TC04643

Appeal number: TC/2013/02316

Income tax – travel expenses – self-employed consultant anaesthetist in private practice making journeys from home (where he had an office) to hospitals where he carried out his professional duties – whether expenses incurred wholly and exclusively for the purposes of his self-employment – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR DAVID JONES **Appellant**

- and -

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

TRIBUNAL: JUDGE ZACHARY CITRON
MRS SHAMEEM AKHTAR

Sitting in public at Eastgate House, Cardiff on 21 April 2015

Mr David J Wright, FCA, FCCA, of DWA Accountants, for the Appellant

Mr Simon Bates, Officer of HMRC, for the Respondents

DECISION

1. The appellant, a consultant anaesthetist in private practice, travelled by car and motorcycle from his home, where he also maintained an office, to hospitals where he performed duties at surgical operations. The issue in the appeal was whether the expenses of these journeys from home/office to hospital and back again, were incurred wholly and exclusively for the purposes of the appellant's self-employed private practice.

The appeal

2. The appellant's accounts for the year ended 31 August 2008, upon which the self employment schedule to his 2008-09 tax return was based, showed motoring expenses of £7,327 and other expenses of £6,013, making for total expenses of £13,340. The motoring expenses comprised the expenses of journeys from the appellant's home to hospitals at which he took part in surgical operations; from those hospitals to his home; and between those hospitals.

3. HMRC took the view that, of the appellant's motoring expenses, only the expenses of the journeys between hospitals were properly deductible for income tax purposes. Using a mileage log provided by the appellant, HMRC calculated (in a letter to the appellant dated 15 September 2010) that the expenses of journeys between hospitals in the year amounted to £775. Accordingly, £6,552 (the remainder of the travelling expenses) was, in HMRC's view, to be disallowed.

4. For the tax years 2009-10 and 2010-11, the appellant claimed total expenses of £12,734 and £13,317 respectively, but did not provide an analysis of his motoring expenses from within these totals. HMRC therefore calculated the proportion of the appellant's total expenses that were disallowed for 2008-09, the year for which the appellant's mileage log was available (being £6,552 of £13,340, or 49%), and disallowed the same proportion of the appellant's total expenses for 2009-10 and 2010-11, taking the view that this was the best estimate that could be made on the basis of the information available.

5. A closure notice for 2008-09 and notices of assessment for 2009-10 and 2010-11, in each case reflecting HMRC's views as described above, were issued to the appellant on 26 November 2012. The appellant appealed against the assessments by letter to HMRC dated 30 November 2012. The appellant accepted an offer of a review by HMRC. That review concluded with a letter from HMRC dated 27 February 2013, in which restrictions to the amounts claimed for travelling expenses in each of the years 2008-09, 2009-10 and 2010-11 were upheld. The amounts at issue were:

Year	Expense disallowed	Tax & NIC due
2008-09	£6,552	£2,686.32
2009-10	£6,239	£2,557.99
2010-11	£6,525	£2,675.25
Total tax in dispute		£7,919.56

6. The appellant submitted a notice of appeal dated 27 March 2013.

7. By direction of the First-tier Tribunal, Tax Chamber ("FTT") dated 31 May 2013, the appeal was stood over pending the decision of the Upper Tribunal, Tax & Chancery Chamber ("UT") in *Samadian v Revenue & Customs Commissioners* [2014] STC 763.

8. We note that HMRC stated in its statement of case and skeleton argument that its acceptance of the deductibility of the appellant's travel expenses for journeys between hospitals reflected its views prior to the decision in *Samadian* in so far as such travel was between the appellant's place of employment (the Royal Gwent Hospital) and hospitals where he carried out his private practice.

Evidence

9. We received a documents bundle with copies of the relevant tax returns and assessments, of the appeal, and of correspondence between the appellant and HMRC between 2010 and 2014.

10. The appellant neither provided a witness statement nor attended the hearing (Mr Wright, representing the appellant, explained that he was attending a surgery on the hearing date, and this had been arranged some time in advance). This did not, however, cause any difficulty, as the facts were not in dispute.

Findings of fact

11. In addition to his self-employed private practice (the expenses of which are the subject of this appeal), the appellant was employed as a consultant anaesthetist by Gwent Healthcare NHS Trust, for which he worked primarily at the Royal Gwent Hospital in Newport, South Wales.

12. The appellant's private practice involved him working with an operating team brought together by the surgeon in charge of the operation in question. The typical pattern of events leading to the appellant's involvement in an operation was as follows.

13. A patient requiring surgery initially would contact his or her own doctor, who in turn would appoint a surgeon either directly or via the patient's insurers. About 85%

of the operations attended by the appellant were paid for by insurance companies; the remainder were paid for privately.

14. The appointed surgeon (or surgeon's staff) would contact the appellant to ask him to work on a particular operation. We find, by inference, that the reason a given surgeon contacted the appellant (rather than another anaesthetist) was an existing professional relationship between the surgeon and the appellant and/or the appellant's professional reputation. Over the course of his private practice, the appellant had worked for some 30 surgeons, many of whom he knew from his employment with the NHS.

15. The initial communication with the surgeon (or surgeon's staff) about a particular operation would typically include the location of the surgery, the expected date and time, the patient's condition and any medical problems, and the fee level the appellant could expect for the work. The surgeon controlled the timing and location of the surgery, financial matters and arrangements with the hospital. The appellant could accept or refuse the offer of work. The time at which the appellant was typically contacted by the surgeon ranged from 2-3 weeks before the surgery, up to the day before.

16. The ensuing contract between the surgeon and the appellant could be verbal or written, usually by email.

17. The surgeon organised the patient's admittance to hospital and after-care. The appellant would introduce himself to the patient prior to the operation; very occasionally, he would visit the patient in the hospital after the operation if additional anaesthetic were required. On rare occasions, there was a need for the appellant and the surgeon to meet prior to the surgery, at a place of mutual convenience.

18. The appellant had no administrative or office facilities provided to him at any of the hospitals at which he carried out his private practice as an anaesthetist – no "name on the door", no telephone, no post box facilities, no locker, no email address connected with the hospital.

19. The administration and management of the appellant's private practice was carried out from his home in Cowbridge in South Wales (about 30 miles by car from Newport). Here he kept records of operations including the name and address of the surgeon and the insurance company (if applicable), surgery date, billing date and limited details of the patient (the detailed patient records were kept at the hospital); and also his accounting records. Home was also his contact address for surgeons, accountants and HMRC in relation to his private practice. The appellant also carried out research at his home.

20. In the year ended 31 August 2008 (in respect of which the appellant provided a mileage log), the appellant was engaged as part of his private practice in operations that took place in operating theatres at five hospitals:

(1) The Royal Gwent (Newport)

(2) St Josephs (Newport)

(3) St Woolos (Newport)

(4) Llanfrechfa Grange (about 5 miles from Newport)

(5) Caerphilly (about 11 miles from Newport)

21. These five hospitals were amongst about a dozen hospitals in the area – not all of which had facilities for private operations. Over the course of his private practice as a whole, the appellant had worked in about 14 hospitals.

22. An analysis of the appellant's journeys to, from and in between these five hospitals during the year ended 31 August 2008, based on information in the appellant's mileage log, was presented to us by Mr Bates, representing HMRC, at the hearing (and accepted by Mr Wright). We have reproduced that analysis in the appendix to this decision; our only addition has been to distinguish between those journeys for which travel expenses were disallowed by HMRC (the first table in the appendix) – these were the journeys either from or to the appellant's home; and those journeys for which travel expenses were not disallowed by HMRC – these were journeys in between hospitals at which the appellant took part in surgical operations.

23. Focusing on journeys in the first table (which are the subject of this appeal):

(1) the journeys involve two hospitals: St Josephs and the Royal Gwent

(2) journeys (in either direction) between the appellant's home and St Joseph's comprised 190 journeys and 5,795 miles (33% of the appellant's total journeys as part of his private practice, and 58% of his total mileage);

(3) journeys (in either direction) between the appellant's home and the Royal Gwent Hospital comprised 106 journeys and 2,978 miles (18% of his total journeys and 30% of his total mileage).

24. We find, accepting evidence given by Mr Wright at the hearing (and not challenged by Mr Bates), that the appellant's journeys, within these total figures, to and from the Royal Gwent Hospital were for his private practice and not for his employment by the NHS at the same hospital.

25. Mr Wright presented us at the hearing with an analysis of the number of days between the 165 operations the appellant took part in as part of his private practice, during the year ended 31 August 2008. In many cases the number of days between operations was 0 (because the appellant took part in more than one operation on the same day). In all but 12 instances, the number of days between operations ranged from 0 to 8. Of those 12 instances of longer gaps, all but one of the gaps was between 12 and 16 days. The one exceptional gap was 27 days, between 6 December 2007 and 2 January 2008. This analysis was not challenged by Mr Bates.

Legislation

26. Section 34(1) of the Income Tax (Trading and Other Income) Act 2005 provides that:

> "In calculating the profits of a trade, no deduction is allowed for—
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade ..."

27. Section 32 of the same Act provides that "the provisions of this Chapter apply to professions and vocations as they apply to trades."

Case law

28. The UT in *Samadian* recently considered the application of the "wholly and exclusively" test in s34(1) to the travelling expenses of a medical practitioner in private practice. Indeed, the similarities between this appeal and *Samadian* were the reason this appeal was stood over in 2013 in order to await the decision of the UT.

29. In *Samadian*, the taxpayer was a consultant geriatrician who maintained a private practice (alongside his NHS employment) as a self-employed medical practitioner. For his private practice, he maintained an office at his home and saw patients at consulting rooms hired by him at two private hospitals. He also occasionally conducted home visits. He sought to deduct travel expenses in respect of his self-employed practice for (a) travel between NHS hospitals (where he carried out his employment) and private hospitals (where he hired consulting rooms for his self-employment); (b) travel between home and the private hospitals; and (c) travel between NHS hospitals and a patient's home for a home visit. HMRC refused these claims and he appealed.

30. The FTT's review of the principal relevant case law authorities was adopted by the UT (at [15] of the UT's decision). The following brief summary of the facts and outcomes of the relevant cases borrows from the FTT's review in *Samadian*.

31. In *Newsom v Robertson (Inspector of Taxes)* (1952) 33 TC 452, [1953] Ch 7, a barrister in private practice claimed to deduct the cost of travelling between his chambers in London and his home in Whipsnade. This was on the basis that he carried out a good deal of his professional work in his well-equipped study at home, especially during court vacations. The High Court held that none of the travel expenses was deductible. This was on the basis that the reason the expenses had been incurred was because the taxpayer wanted to live in the country; it followed that the travel to and fro had a mixed purpose and the expenses of that travel therefore failed the "wholly and exclusively" test.

32. The Court of Appeal upheld the High Court's judgement, with each of the justices giving a slightly different line of reasoning. Romer LJ memorably summarised in one sentence why commuting expenses do not satisfy the "wholly and exclusively" test: "... the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it".

33. In *Horton v Young (Inspector of Taxes)* (1971) 47 TC 60, [1972] Ch 157, the taxpayer was a self-employed bricklayer. He operated from his home and had no yard or other business premises. He worked for a contractor (Mr Page), who would visit the taxpayer at his home and agree details of each job – the site and the rate of pay. The taxpayer would then collect the rest of his team of three men in his car and take them to the site. He worked at seven different sites in the year in question, at distances of between 5 and 55 miles from his home.

34. The Court of Appeal distinguished Mr Horton's case from *Newsom*, holding that the taxpayer's travel expenses satisfied the wholly and exclusively test and were therefore deductible. The reasoning of the decision in *Horton* was looked at closely in *Samadian* – we shall return to that below.

35. *Jackman (Inspector of Taxes) v Powell* [2004] EWHC 550 (Ch), [2004] STC 645, 76 TC 87, concerned a milkman who, each day, travelled 26 miles from his home to a depot, where he picked up his milk float and then went on his milk round. He bought all his milk and other goods from the company that operated the depot and he rented his float from them. After he completed his round and prepared things for the next day, he drove home again. The High Court held that the taxpayer's travel expenses between home and the depot did not satisfy the wholly and exclusively test and therefore were not deductible.

36. *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665, [1983] 2 AC 861 differed from the three authorities above in that it was not concerned with travel expenses; rather, it considered the "wholly and exclusively" test in the context of the deductibility of expenses of maintaining suitable clothing for wearing in court by a barrister. The House of Lords held that the expenses were not deductible. *Mallalieu* too was looked at closely by the UT in the *Samadian* – which we shall touch on below.

37. After a detailed examination of the judgements in these cases – and in particular, in *Horton*, the single case to have held that travel expenses of journeys from and to a taxpayer's home to be deductible – the FTT in *Samadian* held that (a) travel expenses for journeys between the NHS hospitals (where the taxpayer carried out his employment) and the private hospitals (where he hired consulting rooms for his self-employment) were not deductible; (b) travel expenses for journeys between the taxpayer's home and the private hospitals were not in general deductible; and (c) travel expenses for journeys between the NHS hospitals and a patient's home were generally deductible. The taxpayer appealed to the UT in relation to rulings (a) and (b).

38. The first ground of appeal was that the FTT had erred in characterising the private hospitals (where the taxpayer hired consulting rooms) as places of business from which the taxpayer carried on his profession (and in distinguishing *Horton* on that basis). The taxpayer submitted that the FTT should have held that he had a single base of operations for his private practice, namely his home, and that expense in relation to all travel between there and the places where he saw patients in the course

of his private practice (including the private hospitals) should have been treated as deductible.

39. The UT dismissed this ground of appeal, agreeing (at [22]) with the reasoning at [83] of the FTT's decision, "with its analysis of *Horton* and with the reasons it gave for distinguishing *Horton*." We shall now summarise that part of the FTT's decision.

40. In the section of its decision headed "A closer examination of *Horton*", the FTT observed (at [76]) that all three of the Lords Justices in that case "held that Mr Horton's home was the only place of business he had. That was why his travel to and from his home was deductible". The FTT then said (at [77]):

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

41. The FTT explained (at [79]) why the Court of Appeal had held that the building sites at which Mr Horton worked did not amount to additional places of business:

> "It is because of the lack of any fixed or regular place at which Mr Horton actually plied his trade. [The Court of Appeal] were effectively holding that Mr Horton was itinerant (though only Stamp LJ used that word). In the judgement of Brightman J in the High Court (whose decision was confirmed by the Court of Appeal) a little more analysis was provided:
>
> > 'In my view, where a person has no fixed place or places at which he carries on his trade but moves continually from one place to another, at each of which he consecutively exercises his trade or profession on a purely temporary basis and then departs, his trade or profession being in that sense of an itinerant nature, the travelling expenses of that person between his home and the places where from time to time he happens to be exercising his trade or profession will normally be, and are in the case before me, wholly and exclusively laid out or expended for the purposes of that trade or profession'"

42. The FTT noted (at [80]) that Lewison J in *Jackman* "acknowledged this important point when he said … 'It seems to me that the phrase "according as his work demanded" [as used by Denning J in *Horton*] is an important one. There is no predictability about Mr Horton's places of work when he was employed on a bricklaying contract. He would have to go wherever Mr Page's main contracts took him'".

43. The reasoning of the FTT which the UT expressly approved followed the above passages, under the heading "The application of *Horton* in the present case":

> "[81] The question then naturally follows – should this Appellant be treated in the same way as Mr Horton?
>
> [82] There are some important differences between this Appellant's case and that of Mr Horton.
>
> [83] Unlike Mr Horton, he has a pattern of regular and predictable attendance at specific locations other than his home in order to perform significant professional functions as a clinician. He has negotiated an entitlement to avail himself of the facilities at those locations on a regular basis for the purposes of his business. His presence at [the private hospitals] was undoubtedly "temporary and transient" in the sense that he has only occupied consulting rooms or attended on ward rounds for comparatively short periods of time and without having any permanent base – he has never had a permanent office at either hospital with his "name on the door", so to speak. However, his attendance at both locations has involved a significant performance of professional functions of his clinical work (consulting with and treating patients) and has followed a pattern which, although it has changed from time to time, has been generally fixed and predictable. It is this pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor which, in our view, constitutes both [private hospitals] as "places of business" from which he has been carrying on his profession throughout and accordingly negates any suggestion that his profession is "itinerant" (or entirely "home based") within the ratio of *Horton* as properly understood."
>
> [84] For these reasons, we consider that the Appellant falls outside the ratio of *Horton*."

44. Sales J in the UT added only this to the FTT's reasoning as set out above, at [23]:

> "The FTT rightly focused on Dr Samadian having a number of places of business, rather than there being one single location which could be described as *the* base of his business. Although in some cases (and most prominently in the judgment of Denning LJ in *Newsom*) part of the reasoning proceeds by reference to locating the base of a taxpayer's business, such an analysis needs to be approached with caution. The statutory "wholly and exclusively" test does not depend on identifying a single base of business, though in some circumstances it might be useful to do so to assist in the application of the test. The FTT rightly considered it was not of assistance to do so in the present case…."

45. The second ground of appeal to the UT in *Samadian* was that the FTT erred in holding that the taxpayer must have had a mixed object in his general pattern of travelling between his home and his places of business at the private hospitals. The taxpayer submitted that the FTT has applied the "wholly and exclusively" test derived from *Mallalieu* too strictly, and improperly confused inevitable and unavoidable effect of this travel (taking him away from and back to his home) with the intrinsic purpose of such travel.

46. Here too the UT rejected the ground of appeal and (at [35]) upheld the reasoning at [93] and [94] of the FTT's decision:

> "[93] … we find the Appellant does have a place of business at home… But in our view that does not necessarily mean that his travel expenses to and from his home are deductible. The fact remains that the statutory test, when interpreted in line with *Mallalieu*, sets a very high bar for deductibility of travel involving a taxpayer's home. The only reported case of the higher courts in which this bar has been cleared is *Horton*, and we consider the present case falls short of Horton in the important respects we have outlined at [83] above.
>
> [94] We find that the Appellant must have a mixed object in his general pattern of travelling between his home and his places of business at [the private hospitals]. Part of his object in making those journeys must, inescapably in our view, be in order to maintain a private place of residence which is geographically separate from the two hospitals. It follows that even though we find he has a place of business also at his home, his travel between his home and those two locations cannot be deductible, on the basis of the reasoning in *Mallalieu*."

47. In his decision in the UT, Sales J at [26] gave us direct guidance when he stated that tax tribunals, when applying the "wholly and exclusively" test, should be "practical and reasonably robust in their approach". We should not, he said, be "unduly distracted by logical conundrums which it is relatively easy to tease out of the statutory test by playing with examples and counter examples."

48. The third and final ground of appeal to the UT in *Samadian* was that the FTT had erred in concluding that travel between the NHS hospitals and the private hospitals (ie not involving the taxpayer's home) was not deductible. This too was rejected, on similar reasoning as that employed in considering the second ground of appeal. The reason the taxpayer had to travel from the NHS hospitals to the private hospitals (rather than simply driving to the private hospitals from his home) was to neutralise the effect of his travel to his place of employment – or to enable him to maintain both his employment and his private practice (at para [41]).

49. The UT thus upheld the FTT's decision and, in its conclusion (at [46]), categorised travel expenses, and their tax treatment, as follows:

Type of travel expense	Tax treatment
In relation to itinerant work (such as Dr Samadian's home visits to patients)	Deductible
Journeys between places of business for purely business purposes	Deductible
Journeys between home (even where the home is used as place of business) and places of business	Not deductible (other than in very exceptional circumstances)
Journeys between a location which is not a place of business and a location which is a place of business	Not deductible

50. Finally, we note a decision of the FTT on the issue of travel expenses taken subsequent to the UT's decision in *Samadian*: in *Noel White v HMRC* [2014] UKFTT 214 (TC), the FTT found that the travel expenses of a self-employed flying instructor for journeys between his home (where he operated his business) and two airfields where he gave flying lessons, were not deductible.

Appellant's arguments

51. Mr Wright argued that the decision in *Horton* was applicable to this case, such that the appellant's travel expenses for journeys between his home and the two hospitals in Newport were wholly and exclusively for the purposes of his private practice.

52. Mr Wright summarised the similarities between the appellant and Mr Horton as follows:

> (1) Both of necessity carried out the management of his trade at a different location (home) from that at which he carried out the trade itself
>
> (2) The place (and time) where the trade was carried out was dictated by others (by surgeons, in the appellant's case)
>
> (3) Neither could dictate who his ultimate "client" was – each worked for a contractor (in the appellant's case, he worked for the surgeon rather than for the patient directly)
>
> (4) Both entered into their contracts from their homes, where they had their base of operations. The appellant carried out at his home office those administrative functions that today have to have a fixed place – such as telephone land line, postal address, printing-off emails.

53. Addressing *Samadian*, Mr Wright focused on para [83] of the FTT decision, where the FTT explained the important differences between Dr Samadian's case and that of Mr Horton. Mr Wright, for his part, directed us to the differences between the

appellant's circumstances and those of Dr Samadian referred to in this part of the FTT's decision.

54. The FTT referred to Dr Samadian's "pattern of regular and predictable attendance" at the private hospitals. Mr Wright submitted that the appellant's attendance at the hospitals where he participated in surgical operations could not be described as "regular", as number of days between operations the appellant attended did not follow a regular pattern – they varied between a day between operations, and 27 days. This contrasted with Dr Samadian, who attended the private hospitals where he hired consulting rooms, on a regular weekly basis. The appellant's attendance could not be described as "predictable", either, in Mr Wright's submission, because the scheduling of operations was in the hands of the surgeons and their teams, and sometimes was at short notice.

55. The FTT described Dr Samadian as having "negotiated an entitlement" to use facilities at the private hospitals; Mr Wright submitted that this was a significant difference from the appellant, who did none of the negotiations with the hospitals, had no formal relations with them, and never availed himself of hospital facilities other than the machinery of an anaesthetist.

56. For these reasons, in Mr Wright's submission, the hospitals at which the appellant participated in surgical operations should not be considered places of business.

57. Addressing the issue of the purpose of expenditure, Mr Wright submitted that the appellant's position was different from that of the taxpayers in the cases like *Newsom*, *Mallalieu* and *Samadian* because he had no choice over the location of the operations in which he participated as an anaesthetist. The appellant could not be said to have decided to live in a different location from his self-employed work, because he had no control over the location of that work (it was decided by the surgeons with whom he contracted).

58. In *Samadian* and *Newsom*, Mr Wright argued, the taxpayer had a choice (a) whether or not to work from home; and (b) where to carry out his trade. In addition, the taxpayer organised his own clients. The appellant's situation was different in all these respects.

HMRC's arguments

59. Mr Bates made a number of preliminary points before turning to the case authorities:

(1) the "wholly and exclusively" test sets a high bar for the deduction of expenses of travel to and from home.

(2) the UT in *Samadian* noted (at [18]) the limitations to using case authorities: "The authorities provide guidance and illustrations from which it is possible to reason by analogy, but the FTT correctly recognised that it should

not be distracted in its analysis from the critical question it had to determine, which was set by the statutory test."

(3) the UT instructed (at [26] of *Samadian*) tax tribunals to be practical and reasonably robust in their approach to the "wholly and exclusively" test.

60. Turning to the cases, Mr Bates argued was that the appellant's circumstances were comparable to those of the taxpayer in *Samadian*. Mr Bates did not accept that the appellant's home was his base of operations as was the taxpayer's home in *Horton*. In Mr Bates' submissions, 90% of the appellant's journeys in the course of his private practice involved his home and three hospitals in Newport: the Royal Gwent, St Joseph's and St Woolos. In light of this, Mr Bates considered that the appellant had places of business at these hospitals as well as his home.

61. Mr Bates said HMRC accepted that the appellant's travels to the Llanfrechfa and Caerphilly hospitals were too infrequent and unpredictable for these to be places of business for the appellant; therefore HMRC were prepared to treat these journeys like home visits.

62. Mr Bates submitted that, in this case, we are not looking at an itinerant trader with no fixed place of business other than his home. The appellant and Dr Samadian, both doctors, had places they attended on a regular basis. Although the appellant did not hire a room, he did have, in the language of para [83] of the FTT's decision in *Samadian*, approved and upheld by the UT, a "pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor" at the three hospitals in Newport – so constituting them as "places of business" and negating the suggestion that the appellant's profession is "itinerant" within the ratio of *Horton*.

63. Mr Bates accepted that the appellant's attendance at the Newport hospitals was not predictable in the way Dr Samadian's attendance at hospitals where he hired consulting rooms had been. But, viewing the appellant's attendance across the year, it was frequent enough to have predictability about it. The appellant's attendance at hospitals in Newport can also be seen to be regular, with the benefit of hindsight. All this was in contrast to *Horton*, where the taxpayer was itinerant, with no pattern to the location of his work.

64. Mr Bates noted that in *Samadian*, both the FTT and the UT were cautious about adopting an analysis built on locating the base of a taxpayer's business (see [23] of the UT's decision). In *Horton*, a case decided over 40 years ago, contracts were clearly made at the taxpayer's home, in that Mr Page would arrive there to agree terms; in contrast, argued Mr Bates, surgeons did not come to the appellant's home to conclude contracts – this was done by electronic means, and so could be concluded when the appellant was in any number of locations.

65. Mr Bates submitted that the appellant's position falls within the "commuting principle" established by *Newsom*. The appellant's purpose in travelling from and to

his home was not exclusively a business purpose, and so the test set out at s31 is failed.

Discussion

66. The issue in this appeal is the purpose of journeys made by the appellant during the year ended 31 August 2008 between his home and two hospitals in Newport at which he performed his duties as a self-employed anaesthetist at surgical operations. For the appeal to succeed – i.e. for the travel expenses of those journeys to be deductible for income tax purposes - we must find that the travel expenses were incurred wholly and exclusively for the purposes of the appellant's private practice.

67. The preceding statement of the issue here reflects the following parameters to this appeal:

(1) The parties have pursued the appeal on the basis that the assessments for all three tax years involved (2008-09, 2009-10 and 2010-11) stand or fall on the treatment of the appellant's travel expenses in the 12 months ended 31 August 2008. We shall therefore decide this appeal on the same basis.

(2) Journeys made by the appellant in between hospitals at which he performed his duties as a self-employed anaesthetist (and therefore not involving his home) – and the purpose of such journeys - are not at issue in this appeal. This is because HMRC accepted the appellant's claim in its tax returns for the tax years in question for the expenses of such journeys to be deductible.

68. There is considerable case law authority as to whether travel expenses are incurred "wholly and exclusively" for the purposes of a trade or profession. We think the right, and most efficient, approach is to start at the end (so to speak) – with the final paragraph ([46]) of the UT's decision in *Samadian*, where Sales J set out "sensible and coherent categories for treating travel expenses as deductible or non-deductible" (summarised in a table at para [49] above). One such category was: travel expenses for journeys between a person's home (even where the home is used as a place of business) and a place of business. These, said the UT, are non-deductible other than in very exceptional circumstances.

69. The "very exceptional circumstances" are of the kind given in Sales J's decision at [27] – a medical practitioner, preparing to see a patient at a hospital (ie place of business), realises he needs notes on the patient which are located in his office at home, and makes a special trip in his car to go home and collect the notes, and immediately returns to the hospital to see the patient.

70. Such "very exceptional circumstances" are not present in the journeys we are considering here between the appellant's home and St Joseph's and the Royal Gwent. Furthermore, we accept that the appellant had a place of business at his home. The issue, therefore, when we apply the UT's concluding "sensible and coherent

categories" from *Samadian*, is whether St Josephs and the Royal Gwent were also places of business for the appellant.

71. The parties have rightly focused on the passages in *Samadian* that consider whether the private hospitals at which the taxpayer there hired consulting rooms, were places of business for him. The FTT, building on its close analysis of *Horton*, approached this by asking (in passages set out at para [43] above) if there was a pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor. The FTT's approach was affirmed by the UT.

72. This formulation was essentially the FTT's understanding of the features of *Horton* that justified the Court of Appeal in that case departing from the general rule (sometimes called the "commuting principle") established in *Newsom* – that travel expenses of journeys to and from a taxpayer's home are invariably not incurred "wholly and exclusively" for the taxpayer's trade or profession, since a part of the purpose will invariably be to enable the taxpayer to live at a different location from his or her work. The FTT's formulation draws a dividing line between "itinerant" work – another of the UT's "categories" (of which the example given is home visits by Dr Samadian), the travel expenses of which are to be treated as deductible – and other (non-itinerant) forms of self-employment.

73. Applying the FTT's formulation to this case, the appellant clearly carried out significant professional functions at St Josephs and the Royal Gwent. The question is whether there was a pattern of regular and predictable attendance at these two hospitals.

74. Mr Wright argued that this criterion is significantly more difficult to apply in the appellant's case than it was in the case of Dr Samadian, who hired consulting rooms on what was clearly a regular basis. Mr Wright's forceful submissions converge, in our view, on the point that appellant's position as, in effect, a "sub contractor" in relation to his instructing surgeons potentially militates against a pattern of fixed and regular attendance at particular locations, in two respects: first, the appellant was dependent on surgeons offering him work; and second, when the appellant was offered work by a surgeon, it was for a surgical operation at a time and place of the surgeon's choosing.

75. Mr Wright is right that the appellant's position (viz his instructing surgeons) made it possible that the surgeons would ask the appellant to work at a wide variety of different locations, and the appellant would accept such offers of work; and if such a scenario came to pass, the appellant might well not satisfy the criterion of having a pattern of regular and predictable attendance at any particular location.

76. The reality, however, is that, in the 12 months in question, the appellant travelled from his home to just two hospitals, both in Newport, in the course of his private practice. He made nearly 100 journeys to and from home and one of those hospitals, St Josephs, and over 50 journeys to and from home and the other, the Royal Gwent. The simple number of journeys in the space of a year to just two locations strongly indicates a pattern of regular and predictable attendance. The fact there is a

range in the number of days between operations across the year does not, in our view, disturb the pattern, particularly as the length and timing of the longer "gaps" are consistent with the taking of holidays in the normal course of professional life.

77. Despite the possibility, given his position as a sub contractor to surgeons, that the appellant would have no such pattern to his work, it is not surprising that, in reality, there was a clear such pattern: as an anaesthetist in private practice, the appellant could carry out his profession only at hospitals at which private operations were carried out; there was a limited number of such hospitals in the area where the appellant lived and worked. This, combined with the appellant's natural tendency to obtain work form surgeons operating in those local hospitals, underlies the appellant's regular and predictable attendance at St Josephs and the Royal Gwent.

78. We have no hesitation in finding that it was the appellant's actual pattern of attendance, rather than what hypothetically could have happened given his position as a contractor, that determines whether the Newport hospitals were places of business for the appellant.

79. It is in this respect, of course, that the appellant's position differs from that of the taxpayer in *Horton*, for whom no such regular and predictable pattern could, as a matter of fact, be established; he therefore fell into the category labelled "itinerant" by the UT in *Samadian*.

80. Our finding that St Josephs and the Royal Gwent were places of business for the appellant means his travel expenses for journeys there from his home/office fall within a category set out by the UT in *Samadian* as non-deductible. Our analysis follows the UT's guidance in *Samadian* (at [26]) in not seeking to identify a single base of the appellant's business, given our finding that the appellant had multiple places of business.

Conclusion

81. The UT's "sensible and coherent categories" are a valuable tool in this case but our analysis must come back to the statutory test itself. In our view, the appellant's journeys between his home and the two Newport hospitals in the 12 months in question were within the remit of well-established case law that tells us that part of the purpose of such journeys is to enable the taxpayer to live away from his work. Hence the associated travel expenses were not incurred wholly and exclusively for the purposes of the appellant's private practice.

82. The appeal is dismissed and the assessments for the three tax years in question are upheld.

83. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 1 OCTOBER 2015

Appendix

Analysis of the appellant's journeys in the year ended 31 August 2008 (based on the appellant's "mileage log")

Table 1: Journeys for which HMRC disallowed travel expenses

Journey	Number of journeys	Mileage
Home to St Josephs	96	2,928
St Josephs to Home	94	2,867
Home to Royal Gwent	56	1,573
Royal Gwent to Home	50	1,405
Total (Table 1)	296	8,773

Table 2: Journeys for which HMRC did not disallow travel expenses

Journey	Number of journeys	Mileage
St Woolos to St Josephs	14	71
St Josephs to St Woolos	29	148
St Woolos to Royal Gwent	46	46
Royal Gwent to St Woolos	34	34
St Josephs to Royal Gwent	75	390
Royal Gwent to St Josephs	67	355
Royal Gwent to Llanfrechfa	4	24
Llanfrechfa to Royal Gwent	4	24
St Josephs to Llanfrechfa	3	11
Llanfrechfa to St Josephs	3	11
Caerphilly to St Josephs	1	19
Royal Gwent to Caerphillly	1	17
Total (Table 2)	281	1,150

Grand total (both tables)	577	9,923