Neutral Citation: [2023] UKFTT 00420 (TC)

Case Number: TC08818

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00808

INCOME TAX – employment expenses – legal costs, travel and accommodation costs, professional subscriptions, dental treatment, training costs, costs of computer – whether allowable in principle – quantum – appeal allowed in part

Heard on 21 March 2023 and 25 April 2023
Judgment date: 15 May 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR IAN SHEARER

Between

DR HARRY NDUKA

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

Dr Nduka in person

For the Respondents: Ms Laurie Outten, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. In his self-assessment ("SA") tax return for 2016-17, Dr Nduka included employment income of £48,500, tax deducted via PAYE from those earnings of £10,500 and expenses of £43,500. Most of the claimed expenses were legal fees relating to Dr Nduka's dispute with the General Medical Council ("GMC"), but he also claimed travel and accommodation costs; a professional subscription; private dental treatment; training and the costs of a computer.

2. The PAYE information filed by his employers showed that Dr Nduka's 2016-17 earnings were £40,295.70, from which tax of £6,356.44 had been deducted. HMRC opened an enquiry into Dr Nduka's SA return, asking for his explanation of the income, the tax and the expenses and other costs. On 19 July 2018, HMRC closed the enquiry and amended his SA return to reduce the income and the tax, and remove the employment deductions. Dr Nduka appealed to the Tribunal on the basis that the expenses and costs he had claimed were allowable.

3. On behalf of HMRC, Ms Outten accepted that a professional subscription of £499 was allowable, and we agreed. However, we found that none of the other sums claimed were allowable so as to reduce Dr Nduka's employment income. We explain our reasons in the main body of this decision notice.

4. We therefore allowed Dr Nduka's appeal to the extent of the £499, but otherwise refused it.

THE HEARINGS

5. In addition to the hearing of Dr Nduka's appeal, there had been a previous application hearing.

The strike out application hearing

6. HMRC had applied to strike out Dr Nduka's appeal on the basis that it was out of time. Judge Amanda Brown KC heard that application on 19 May 2022, and refused it because Dr Nduka had neither requested nor been offered a review of the HMRC decision, and Taxes Management Act 1970 ("TMA"), s 49D therefore applied. That section does not set a time limit for an appeal to be notified to the Tribunal. Judge Brown issued her decision on 24 May 2022, together with directions for the hearing of Dr Nduka's appeal.

The substantive hearing

7. That hearing was listed for 21 March 2023 to be held on a hybrid basis, with Dr Nduka attending the Tribunal Centre at Taylor House in London and HMRC and the Tribunal attending by video. However, by mistake Dr Nduka travelled to Birmingham, because he had understood he was to connect to the hearing from that location; he had made that journey overnight via two buses.

8. Dr Nduka's appeal started late because arrangements had to be made to set up a hybrid hearing in Birmingham. Although he confirmed on arrival that he was able to concentrate on the case, and he repeated that confirmation after the lunch break, part way through the afternoon he said he was not able to continue.

9. The Tribunal decided that it was in the interests of justice to adjourn the hearing and it was listed to continue on 25 April 2023, also on a hybrid basis. In issuing directions for the relisted hearing, we also allowed Dr Nduka to provide further evidence for the reasons given at §16, and we asked HMRC for submissions on the two issues discussed at §71ff and §105ff. On 25 April 2023, Dr Nduka attended Taylor House for the relisted hearing.

10. In this decision, we have referred to the hearing day on 21 March 2023 for brevity as "the first hearing" and that on 25 April 2023 as "the second hearing", although both days were of course part of the same adjourned hearing.

THE EVIDENCE

11. The evidence consisted of documents and oral evidence from Dr Nduka.

The documents

12. For the first day of the hearing, HMRC provided the Tribunal with a Bundle of 202 pages which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) Dr Nduka's SA return for 2016-17; and

(3) various documents extracted from HMRC's computer system.

The High Court judgment and the ECtHR proceedings

13. The Bundle also contained an email from a barrister working for the Doctor's Defence Service dated 10 January 2017, attaching a draft application relating to Dr Nduka's appeal to the High Court against the determination issued by a fitness to practise hearing before the Medical Practitioners Tribunal.

14. Dr Nduka said that he had not provided the full judgment because of its length, but he asked the Tribunal and Ms Outten to download a copy from the internet, which we did. He also said that he had intended the Bundle to include a copy of the judgment issued by the European Court of Human Rights ("ECtHR") following his appeal to that Court, and asked for permission to obtain a copy and send it to the Tribunal and HMRC.

15. We gave that permission, but no copy was provided: Dr Nduka said that this was because the case was being re-opened. However, we found as a fact that the related costs were incurred after the end of the relevant year, see §35, and in any event we decided that Dr Nduka's legal costs were not allowable, see §80ff. For both those reasons it would have made no difference to our decision had the ECtHR judgment been made available to us.

Missing documents?

16. On the first day of the hearing, Dr Nduka said his Notice of Appeal had contained receipts which he had sent to the Tribunal, but that those pages in the Bundle were blank. We subsequently checked the original Notice of Appeal on the Tribunal file, and it was also not accompanied by any receipts.

17. Dr Nduka also stated more generally that the Bundle did not include all the documents he had provided to HMRC. Ms Outten said that she had included everything in the Bundle which had been provided by Dr Nduka, and that no receipts had been sent to HMRC and subsequently lost.

18. On the second day of the hearing, Dr Nduka said he had forwarded to Ms Outten and the Tribunal an email from another HMRC officer which contained confirmation that HMRC accepted they had received his receipts but subsequently lost them. Ms Outten had not received that email, and it had also not been received by the Tribunal. We allowed a short adjournment for Dr Nduka to resend his email, but the document he sent concerned other matters.

19. On the basis of the evidence provided to us, we did not accept that HMRC had lost Dr Nduka's receipts. Nevertheless, as noted above, because the hearing had to be adjourned and relisted in any event, at the end of that first day we gave Dr Nduka permission to provide any further evidence relevant to his claims.

20. Before the second hearing day, he supplied one further invoice relating to his legal costs and an estimate from a second firm of solicitors; a schedule relating to his rental payments; a page from his bank statements; confirmation that he had registered for an examination and a direct debit form relating to membership of the Royal College of Medicine. We consider the further documents he supplied in making our findings below.

Overall lack of documentary evidence

21. Dr Nduka frequently reiterated that the Tribunal could consider evidence other than receipts, and submitted that the lack of receipts was thus not fatal to his claim. We agree that other evidence can be provided. But, as Ms Outten pointed out, there was little documentary evidence of any sort to support Dr Nduka's claim for employment expenses or costs. In particular, there were only two receipts (see §35) plus the rental schedule, the exam confirmation and a single page of a bank statement showing a further rental payment. There were no other bank statements, no credit card statements showing expenditure, no contractual agreements and little correspondence relating to amounts charged or payable.

22. Apart from submitting that his receipts had been lost by HMRC, Dr Nduka also sought to explain the lack of supporting documentation by reference to the passage of time. However, HMRC first wrote asking for such evidence on 11 January 2018, less than a year after the end of the tax year in question. As we pointed out to Dr Nduka, he had the burden of proof and it was for him to provide the evidence.

Varying claims

23. The Bundle contained three lists itemising Dr Nduka's claims. One was included in a letter sent to HMRC in January or February 2018; he sent in a new list on 1 August 2022 and amended it on 26 August 2022.

24. The amounts Dr Nduka said he had incurred varied over time. The first list itemised costs of £48,300, but the second totalled £43.429 (and not the £43,999 stated on that document) and the third totalled £44,829 (and not the £44,999 stated on that document). None of the lists came to the £43,500 he had claimed on his SA return.

25. The make up of the lists also varied: for example, the first included fees for the Royal College of Obstetricians and Gynaecologists of £180 and dental costs of £2,000, but both later lists said these amounts were £499 and £3,000 respectively. Accommodation costs increased from £9,500 on the first list to £9,800 on the second and to £11,800 on the third.

26. The lists also contained some different items: the first included legal fees relating to a house dispute of £7,000, storage fees of £2,400 and "private child carer" of £4,500, but these were omitted from the later lists. The reduction to the total claim which would have been caused by the removal of those amounts was largely recouped by an increase in the other costs, in particular legal fees: these were £17,000 on the first list; £27,430 on the second and £27,830 on the third. During the second day of the hearing, Dr Nduka invited us to accept the third list as the most definitive version.

27. Dr Nduka sought to explain these changes by saying that he had considered points made by HMRC at the hearing before Judge Brown, and had then removed some sums which HMRC had challenged as being not allowable. We agree that this provides an explanation for his removal of the child care costs and storage fees, but it does not explain the increases in his claims for legal fees, accommodation and other items.

The oral evidence

28. Dr Nduka gave witness evidence at both hearings; he was cross-examined by Ms Outten and answered questions from the Tribunal. Some of his oral evidence as to his expenditure was inconsistent with the figures given on his lists: for example, in August 2022

he had said his daily travel cost was £40 per day but his oral evidence was that it was £34. When asked about the dates on which he instructed lawyers relating to his ECtHR challenge, he initially said that this was in June 2017, but when it was pointed out that this was after the 5 April 2017, he sought to amend his evidence, saying that he had begun the proceedings "before the end of the tax year". He made further amendments at the second hearing, see §36.

Reliability

29. Taking into account the different lists, the paucity of direct evidence for his expenditure without any good reason, and the many inconsistencies discussed further below, we find Dr Nduka was not a reliable witness in relation to the matters in dispute.

THE FACTS

30. On the basis of the evidence summarised above, including our finding on reliability, we make the following findings of fact.

Dr Nduka and the GMC

31. Dr Nduka qualified as a medical doctor in Nigeria and came to the UK in 1998; he began working as a doctor in 1999. He took up posts in various hospitals as a specialist registrar in obstetrics and gynaecology. In 2012 he applied for a post in Salisbury and at some point during this posting the GMC became involved.

32. In 2015-16 Dr Nduka worked for the East and North Hertfordshire NHS Trust based in Stevenage, and that role continued into April 2016. In 2016-17 he earned £517.50 for that Trust.

33. He subsequently worked at St George's Hospital in Tooting until around August 2016, earning £3,428.46. In September 2016 he took up a post as a registrar in the West Hertfordshire Hospitals NHS Trust ("the WHH Trust"), based at Watford General Hospital. The contract was effective from 12 September 2016 and was expressed to run for six months; in 2016-17 he was paid £36,349.74 for this work. His overall employment earnings for the tax year were £40,295.70.

34. Dr Nduka was allowed time off from his job at the WHH Trust to prepare for and attend a GMC fitness to practise hearing. On 15 December 2016, the Medical Practitioners Tribunal decided that his fitness to practise was impaired by reason of misconduct, and directed that he should be suspended from the medical register for 4 months. Dr Nduka appealed that decision, and as a result, the suspension did not take effect until after the appeal had been heard and decided. Dr Nduka therefore continued to work for the WHH Trust throughout the 2016-17 tax year.

35. Dr Nduka paid a barrister £2,640 to advise on the merits of his appeal to the High Court, and to draft his grounds of appeal. The GMC applied to strike out that appeal, and a hearing of that application took place before the end of the 2016-17 tax year. Dr Nduka attended as a litigant in person. The appeal was not struck out and the substantive hearing took place before Lang J on 17 May 2017. Dr Nduka was again a litigant in person, albeit accompanied by a trainee from a firm of solicitors who is recorded on the judgment as a MacKenzie friend. Lang J handed down her judgment on 15 June 2017 dismissing Dr Nduka's appeal.

36. Dr Nduka instructed lawyers to take his case to the ECtHR. His evidence about when he did so changed over time:

(1) As noted above, he initially told the Tribunal that this was in June 2017, but when it was pointed out to him that this was after 5 April 2017, he sought to amend his evidence, saying that he had begun the proceedings "before the end of the tax year".

(2) He later said that he "could tell from the hearing" at the High Court that he "would have a problem" and that his appeal was unlikely to succeed, and this had led him to instruct lawyers relating to taking a case to the ECtHR before 6 April 2017.

(3) The Tribunal pointed that the hearing of his substantive appeal was not until 17 May 2017. Dr Nduka then said he instructed lawyers about the ECtHR after the *strike out* hearing. We did not accept that this was credible, particularly as he succeeded in the strike out proceedings.

37. Dr Nduka provided no documentary evidence that he had paid for legal advice about the ECtHR proceedings during 2016-17.

38. Taking into account all the above, we find as a fact that Dr Nduka took advice on his ECtHR claim no earlier than May 2017, after the High Court hearing and thus after the end of the relevant tax year.

39. In 2018 Dr Nduka told HMRC that in the 2016-17 tax year he had spent £17,000 on legal fees relating to his dispute with the GMC, but in the two 2022 lists, the figure had increased to over £27,000.

40. On the basis of the documentary evidence received, and taking into account our findings on reliability, we accept that in the 2016-17 tax year, Dr Nduka incurred court fees of £1,200 relating to his High Court appeal, and that he spent £2,640 in legal fees, but we are unable to make any finding of fact as to the extent or quantum of any other legal fees relating to his dispute with the GMC in that tax year, other than to find that they did not include any costs relating to his ECtHR application.

41. We record for completeness that Dr Nduka provided an email relating to a firm of solicitors called "Addison and Khan" for the second hearing, and this included an estimate of costs. However, Dr Nduka had removed the date on that email; when asked about this, he said it was for "GDPR reasons". We do not accept that "GDPR reasons" provide any reasonable justification for removing the date from the email, and we find that Dr Nduka has failed to show that this estimate was supplied in 2016-17. In addition, there was no documentary evidence that Dr Nduka had *paid* any sums to Addison and Khan.

Accommodation

42. Dr Nduka was not provided with accommodation by the WHH Trust in Watford. However, as noted above, he had previously worked in Stevenage for the East and North Hertfordshire NHS Trust, and had been provided with accommodation by that Trust, which he retained when he moved to Watford. Throughout 2016-17 he also rented a house in Dagenham, from which he travelled to St George's Hospital in Tooting where he worked for part of the year, and where he also met his children (who were living with his former wife in South London).

43. Dr Nduka's evidence was that during 2016-17 he was living in the hospital accommodation in Stevenage, and that he incurred rental costs both for that accommodation and for his London flat. The quantum of his claim varied from the figure of £9,500 given to HMRC in 2018, to £9,800 on the second list (made up of £4,000 in London and £5,800 in Stevenage) to £11,800 on the third list (made up of £6,000 in London and £5,800 in Stevenage).

44. The evidence provided after the first hearing included a statement of Dr Nduka's monthly rent in Stevenage of £398 pcm and a monthly "other charge" for utilities of £23.58. The Stevenage rent thus totalled £4,776 per annum, and the other charges £283, making a total of £5,059. Dr Nduka said at the second hearing that the difference between that figure and the £5,800 he had claimed related to call out costs for repairs, a replacement key for his flat, and internet charges. In relation to London, he provided a bank statement which included an amount of £430 labelled rent and dated 28 February 2017. Asked why he had increased the London accommodation figure from £4,000 to £6,000 between the second and third lists, he said the difference related to a deposit payment to a landlord, which had initially been excluded.

45. We accept that Dr Nduka was paying rent on both properties, and we also accept that he paid rent of £398 pcm and utilities of £23.58 pcm for the Stevenage property. Given the paucity of supporting evidence relating to the London property and our overall findings as to Dr Nduka's credibility, we make no finding as to the quantum of his rent for that property.

Travel costs from home to the hospitals

46. In 2018, Dr Nduka told HMRC that his transport costs relating to his employment income were £3,500. In the second list, this had reduced to £1,800, which he said included the cost of travelling every day, initially to St George's Tooting and subsequently then from his flat in Stevenage to London, and from London to Watford, in order to work at the Watford General Hospital, and that his daily travel cost was £40. The travel cost dropped again in the third list to £800.

47. During the hearing, his evidence changed again: he said he spent £34 a day, every weekday and sometimes also on weekends, travelling from Stevenage to Watford and back However, he was unable to explain why he would not stay in his London flat and travel from there to Watford, rather than travelling to London from Stevenage and then catching a second train to Watford.

48. On the balance of probabilities we find as facts that Dr Nduka:

(1) was living in Stevenage in April 2016 when he was working at the nearby hospital, and so had no travel costs;

(2) was living in Dagenham and commuting from there to St George's Tooting when he worked at that hospital;

(3) was living in Dagenham and commuting from there to Watford during the period from 12 September 2016 to the end of the tax year, and that he incurred the cost of a standard class return train ticket each working day.

49. We were unable to make a finding as to the costs of those journeys.

Travel costs from WHH to clinic in St Albans

50. Dr Nduka was required to travel from Watford to St Albans for clinics on a regular basis, and he made those journeys by taxi. He would be given a list of patients to see when he arrived at the clinic; before his arrival he only knew that he had been rostered to attend the clinic.

51. Dr Nduka originally told HMRC that these costs were not reimbursed by his employer. In his oral evidence his position changed: he said the costs were initially reimbursed, but that "later" he had to incur them himself.

52. We accept that Dr Nduka was not reimbursed for some of these journeys. He did not specify the amount he spent on taxis and we were unable to make a finding as to the quantum.

Fees to the RCOG

53. In 2016-17, Dr Nduka was working as a registrar in Obstetrics and Gynaecology. His evidence was that he had paid membership fees to the Royal College of Obstetricians and Gynaecologists ("RCOG").

54. We accept that payment of those fees is consistent with his role. Dr Nduka told HMRC in 2018 that this had cost £180, but in 2022 he stated that it had cost £499. In the absence of any documentary evidence, we are again unable to make a finding as to the cost of that membership.

The computer and training

55. We accepted Dr Nduka's evidence that during 2016-17 he purchased a new computer. At the first hearing, he told the Tribunal that he used it not only for personal reasons but also to communicate with his employer and others about patients.

56. However, at the second hearing Dr Nduka corrected his evidence, saying that it would be a breach of procedure to use a personal computer to refer to a particular patient's medical history or condition, and that he only used his computer for preparing training material and for staff presentations. He did that work at home because otherwise he would have had to spend longer in the hospital after the end of his shifts. He did not provide any evidence as to how much time he used the computer for these tasks and we were thus unable to make a finding.

57. In 2018 Dr Nduka told HMRC that the computer had cost £720, and that he had separately spent £1,500 on "course work", but the second list stated that he had spent £900 on "work conference and course, computer" and the third that he had spent the same amount but on "work conference and computer".

58. In relation to the courses, he said at the first hearing that the GMC had required him to attend a course as proof that he was competent, and he subsequently provided an email from the RCOG confirming acceptance of his application to take an examination in March 2017.

59. Dr Nduka told us he had paid £490 to attend that course, and sought to explain the lack of evidence of payment by saying he had paid this sum in cash. Taking into account the lack of any documentary evidence as to the payment (but only as to the booking); the absence of a specific sum in any of Dr Nduka's three lists and our findings on credibility, we found his evidence about making this cash payment to be unreliable.

60. Although we accept that Dr Nduka did purchase a computer and did attend the RCOG course, we are unable to make a finding of fact as to the cost of the computer or as to the cost of the training.

Royal Society of Medicine

61. As noted above, one of the extra documents filed after the first hearing was a direct debit form relating to membership of the Royal Society of Medicine ("RSM"). The "quarterly direct debit" box on the form was ticked: that option cost £422.12, payable as to £105.53 per quarter.

62. However, the form itself did not have a year on it. Dr Nduka had typed a footnote underneath the photocopy stating "Direct payment for fellow FRSP, yearly since 2012 up to 2017" (we presumed that "FRSP" was a typographical error for "FRSM"). There was no other evidence such as a bank statement that showed Dr Nduka had paid these sums by direct

debit in 2016-17. In addition, there was no reference to fees payable to the RSM in any of Dr Nduka's lists.

63. When asked about this during the second hearing, Dr Nduka said that two of the quarterly payments had been included in his claim for "work conference and computer" of £900; he was unable to explain why only two of the four payments had been included. However, at the first hearing, Dr Nduka had said that the £900 was for his computer and for a conference run by the RCOG; he made no mention of subscription paid to the RSM. Taking into account all relevant evidence and our findings as to reliability, we found as a fact that Dr Nduka did not pay these fees to the RSM in 2016-17.

Dental treatment

64. When Dr Nduka was working at the Watford hospital, he suffered a dental emergency and paid for private treatment. There was no supporting evidence as to its cost, and his own statements were inconsistent: in 2018 he said it had cost £2,000 and in 2022 that it had cost £3,000. We are unable to make a finding of fact as to the cost of that treatment.

Other costs

65. In 2018, Dr Nduka said his employment-related costs claimed in his SA return included legal fees for a house dispute of £7,000 and storage fees charged by the firm "Big Yellow" of £2,400. Neither of these items was included on the list he provided in 2022, and at the second hearing he confirmed that he was not seeking to claim either amount, as he had understood during the hearing before Judge Brown that they were not allowable.

Childcare costs

66. Dr Nduka has three children; as noted above, they live with his ex-wife, although they visit him from time to time. His wife worked, and she paid for childcare when she was at work. Dr Nduka's evidence, which we accepted, was that he paid some money to his ex-wife, which was used to cover some of her childcare costs.

67. In 2018, Dr Nduka had told HMRC that the employment-related costs claimed in his SA return included "private child care" of £4,500, but this item was not included in either 2022 list. At the first day of the hearing he said he had left out this cost as a "concession" to HMRC and also because had he included it on the later lists, the total of his claimed expenses would have exceeded his earned income.

The SA return and the enquiry

68. Dr Nduka's 2016-17 return was issued shortly after 6 April 2017 and filed by him around two weeks later, on 25 April 2017. It stated that his employment earnings for the tax year were £48,500 and that expenses of £43,500 were allowable to reduce that figure. No analysis of those expenses amounts was provided as part of, or in documents linked to, his SA return.

69. On 1 November 2017, Ms Harewood, an HMRC compliance officer, opened an enquiry into Dr Nduka's return. On 7 December 2017, she wrote to Dr Nduka, saying that PAYE information showed his employment income for the year to be £40,295 from the three employments set out at §32. She asked him to provide "copies of all the expense receipts and a calculation detailing how the figure of £43,500 was arrived at"; copies of his employment contracts and questions about his travel costs. In a letter sent in January or February 2018, Dr Nduka provided the first list of expenses to support his claim; the items on the list totalled £48,300 rather than the £43,500 shown on his return.

70. HMRC tried twice to meet with Dr Nduka, but received no response. On 4 April 2018 Dr Nduka asked that HMRC stop "bothering" him. On 19 July 2018, Ms Harewood closed

the enquiry, reducing his employment income to the figure shown on the PAYE returns and removing all the employment expenses. Dr Nduka appealed to the Tribunal.

WHETHER THERE HAD BEEN AN EARLIER ENQUIRY

71. TMA s 9A is headed "Notice of Enquiry"; the section gives HMRC power to enquire into SA tax returns. Subsection (3) reads:

> "A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act."

72. During the first hearing, Dr Nduka said HMRC had opened an earlier enquiry into the 2016-17 tax year, and that the enquiry opened on 1 November 2017 was therefore invalid.

73. In the directions issued at the end of the first hearing, we gave Dr Nduka permission to provide evidence (such as correspondence from HMRC) relating to this ground of appeal, and we directed HMRC to check their files. However, Dr Nduka provided no correspondence or other documentary evidence, and Ms Outten confirmed that having checked the files, there had been no earlier HMRC enquiry into this tax year. We therefore refuse this ground of appeal.

EMPLOYMENT EXPENSES GENERALLY

74. We first set out the law as to the deductibility of expenses from employment income. Different rules apply to travel expenses, the cost of purchasing equipment and membership fees, and we consider each of those separately below.

The law

75. The Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") sets out, at s 336(1), the "general rule" in relation to the expenses of an employment. It reads:

> "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."

76. The words of this provision essentially replicate the earlier legislation at Income and Corporation Taxes Act 1988, s 198(1), which read:

> "If the holder of an office or employment is necessarily obliged to incur and defray out of the emoluments of that office or employment the expenses of travelling in the performance of the duties of the office or employment … or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

77. In *Lomax v Newton* 34 TC 558 at 561, Vaisey J described the test as being "notoriously rigid, narrow and restricted in their operation", and continued:

> "An expenditure may be 'necessary' for the holder of an office without being necessary to him in the performance of the duties of that office; it may be necessary in the performance of those duties without being exclusively referable to those duties; it may perhaps be both necessarily and exclusively, but still not wholly so referable. The words are indeed stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the Rule is to be claimed successfully…"

78. In the context of Dr Nduka's appeal, we emphasise that in order to be allowable under s 336(1):

(1) the expenditure must be "wholly exclusively and necessarily" incurred in the performance of the duties of the employment;

(2) it must be "necessary" not only to the employee in question, but to every person who does or might do the same job; and

(3) a cost is not incurred "in the performance" of the duties of the employment if it puts a person in a position to carry out those duties. .

79. There is extensive case law on the application of ITEPA s 336 and the predecessor legislation. Ms Outten relied on some specific cases in her skeleton argument, and attached Chapter E4.707A from Simon's Taxes, which provides a helpful summary of key judgments, some of which we cite below.

Legal costs

80. Dr Nduka submitted that his legal expenses were allowable because (a) they "related" to his profession as a doctor, and (b) unless he succeeded in defending his position, he "couldn't continue" in his job. Ms Outten responded by saying that these costs did not meet the requirements in s 336(1) because they were personal to Dr Nduka and not a necessary cost which would be incurred by every employee working as an obstetrics and gynaecology registrar for the WHH Trust.

81. We agree with Ms Outten that these costs are not allowable. The position is similar to that of the taxpayer in *Ben Nevis v HMRC* [2001] STC (SCD) 144, who worked as a share dealer and incurred legal expenses to clear his name following an investigation. Special Commissioner Brice considered the facts and the law and decided that the costs were not allowable for two reasons, one of which was that "the expenditure incurred by the taxpayer was personal to him and was not an objective requirement of the holder of any post as a dealer". Her conclusion was consistent with the judgment of the High Court in *Eagles v Levy* KB 1934 19 TC 23, in which the taxpayer had sought a deduction for legal costs incurred in litigation with his employer in order to obtain the salary to which he was entitled; the Court rejected the claim because it was not a "necessary" cost of holding the office, but instead personal to the taxpayer.

82. In addition, the legal costs were incurred to put Dr Nduka in a position to continue to carry out his work as a registrar; they were not incurred "in" the performance of his duties.

83. Thus, even had we been able to make a finding as to the quantum of legal costs incurred by Dr Nduka, that expenditure is not deductible from his employment income.

Accommodation

84. Dr Nduka submitted that the costs of his accommodation both in London and Stevenage were allowable as a deduction, because the WHH Trust did not provide him with a flat in which to live. He sought to rely on *Parveen v HMRC* [2016] UKFTT 823 (TC), and said that the Tribunal in that case had allowed Ms Parveen's claim for the costs of the first-floor flat in which she lived.

85. Ms Outten said that the costs of Dr Nduka's accommodation were not "wholly, exclusively and necessarily incurred in the performance of the duties". We agree. The High Court came to a similar conclusion in *McKie v Warner* (1961) 40 TC 65, where the taxpayer was required by his employer to reside in London in order to carry out his duties. The Court held that the costs failed the "wholly and exclusively" requirement because:

> "there is an element of expense which has no connection with the business at all. There are days and nights when Mr. Warner is off duty and the flat is simply his home."

86. The Court also said that the costs did not meet the "necessary" requirement, because :

> "In order to qualify, the expense must have been necessitated by the duties of the employment. The fact that it was required by the employer is not sufficient. nor is the fact that it was thought to be necessary by the employee."

87. Although Dr Nduka sought to rely on *Parveen,* that case was not about employment earnings, but concerned a self-employed person running a nursery. The deductions which can be claimed by the self-employed are different to those which apply to the employed: the self-employed only have to show that costs are "wholly and exclusively" for their business. Moreover, the Tribunal in *Parveen*:

(1) found that the first-floor flat was used for business meetings, not for private living accommodation (as Dr Nduka had submitted); and

(2) did not accept that Ms Parveen had "satisfied that burden of proof in respect of any rental payments in respect of that space", and refused the claim, see [76] of the judgment.

88. For all the above reasons, we find that Dr Nduka cannot claim a deduction for his accommodation costs for either London or Stevenage.

89. At the second hearing, Dr Nduka said that in the past, HMRC had always allowed him a deduction for the costs of one property and they should not change that practice now. We had no information as to why HMRC had previously allowed a deduction for Dr Nduka's accommodation, but we are clear that the law does not allow him to reduce his 2016-17 earnings by offsetting his rent or utilities.

Dental costs

90. Dr Nduka submitted that his dental costs were deductible because the treatment was urgently required, so he had to pay a private dentist. Ms Outten said that this too failed the statutory test – it was a cost personal to Dr Nduka; it was not "wholly and exclusively" incurred in the performance of the duties and it was not "necessary" that every holder of the registrar post would incur the same costs.

91. We agree. Dr Nduka therefore cannot claim a deduction for dental costs, even had we been able to make a finding as to the quantum of those costs.

Training

92. In *HMRC v Banerjee* [2010] EWCA Civ 843 at [32] the Court of Appeal held that where a doctor is required to attend a course which would enable him to perform his duties better, those costs are not deductible, because attending the course is not carried out "in the performance of" the doctor's duties. The Court went on to distinguish Dr Banerjee's case on the basis that she was employed on a *training* contract, so attending the courses was an intrinsic part of her job.

93. Dr Nduka was not employed on a training contract. Instead, he underwent the training/ courses because he was required by the GMC to prove his competency – in other words, the purpose of the course was to put him in a position to carry out his job. Attending courses was therefore not incurred "in" the performance of his duties. We find that the costs were not allowable, even had we been able to quantify them.

Childcare

94. Certain specific tax exemptions apply where (a) childcare is provided by the employer for the children of employees in a workplace nursery, or (b) the employee is provided with childcare vouchers. Dr Nduka was not in either position. Instead, he reimbursed his wife for some of her childcare costs out of his earnings.

95. The self-employed taxpayers in *Halstead v Condon* (1970) 46 TC 289 and *Carney v Nathan* [2003] SpC 347 were refused deductions from their earnings because expenditure on childcare was not "wholly and exclusively" for the purposes of their work, but in part to have the children properly looked after. In *Lorber v HMRC* [2011] UKFTT 110, the employed taxpayer was refused a deduction because the childcare expenses were not dictated by the requirements of the job, but by the taxpayer's personal circumstances. We similarly find that Dr Nduka's childcare costs were not incurred wholly, exclusively and necessarily in the performance of his duties as a registrar, and are not deductible.

TRAVEL EXPENSES

96. ITEPA s 338(2) provides that no deduction from employment income is allowed for travel expenses which are "ordinary commuting". This is defined in subsection (3) as travel between an employee's home and a permanent workplace. The hospital in Watford fits the statutory tests and so was a "permanent workplace", see ITEPA s 339. Most of Dr Nduka's travel costs are ordinary commuting, and so are excluded from tax relief for that reason.

97. Dr Nduka was also required to travel from Watford to St Albans to attend clinics on a regular basis, and he paid the costs of that travel for part of the time. We considered whether St Albans was a "temporary workplace" rather than a permanent workplace, so that the travel costs would be allowable.

98. ITEPA s 339(3) defines a "temporary workplace" as:

> "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."

99. However, s 339(4) goes on to say:

> "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."

100. Dr Nduka regularly attended the clinic in St Albans; the clinic formed the base from which the duties were performed, and the tasks he had to carry out were allocated at that clinic. We therefore find that the costs of his taxi fares to and from St Albans are not allowable. In addition, we were in any event again unable to make a finding as to the costs incurred.

THE COSTS OF THE COMPUTER

101. Section 36(1)(b) of the Capital Allowances Act 2001 ("CAA") provides that an employee is only entitled to claim a relief for the costs of machinery, such as a computer, if it is "necessarily provided for use in the performance of the duties of the employment".

102. To meet this test, Dr Nduka would have to show that he was required to provide his own computer in order to carry out his work. There is no such obligation in his contract of employment. Dr Nduka used the computer to draft training materials and prepare for seminars, when he was working on those matters at home as a matter of convenience.

103. Even if we were to accept that it was necessary for Dr Nduka to purchase a computer for use at work, he also used it privately. The cost would thus require apportionment, see CAA s 205. However, we have been unable to make a finding as to the cost of the computer, or the extent of any private use.

104. For all the above reasons, no deduction can be allowed from Dr Nduka's employment earnings for the cost of a computer.

FEES PAID TO THE RCOG

105. ITEPA s 343(1) reads

> "A deduction from earnings from an employment is allowed for an amount paid in respect of a professional fee if
>
> (a) the duties of the employment involve the practice of the profession to which the fee relates, and
>
> (b) the registration, certification, licensing or other matter in respect of which the fee is payable is a condition, or one of alternative conditions, which must be met if that profession is to be practised in the performance of those duties."

106. HMRC publish a list of allowable fees, called List 3, which includes certain payments to the RCOG. After the first hearing, the Tribunal asked HMRC if it had any further submissions on this part of Dr Nduka's claim, and at the second hearing, Ms Outten said HMRC now accepted that an amount of £499 had been paid and was deductible from his earnings for 2016-17. We have therefore allowed his claim for that amount.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

107. Dr Nduka's appeal is allowed in part. His employment income is reduced by the subscription to the RCOG, but for no other expenses or costs. HMRC are to recalculate Dr Nduka's tax liability for 2016-17 on the basis that his employment income is reduced by the £499.

108. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 15th MAY 2023