depend on the expectations of the client as communicated to the agency and the worker.

215. It follows that if (a) the time spent at the second location did not comprise almost all of the period for which the person was likely to hold the employment, or (b) the travel occurred at a time when it was reasonable to assume that was the

positon, the second location would be a temporary workplace. In either case, tax relief would then be available for travel from home to the second location.

216. However, the legislation is structured to allow tax relief where an employee is sent to a "temporary" workplace by his employer. An agency worker is not in a comparable position: he has expressly agreed to a second contract at a different location, which happens to be with the same client.

217. We also compared the position to that of an employee who had sequential fixed term contracts directly with the client as an "employed temp", ie without an agency being involved. One of the issues considered in *Reed* was whether an employed temp was engaged under an "overarching" contract of employment with the agency, which was "a contract that continued beyond the conclusion of any particular assignment until terminated by notice" or whether he was engaged under a succession of "job-by-job" contracts, see issue (i) of the FTT decision in that case, under reference [2012] UKFTT 28 (TC) at [190].

218. The Upper Tribunal (Proudman J and Judge Herrington) found at [321] that as there was no obligation on the agency to offer the employed temp the second assignment, and no obligation on the employed temp to accept it, the mutuality of obligation necessary before a contract of employment can subsist did not survive the end of the first contract. If a second contract were agreed, mutuality was then re-established for the duration of that second assignment, but there were two separate contracts rather than a single employment.

219. That part of the Upper Tribunal's decision was *obiter* because the taxpayer had already failed on its primary argument, but the issue was carefully and fully argued by both parties and we find the decision helpful.

220. On the assumption that the Upper Tribunal's conclusion is correct, an employed temp cannot claim tax relief on the second of two sequential assignments with the same client, if that second assignment is in a different location from the first. We can think of no policy reason why a person with two fixed term agency contracts should be in a better position.

221. Thus, while it is arguable that tax relief may be available for travel to the second location, that outcome is less consistent with the purpose of the legislation than that found by applying our earlier conclusion, namely that each assignment is a separate deemed employment.

Claims for capital expenditure

222. Mr Thoene has sought to claim the costs of acquiring a computer, fax, photocopier and scanner, on the basis that he needed this equipment to send his timesheets and other unspecified business documents to the agencies, and he also used his computer to carry out work-related training and latterly to submit his timesheets.

223. Since the services Mr Thoene provided under the agency contracts "are to be treated for income tax purposes as duties of an employment", capital allowances are

only allowable against employment income if that equipment is "necessarily provided for use in the performance of the duties", see CAA s 36(1)(b) set out at §103.

224. It is therefore not enough that Mr Thoene finds it convenient or useful to have this equipment at home. He has access to a fax machine and other office equipment at the hospitals and the Offices, so it cannot be necessary for him to have the same equipment at home.

225. In relation to the computer, it was not required for the mandatory training in first aid and manual handling, because that training was not carried out on Mr Thoene's computer. Other training helped him to obtain work because it kept his skills up to date, but was neither necessary, nor "in the performance of the duties."

226. Mr Thoene said that the agencies required him to "own" a computer. However, there is no reference to any such requirement in the contracts. Moreover, for most of the years in question, Mr Thoene used his fax machine to send the timesheets; it was only towards the end of the period that he began to scan and email these documents. We have been provided with no evidence to show when this change of practice occurred; whether it was mandated by the agencies, and whether any such mandation required ownership (rather than use) of a computer. It is also not credible that the agencies would have required Mr Thoene to own a computer in order to complete online training, as that training was optional.

227. But even if Mr Thoene was required by the agencies to own a computer or other equipment, that would be insufficient to satisfy the statutory test. The reference to "the duties" in the legislation means that the equipment must be necessary for all employees carrying out the same duties, not just Mr Thoene, and irrespective of what is required by the agencies. In *Brown v Bullock* [1961] 1 WLR 1095, Donovan LJ said (at p 1002) in relation to similar legislation on expenses, that following *Ricketts*:

> "The test is not simply whether the employer imposes the expense, but primarily whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties themselves involve the particular outlay".

228. We therefore find that Mr Thoene is not entitled to claim capital allowances.

229. Even were we to have found that the equipment was "necessarily provided for use in the performance of the duties", we do not accept that Mr Thoene used the equipment "wholly" for his work. It is simply not credible that a person would purchase a fax machine, copier and scanner to keep at home, and use them only to send timesheets to the agencies. It is also wholly implausible that he uses his computer only to carry out online training, and, latterly, to submit his scanned timesheets. As he himself said, "the computer is now a part of our life".

230. Although capital allowances can be claimed on plant and machinery used "partly" for work (there is no "wholly and exclusively" test here, see CAA s 11(4)(a)) the claimant must provide evidence of the extent of that qualifying use. We have had no credible evidence under this heading, but only Mr Thoene's statements that he uses

the equipment only for work. Given that sending a single fax or email takes no more than a few minutes, we find that the amount of time for which the equipment was used for that purpose to be minimal. Training does not meet the test of being "in the performance of the duties" and was in any event occasional.

231. We had other difficulties with Mr Thoene's claims: he provided no evidence of purchase costs such as receipts, and we also had difficulty in identifying, from the material provided to us, the amounts actually claimed for capital expenditure. Those points are, however, academic given our decision that Mr Thoene is not entitled to make capital allowances claims in any event.

Other claims

232. The legislation relevant to Mr Thoene's other expenses is ITEPA s 336, which we set out at §101. We consider each of the specific claims below.

Claims for telephone costs

233. Until some time in 2011, Mr Thoene had two mobile phones, one of which he used only to communicate with the agencies. He submitted that it was therefore used "wholly and exclusively" for work purposes. However, at least some of the calls made and received were not about the duties themselves, but about whether he was available for work: he said that without a telephone he "would lose out on work or would have no work". Calls offering work are not "in the performance of the duties of the employment" but are a precursor to taking up the employment.

234. Furthermore, in 2011 Mr Thoene found he could manage with one mobile phone. As there was no relevant change to his working practices, it follows that it was not necessary for him to have a separate mobile phone to carry out his work.

235. In relation to the landline, and the mobile phone used from 2011, Mr Thoene accepted that these were not used wholly and exclusively for his work, but were also used for private purposes.

236. Although a claim could have been made for the cost of specific necessary work-related calls on a mobile or landline, Mr Thoene did not provide any evidence as to the costs of any such calls, despite Mr Warwick's requests for details.

237. For all the above reasons, these claims are refused.

Claims for clothing and shoes

238. In *Hillyer v Leeke* [1976] STC 490, the appellant, an employed surveyor, was required to dress smartly for work. He claimed tax relief for the cost of two suits which he kept only for work. Goulding J rejected his appeal. At p 493 of the judgment he said:

> "The truth is that the employee has to wear something, and the nature of his job dictates what that something will be. It cannot be said that the expense of his clothing is wholly or exclusively incurred in the performance of the duties of the employment…In the case of clothing, the individual is wearing clothing for his own

> purposes of cover and comfort concurrently with wearing it in order to have the appearance which the job requires."

239. This passage was later endorsed by Lord Brightman when he gave the leading judgment in *Mallalieu v Drummond* 57 TC 330, see p 371.

240. A different approach is taken to uniforms, because the personal benefit of being kept warm and decent is accepted as being a merely incidental benefit (see, for example, Lord Brightman at p 370 of *Mallalieu*).

241. We therefore agree with HMRC that no deduction is allowable for the costs of Mr Thoene's clothing or shoes, other than in relation to the uniforms. The same applies to the costs of laundering or mending those ordinary clothes or shoes.

242. Mr Thoene did not provide any receipts or evidence for the costs of the uniforms, but HMRC has allowed a fixed rate annual deduction.

243. Given that Mr Thoene must have had to incur expenditure on purchasing uniforms, and must regularly wash those uniforms, we decided it was not appropriate to interfere with that fixed rate deduction. Any further tax relief for the cost of uniforms is not possible in the absence of particularised evidence.

Claims for costs of CRB checks

244. Mr Thoene is required to undergo annual CRB checks because without them he will not be offered assignments. The CRB checks therefore put him in a position to be able to undertake the work.

245. As Mr Warwick said in his correspondence, this is not "in the performance of" the duties and so does not meet the statutory test. As a result, the expenses are not deductible.

Stationery

246. Mr Thoene also claimed for the cost of stationery he used for his work. However, he is allowed to use the paper and pens provided at the hospitals and Offices, so it is not necessary for him to purchase his own stationery. He also provided no evidence of expenditure. We find that no deduction is due.

Decision and appeal rights

247. For the reasons set out above, we refused Mr Thoene's appeal and confirmed HMRC's amendments to the assessments.

248. 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 Rules.

249. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 24 JUNE 2016