TC07851

INCOME TAX – section 34 Income Tax (Trading and Other Income) Act 2005 - deductibility of fitness training expenditure for saturation diver – duality of purpose

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05971

BETWEEN

ROBERT JOHN OSBORNE **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
LESLIE HOWARD

Hearing conducted remotely by video on 19 August 2020

The Appellant in person

Ms Helen Davies, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal is made by the Appellant ("Mr Osborne") against the decision of the Respondents ("HMRC") to disallow his claim in respect of fitness training expenditure. The expenditure the subject of this appeal is allowed because it is wholly and exclusively for the purpose of Mr Osborne's occupation as a saturation diver.

BACKGROUND

Saturation diving

2. Saturation diving is a diving technique that allows deep sea divers to reduce the risk of decompression by remaining in a pressurised environment (in the diving support vessel) for a period that can last for days or weeks. In Mr Osborne's case, the diving support vessel has six chambers that are pressurised to the level required for the divers' work. The divers are supplied with a helium-oxygen mixture because of the effect of the depths at which they dive. Transfers to and from the pressurised environment are made using a pressurised diving bell. In the North Sea Mr Osborne works at 150m depths, spending days or weeks in the compressed chamber of the vessel or working at depth. The divers are only decompressed at the end of their deployment.

Procedural background

3. HMRC received Mr Osborne's Self-Assessment Tax Return for the 2016/17 tax year on 13 September 2017. On 27 June 2018, HMRC advised Mr Osborne and his agent, Mr Johnson of Johnson Holmes & Co, that a check would be carried out into the 2016/17 return under section 9A Taxes Management Act 1970 ("TMA"). Johnson Holmes & Co provided records and information, and advised HMRC that an amended return had been filed to correct a date.

4. On 7 September 2018, HMRC requested further information, including a mileage log or other documentary evidence to confirm the total vehicle mileage covered in the 2016/17 tax year. The letter also advised that expenses relating to maintaining fitness are not allowable on grounds on duality of purpose.

5. On 5 October 2018, Johnson Holmes & Co wrote to HMRC enclosing information about Mr Osborne's course fees, his wife's salary and his travel and subsistence expenditure. The letter also advised that there was an agreement in place between Mr Osborne and HMRC allowing him to claim a deduction for 40% of his fitness training expenditure as follows:

> " You referred to fitness training and propose to disallow claim for fitness on the basis of duality of purpose. We believe RMT reached without prejudice agreement with Aberdeen HM Revenue & Customs some time ago that a percentage of costs of fitness training can be claimed depending on age. Our client falls within the age category of 40-49 years and therefore 40% is deductible."

6. On 2 November 2018 HMRC advised Mr Osborne that his claim for the costs of his course fees and his wife's wages had been accepted, but that HMRC required a further analysis of the travel and subsistence expenditure and vehicle running costs. The letter also advised Mr Osborne that the agreement made with HMRC in 2009 regarding the deductibility of fitness training costs was not binding. On 21 December 2018, Mr Stephen of HMRC wrote to Johnson Holmes & Co to confirm that the agreement between Mr Osborne and HMRC in 2009 was non-binding, and that there is no formal legislation to allow expenditure of this nature.

7. On 1 February 2019, Mr Stephen of HMRC wrote to Mr Osborne to advise him of the adjustments considered to be required to his 2016/17 return. These were the withdrawal of the Seaman Earnings Deduction and the reduction of the claim for motoring costs to £625 based on business mileage of 1390 miles at the standard mileage rate of £0.45 per mile. Mr Stephen explained that in view of his decision to allow the 0.45 per mile expense, no relief would be given for a proportion of the balancing allowance and finance charges claimed.

8. On 6 February 2019, Mr Stephen of HMRC issued a letter to Mr Osborne advising that a penalty would be issued under Schedule 24 FA 2007 in the sum of £2,027.64. Mr Osborne has since agreed to the suspension conditions.

9. On 20 March 2019, Mr Stephen of HMRC issued a closure notice under section 28A(1B) & (2) TMA 1970 for the tax year 2016/17. The closure notice calculated an increase in Mr Osborne's tax liability of £21,598.80.

10. On 26 March 2019 Mr Osborne's agent formally appealed against HMRC's decision of 20 March 2019 and requested a review of the decision.

11. On 23 April 2019, Mr Stephen of HMRC issued a View of the Matter that confirmed his decision of 20 March 2019. On 5 July 2019, HMRC issued the review conclusion letter. The review confirmed Mr Stephen's disallowance of the fitness related expenditure because of its duality of purpose, but reduced the assessment to reflect Mr Osborne's actual expenditure rather than the simplified 0.45 rate adopted by Mr Stephen in calculating the allowable mileage. This reduced the tax liability to be assessed to £20,514.40.

12. On 19 August 2019 Mr Osborne submitted his appeal to Tribunal.

13. On 25 February 2020 Mr Stephen wrote to Mr Osborne to advise him that following the receipt of further documentation, he would allow all of Mr Osborne's business mileage other than the fitness mileage. This increased the allowable percentage business mileage from 17% to 23.66%, which in turn reduced the disallowed expenditure from £15,592 to £13,429.

14. On 2 June 2020 Mr Stephen of HMRC wrote to advise that the figures that he had provided on 25 February 2020 should be corrected as it had come to his attention that his figure of 23.66% was incorrect. Mr Stephen recalculated that the allowable percentage of the mileage should be increased to 27.5%. This reduced his calculation of the disallowed expenditure from £13,429 to £13,182. The schedule attached to Mr Stephen's letter is not included in the bundle, but we were advised at the hearing that HMRC now wish to issue a revised assessment for £18907.60 to reflect these calculations.

FINDINGS OF FACT

15. We have made the following findings of fact from the evidence in the Tribunal's bundle and the oral evidence of Mr Osborne and HMRC Officer Mark Stephen. Mr Stephen is a higher officer in the Dive Team, Individual and Small Business Compliance (ISBC), Complex and Agent, located in Glasgow. Mr Osborne gave the Tribunal clear and persuasive evidence about the requirements of his work as a saturation diver, his fitness regime and their combined impact on his body.

Mr Osborne's expenses claim

16. Mr Osborne is an experienced saturation diver in his late 40s. In the 2016/17 tax year Mr Osborne contracted with Technip Singapore Limited to dive offshore in the Congo and North Sea. Mr Osborne's accountant, Mr Johnson of Johnson Holmes & Co, prepared and filed Mr Osborne's tax return for 2016/17 in the same way as he had in prior years. The return included a claim to deduct Mr Osborne's business motoring expenditure, part of which related to fitness training.

17. Mr Osborne's claim for the business motoring expenditure was calculated by taking his business mileage as a percentage of his total mileage, and applying this percentage to his total motoring costs. Mr Osborne's annual mileage in the tax year 2016/17 was 8559. Mr Osborne's wife has a car that is used for nearly all family and private purposes when Mr Osborne is not working. Mr Osborne's private mileage estimate of 719 miles was noted and used by HMRC in their calculations of his liability. The remaining miles were claimed as business mileage under the following headings:

Purpose of travel	**Distance**
Mobilisations & CIS work	1268
Accountants	56
Banking	220
Medical	28
Training courses	786
Fitness travelling (see further detail below in para 18)	5482
Total business mileage claimed	7840

18. Mr Osborne's records show that he spent a total of 211 days onshore in the 2016/17 tax year and that he made the following journeys to fitness train:

	No. days	Distance	Total mileage
Gym VO2 training	211	22	4642
Beach/Woodland VO2 training	30	28	840
Total fitness mileage			5482

19. Following HMRC's independent review of Mr Stephen's decision, HMRC conceded that all of Mr Osborne's business mileage was allowable other than the 5482 miles undertaken for fitness training. This increased his allowed mileage from the 1390 allowed by Mr Stephen to 2358, giving rise to deduction in respect of 27.5% of his motoring costs. The expenditure the subject of this appeal is therefore limited to the percentage in respect of the 5482 mileage for fitness training.

20. In terms of quantum, Mr Osborne's motoring expenditure claim for 2016/17 was made up of vehicle running costs, car finance expenses and a balancing allowance as Mr Osborne changed his car in the tax year. The quantum of the items is no longer in issue. Mr Stephen had queried Mr Osborne's choice of a Range Rover and contended that a 0.45 pence per mile simplified allowance should be given rather than a proportion of the actual expenditure, but this was corrected by HMRC's independent reviewer. HMRC's review letter of 5 July 2019 explained why Mr Stephen's approach was incorrect as follows:

> "[The caseworker] has used the standard mileage rate of £0.45 per mile as they believe it is a matter of personal choice as to what vehicle you choose to purchase and use, but if this is a more expensive vehicle with greater than average running costs they do not consider that it gives an equitable result to allow relief against earnings based on a percentage of the overall costs applicable to business use.

> It is not within HMRC's remit to stipulate the type of car/mode of transport you utilise, so long as there is a trade purpose for incurring the expenditure. It is not for HMRC to prescribe the method you should take as the method of computing vehicle expenses is entirely optional, whether the business is also using the cash basis or not."

21. The disallowance of the fitness training mileage was accordingly reduced on review to the percentage that it represented of Mr Osborne' total motoring expenditure. The disallowance of the fitness training mileage increased the enquiry closure notice assessment for 2016/17 by £13,182, bringing the total amount assessed to £18,907.60 as noted in paragraph 14 of the procedural background above.

22. Mr Osborne believes that his fitness expenditure included the cost of his gym membership at a local council operated gym (£21 per month), in addition to his expenses in travelling to and from the gym and his weekly outdoor exercise. It is not clear from the papers in the bundle whether this claim is included as part of a wider expense heading, but Mr Stephen of HMRC did not think that it was. However, HMRC's review letter treats the claim as one for gym membership and associated travel expenditure, stating:

> "[HMRC's] view is there is a clear personal/non-trade purpose here. Therefore the gym membership and associated travel expenditure is not allowable."

23. As Mr Stephen confirmed that HMRC would treat both the gym membership and the associated travelling expenses in the same way, we have treated the claim as including both the gym membership fees and the associated travelling expense for the purpose of determining this question for the parties.

Fitness requirements for Mr Osborne as a saturation diver

24. Saturation diving is dangerous, and fatalities can be attributable to insufficient diver fitness. For this reason, the industry and contractors require minimum levels of fitness for divers. The method of achieving the required level of fitness is not standardised, but the level required is specified by age and diving type, and the testing is prescribed by the industry and contractors.

25. Mr Osborne explained that different levels of fitness and testing are prescribed for different levels of diving, ranging from scuba divers, gradually increasing to saturation divers. The reasons for, and the nature of, the industry requirements are explained in the extracts from (1) the Health and Safety Executive's standards and guidelines for the medical examination and assessment of commercial divers ("MA1"), (2) the International Marine Contractors Association (IMCA) Guidelines for regulating commercial diver fitness and (3) a letter from Ingrid Eftedal PhD, Faculty of Medicine, Norwegian University of Science and Technology, in the Appendix. Compliance with these regulations and guidelines is a requirement for the safe operation and insurance of the industry.

26. As Mr Osborne's contract is with Technip, he is required to meet their requirements. These are summarised in the following extracts from an email from Technip's DSV Personnel Lead – Freya Lobban:

> "Your fitness will be tested at this medical and you need to reach a minimum direct V02 max of 44mls02/kg/min.
>
> It is suggested that you train and if necessary, seek support and guidance from a trained professional to follow the Chester Police Run Test (link below)

> If you can complete this test easily...to the end of level 5 this theoretically gives an Indirect V02 max of 51mlsO2/Kg/Min."

27. Mr Osborne explained that the Chester Police Run is a training test that provides a crude VO2 estimate. It is an indirect test and it does not take account of age, heart rate and the expired breath is not analysed for oxygen. It has a 12-15% margin of error. Someone who passes this test may not pass a direct test. The comparison with direct testing is discussed in para 2.4 of the Appendix.

28. Freya Lobban's email concludes that the medical will include the following tests (in addition to others):

> "Stress ECG + Direct V02 (called Bruce protocol and it measures heart and lung fitness)
>
> Consultation - physical examination with a Diving doctor."

29. Mr Osborne's contract with Technip includes the following condition:

> "If the Contractor refuses to submit to, or fails to pass a medical examination or alcohol or drugs test requested by the Company or its clients, the Company reserves the right to terminate this Contract without notice."

30. As noted in paragraph 28, Technip use direct VO2 testing using the Bruce protocol. The Bruce protocol is a method for estimating VO2 max in athletes. The guidance in the protocol includes the following statements:

> "VO2 max, or maximal oxygen uptake, is one factor that can determine an athlete's capacity to perform sustained exercise and is linked to aerobic endurance. VO2 max refers to the maximum amount of oxygen that an individual can utilize during intense or maximal exercise. It is measured as "millilitres of oxygen used in one minute per kilogram of body weight" (ml/kg/min)."…
>
> "The Bruce Protocol is a maximal exercise test where the athlete works to complete exhaustion as the treadmill speed and incline is increased every three minutes (See chart). The length of time on the treadmill is the test score and can be used to estimate the VO2 max value. During the test, heart rate, blood pressure and ratings of perceived exertion are often also collected". …

31. The direct Bruce protocol test for Mr Osborne requires him to achieve a VO2 of at least 44 without his heart rate exceeding 220 bpm minus his age less a 20% safety factor. This means that he has to complete the test without exceeding 138.4 bpm (173 less 20% safety factor). We accept Mr Osborne's unchallenged evidence that achieving 44 on a VO2 max test is very much harder if it has to be done without exceeding 138.4 bpm. The test heart rate calculation means that the tests becomes harder with age.

32. We find that while each diver may use different training methods, including the Chester Police Run Test to fitness train, Mr Osborne's fitness requirements in 2016/17 included reaching a minimum VO2 of 44 before his bpm reached the limit prescribed by the direct Bruce protocol testing.

Mr Osborne's fitness training

33. As Mr Osborne noted, the IMCA guidelines (extract at paragraph 2.1 in the Appendix) state:

> "When people dive they are exposed to stresses that are unique to the underwater environment, i.e. terrestrial counterparts of the stresses do not exist, or they are ordinarily so minimal that they go unnoticed while a person is on land."

34. Both Mr Osborne's contract and the industry guidance in the Appendix make clear that it is Mr Osborne's responsibility to ensure that he is physically fit enough to work as a saturation diver. He cannot work unless he meets the fitness requirements and passes both the annual and pre/post saturation tests and drills. The nature and frequency of the level of fitness required and the testing is determined by the industry and company guidance, but the method of achieving the necessary fitness is not prescribed. Mr Osborne is a day rate contractor and he considers that Technip have neither the obligation nor expertise to advise him on the training required for the purpose of his work. Instead, Technip advised Mr Osborne to seek support and guidance from a trained professional.

35. Mr Osborne has consulted a diving doctor and a gym instructor as suggested by Technip. Divers understand that remaining at pressure for days at a time and diving to 150m affects the cartilage in their joints. Mr Osborne explained that it makes his joints ache and causes cartilage and bone damage. His diving doctor and gym instructor have advised him to run on loose soft hills in woodland or sand as this minimises the damage while maximising the strengthening effect of his training. This training, combined with his daily fitness training, was designed to allow Mr Osborne to lengthen his career by allowing him to continue training and working notwithstanding his age and pains. It is not, and presumably could not, be designed to repair the years of wear and tear of working as a saturation diver.

36. We find that Mr Osborne's only motive for his fitness training is to maintain the level of lung (VO2), heart and muscular fitness required to work safely as a member of a saturation diving team. As Mr Osborne explained, these measures are a matter of physical necessity for saturation divers. As the fitness level is specified for each diver, taking account of his age and the type of diving undertaken, the fitness training varies from diver to diver, but the physical necessity for the level of fitness is dictated by the occupation.

HMRC Dive Team's 2009 agreement

37. Mr Osborne referred repeatedly to HMRC's agreement with divers that allowed the deduction of a percentage of their fitness expenditure. His complaint about the way in which it was withdrawn without notice is outside the scope of this appeal, but we consider that its terms are relevant. The following extract was reproduced in Taxation magazine in May 2010 on the basis that it apparently represented the outcome of negotiations between HMRC's Divers Unit and the RMT, the National Union of Rail, Maritime and Transport Workers:

> 'To all RMT Diving Members.
>
> 'An increasing number of diving members have asked me whether they can claim for the cost of going to the gym to keep fit for a diving medical and dental costs as good teeth are also required for the diving medical.
>
> 'Following discussions between the RMT and HMRC Divers Unit in Aberdeen as to whether the following expenses, "gym and dental" costs would be allowable for persons who undertake an annual HSE diving medical, both sides presented cases for and against the expenses being allowed against trade receipts. Claims for the cost of gym training (membership of a fitness or health club or use of such facilities) to keep fit for a diving medical and essential dental work to pass a diving medical, will be considered by HMRC Divers Unit in Aberdeen, subject to official receipts, in tax returns from 2009.
>
> 'The HMRC Divers Unit in Aberdeen have assured the RMT that each case will be looked at on its merits and that in the spirit of a compromise, claims of up to 50% from persons aged say 50 and on a sliding scale downward for younger divers would seem reasonable (e.g. 20% for age 20 to 30, 30% for age 30 to 40, 40% age 40 to so and 50% max from the age of 50).

> 'This is due to the duality of purpose of the "gym" expenses which excludes the entire cost being allowable as a revenue expense in that the cost is not wholly and exclusively for the purpose of the trade, but is incurred for more than one purpose and a deduction is only permitted "for an identifiable part or identifiable proportion" of the expense which is incurred "wholly and exclusively" for the purposes of the trade….'

38. As noted in paragraph 6 above, Mr Stephen's letter of 21 December 2018 set out his views on the agreement reached with the Aberdeen Diver's Unit:

> "I can confirm that of course the Aberdeen Diver's Unit is part of HMRC."
>
> "It is also the case that the agreement in point negotiated by Mr Gowers would not have been done so by him in isolation; it will inevitably have been endorsed by his manager. However the key point is that as Mr Gower acknowledged at the time the agreement was made on a non-statutory basis and should not "be construed to mean that the Department accept that fitness expenses are incurred wholly and exclusively for business purposes."
>
> "In my letter of 2 November 2018 I described the agreement as in my view nonbinding. I can confirm that this is not my view in isolation it is the view endorsed by the current dive team leader. I hope therefore that you can now see that I am not personally unilaterally changing HMRC practice."

39. We asked Mr Stephen when the agreement had been withdrawn by HMRC. Mr Stephen explained that he did not know when the decision was made to withdraw the agreement, but that he had joined the HMRC Dive Team in November 2017 and that he had been advised by his Team Leader that the agreement no longer applied when he queried it in relation to the enquiry into Mr Osborne's tax return for 2016/17. Mr Stephen said that all of his workload now concerns divers and that he had taken the same approach in relation to all of his cases.

40. We asked Mr Stephen why he had imposed a penalty in respect of the part of the assessment that related to the unannounced withdrawal of an agreement with HMRC. Mr Stephen was not able to explain why he considered that this represented careless behaviour on the part of the taxpayer, and he answered that it was approved by his senior officer, as in the case of all penalties. The penalty is not the subject of this appeal as it has been suspended following the agreement of conditions. If this were not the case, we would have addressed the point that relying on an agreement with HMRC is not careless behaviour.

SUBMISSIONS

41. Mr Osborne claims that the only reason for incurring his fitness training expenditure is for the purpose of his work as a saturation diver. Mr Osborne submits that he would not put his body through daily unsustainable training of this nature if it were not required for his work as a saturation diver. The cases referred to by HMRC can be distinguished as saturation diving is unique because of the fitness levels required when working, the stress that it puts on the body, and the testing levels.

42. HMRC's case is that there is necessarily an element of duality of purpose in fitness training, and that the expenditure cannot therefore meet the "wholly and exclusively for the purposes of the trade" test in section 34. Ms Davies referred the Tribunal to the cases of *Norman*, *Mallalieu* and *Parsons* and concluded that if the Tribunal applies the guidance in these cases, it must conclude that Mr Osborne's fitness expenditure is not deductible because it provides a personal benefit for him as a living human being and therefore has duality of purpose.

43. Ms Davies has invited us to find that unless his fitness training is of a special character dictated by the occupation, the expenditure must be disallowed. HMRC accept that there is a

minimum VO2 specification for saturation divers, but argue that the types of exercise undertaken by Mr Osborne for the purpose of meeting this specification are not of a special character, and that his fitness training is not dictated by, or an expectation of, his employer. The contract does not state how the fitness should be achieved. The fitness training is not universal training for all divers or mandatory.

RELEVANT LAW

44. The following provisions in the Income Tax (Trading and Other Income) Act 2005 are relevant:

45. Section 34 ("section 34") Expenses not wholly and exclusively for trade and unconnected losses

"(1) 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, or

(b) losses not connected with or arising out of the trade.

(2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

46. Section 15 ("section 15") Divers and diving supervisors

"(1) This section applies if–

(a) a person performs the duties of employment as a diver or diving supervisor in the United Kingdom or in any area designated by Order in Council under section 1(7) of the Continental Shelf Act 1964 (c. 29),

(b)the duties consist wholly or mainly of seabed diving activities, and

(c)any employment income from the employment would otherwise be chargeable to tax under Part 2 of ITEPA 2003.

15(2) The performance of the duties of employment is instead treated for income tax purposes as the carrying on of a trade in the United Kingdom.

15(3) For the purposes of this section the following are seabed diving activities– (a)taking part as a diver in diving operations concerned with the exploration or exploitation of the seabed, its subsoil and their natural resources, and (b)acting as a diving supervisor in relation to any such diving operations."

47. HMRC referred the Tribunal to the following cases:

Norman v Goulder [1944] 26 TC 293 (*Norman*)

Mallalieu v Drummond [1983] 2 All ER 801 (CA), [1983] 2 All ER 1095 (HL) (*Mallalieu*)

Parsons v HMRC [2010] UKFTT 110 (TC) (*Parsons*)

48. The burden of proof in this appeal is on Mr Osborne, and standard of proof is the balance of probabilities.

DISCUSSION

49. The only matter in issue in this appeal is whether Mr Osborne is entitled to claim a deduction under section 34 in respect of his fitness expenditure.

50. HMRC have not challenged the fitness expenditure on the grounds that there is duality in the travelling between Mr Osborne's home and the places where he fitness trains. It has

been accepted that he bases his business from home and that travelling from there to his business activities, including his travel to mobilisations, CIS work and courses, is deductible. The proportion of his travelling expenses attributable to these journeys has since been allowed and the only question in dispute is therefore whether there is duality of purpose in fitness training as it also serves the purpose of the human need for fitness.

51. We have considered the restriction in section 34 and the way that the courts have interpreted this provision in the authorities cited to the Tribunal.

Section 34

52. We note that Mr Osborne has disputed his employment status but, as he works as a diver, section 15 provides that section 34 applies whether he is self-employed or an employed diver. As Mr Osborne's employment status is not the subject of this appeal, we have not considered this further.

53. Section 34(1)(a) operates to preclude a deduction for expenses that are not incurred "wholly and exclusively for the purposes of the trade". As discussed below, this test has operated for over 100 years and it has been the subject of a considerable body of case law. We have considered and applied the case law referred to in the Tribunal's bundle below.

54. Section 34(2) provides that if an expense is incurred for more than one purpose, a deduction may be allowed for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade. Mr Osborne suggested that as HMRC had informally allowed the deduction of a percentage of divers' fitness expenditure in the past, it should continue to do so. He cited the similar arrangements agreed by HMRC in relation to the proportion of home office expenses that are deductible.

55. We agree with HMRC that the nature of fitness expenditure is such that it is not possible to identify a part or proportion separately from the remainder for the purposes of section 34(2) as may be possible for a room in a home used solely for business purposes. The fitness expenditure is either allowable in full or not at all.

Case law

56. The earliest case that Ms Davies referred us to is *Norman*, in which the Court of Appeal considered whether medical expenses incurred by a shorthand writer were deductible in computing his liability to tax on his professional income. Mr Norman contended that the expenditure on his illness was laid out in order to continue his professional activities. The relevant legislation in the Income Tax Act 1918 provided that in computing the amount of the profits or gains to be charged, no sum could be deducted in respect of any disbursements or expenses, not being money "wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation".

57. Lord Greene MR's decision explains that no deduction can be allowed if the expenses are in part to provide an advantage and benefit to the taxpayer as a human being, in addition to the trade purpose:

> "It is quite impossible to argue that doctor's bills represent money wholly and exclusively laid out for the purposes of the trade, profession, employment or vocation of the patient. True it is that if you do not get yourself well and so incur expenses to doctors you cannot carry on your trade or profession, and if you do not carry on your trade or profession you will not earn an income, and if you do not earn an income the Revenue will not get any tax. The same thing applies to the food you eat and the clothes that you wear. But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being."

58. In *Mallalieu* the House of Lords considered the claim by a practising barrister that expenditure on the purchase and cleaning of black tights, black shoes, black suits, black dresses and white shirts was deductible. It was common ground that the cost of collars was deductible. The relevant test (in section 130(a) Income and Corporation Taxes Act 1970 at that time) was whether the relevant expenditure was "wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation".

59. HMRC provided the Tribunal with the decision of the Court of Appeal in *Mallalieu*. It is interesting to note that both the High Court and Court of Appeal allowed Miss Mallalieu's appeal in the basis of the Commissioners' finding that her only conscious motive in incurring the expenditure was the requirements of her profession. We note that in allowing Miss Mallalieu's appeal, Sir John Donaldson M.R. approved and applied the approach set out by Oliver J. in *Sargent v. Barnes* [1978] STC 322 in a passage at p. 329:

> "This is an area in which it is difficult and, I think, positively dangerous to seek to lay down any general proposition designed to serve as a touchstone for all cases. The statute, by its very terms, directs the court to look at the purpose for which the expense was incurred in an individual case, and that necessarily involves a consideration of the intention governing or the reason behind a particular expenditure, which must depend in every case on its own individual facts. The stone which kills two birds may be aimed at one and kill another as a fortuitous or fortunate consequence; or it may be aimed at both. But it is only in the former case that the statute permits the taxpayer to deduct its cost."

60. The application of this approach to the findings of fact made by the commissioners led the Court of Appeal to dismiss HMRC's appeal in Miss Mallalieu's favour. However, the majority in the House of Lords found that the Commissioners were entitled to draw the inference that Miss Mallalieu's expenditure had a "dual purpose, one professional and one non-professional" from their findings of fact. Lord Brightman stated (at p.1103):

> " Of course Miss Mallalieu thought only of the requirements of her profession when B she first bought (as a capital expense) her wardrobe of subdued clothing and, no doubt, as and when she replaced items or sent them to the launderers or the cleaners she would, if asked, have repeated that she was maintaining her wardrobe because of those requirements. It is the natural way that anyone incurring such expenditure would think and speak. But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist. In my opinion the Commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."

61. Interestingly, Lord Brightman went on to cite the following passage from Goulding J's decision at p 93 in *Hillyer v. Leeke* (1976) 51 T.C. 90, commenting:

> "I find myself in complete agreement with Goulding J. and I regard his observations as appropriate in their entirety to the case before your Lordships."

62. *Hillyer v Leeke* concerned a computer engineer who was required to wear a suit when visiting customers. The passage cited is as follows:

> "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**. . . .** Does it make any difference if the taxpayer chooses, as apparently Mr. Hillyer did, to keep a suit or suits exclusively for wear when he is at work? Is it possible to say, as Templeman J. said about protective clothing in the case of *Caillebotte v. Quinn* [1975] 1 W.L.R. 731, that the cost of the clothing is deductible because warmth and decency are merely incidental to what is necessary for the carrying on of the occupation? That, of course, was a Schedule D and not a Schedule E case, but the problem arises in a similar way. The answer that the Crown makes is that where the clothing worn is not of a special character dictated by the occupation as a matter of physical necessity but is ordinary civilian clothing of a standard required for the occupation, you cannot say that the one purpose is merely incidental to the other. Reference is made to what Lord Greene M.R. said in *Norman v. Golder* (1944) 26 T.C. 293, 299. That was another case under Schedule D, but again, in my judgment, applicable to Schedule E cases, where the learned Master of the Rolls said, referring to the food you eat and the clothes that you wear: 'But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being.' In my judgment, that argument is conclusive of the present case, and the expenditure in question, although on suits that were only worn while at work, had two purposes inextricably intermingled and not severable by any apportionment that the court could undertake."

63. In *Parsons* the First-tier Tribunal (Dr Christopher Staker and Ms Anne Redston) took Lord Brightman's approval of the passage from Goulding J's decision to mean that he considered it to be a material consideration whether the expenditure is "of a special character dictated by the occupation as a matter of physical necessity", stating (at para 31):

> "Lord Brightman considered it to be immaterial in that case that the clothing was only purchased in order to be worn when 'on-duty', and that the clothing was only worn when 'on-duty'. However, in quoting from *Hillyer v Leeke* (1976) 51 TC 36 90, he indicates that it was a material consideration that the clothing in question was 'not of a special character dictated by the occupation as a matter of physical necessity but [was] ordinary civilian clothing of a standard required for the occupation'. Lord Brightman thereby indicated that the position might be different if the clothing was 'of a special character dictated by the occupation', as in the case of a uniform."

64. Our reading of the cases is that they suggest that an exclusively trade purpose can be identified because of a "special character dictated by the occupation as a matter of physical necessity", but this does create an additional test that something specific must be dictated for the expenses to be deductible. The examples cited by Lord Brightman in *Mallalieu*, and those referred to in the extracts of the other cases cited above, including *Parsons*, were to assist in identifying whether the expenditure was exclusively for the purpose of the trade by looking at what was required as a matter of physical necessity for the occupation.

65. This is supported by the following passages in *Mallalieu* and *Parsons* that do not look for an organisational specification, but whether its character reflects the physical needs of the

occupation. For example, a piece of safety clothing or uniform may feasibly be worn in both work and non-work contexts, but it is reasonable to infer that most taxpayers do not have a non-business purpose for expenditure on such clothing. The expenditure must be considered by reference to the evidence and circumstances of its design and purpose for the taxpayer. In *Mallalieu* Lord Brightman considered examples of a nurse's uniform or a waiter's "tails", and that that it is a matter of degree, concluding (at p.1100) that:

> "The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes."

66. In *Parsons* the Tribunal found in the taxpayer's favour in relation to the expenses of a knee operation (para 38), chiropractor and masseur expenses, and dental treatment (para 43), explaining that:

> "In the Tribunal's view, the very circumstances in which the injury was sustained, and the need for this particular injury to be repaired in order for the Appellant to be able to continue to meet the particular demands of his specialised work, lead to the conclusion that the circumstances of the knee operation were 'of a special character dictated by the occupation'"

> "In the case of the dental treatment, it is more readily apparent that the Appellant has a personal benefit as a human being. However, the Tribunal takes into account that the injuries to the Appellant's teeth were specifically sustained in the course of his work, that it was an inherent part of his work to subject himself to the risk of such injuries occurring, and that it was necessary for him to have the damage repaired in order to continue working."

67. The Tribunal did not describe the medical operation itself as having a "special character" or as something dictated by Mr Parsons' contract; it was the special circumstances of the medical operation that were dictated by the physical necessities of the occupation.

68. This reasoning is consistent with the Tribunal's refusal of the fitness expenditure in *Parsons* as the decision reflects the taxpayer's failure to evidence how his fitness training reflected the physical necessities of his occupation (indeed, there is only one paragraph of evidence about his fitness training). The Tribunal therefore concluded as follows (at para 47):

> "[The] Tribunal was not provided with evidence of the details of precisely what the expenses for 'health & fitness' were for. The Appellant referred in his evidence to 'fitness training' generally and to boxing classes. The Tribunal finds that the evidence before it does not establish that these expenses related, for instance, directly and specifically to maintaining these specialised skills that the Appellant must have to remain on the stunt register. The Tribunal finds that the evidence before it does not establish that the expenses related to more than maintaining the standard of fitness generally that is required in order for the Appellant to be able to perform this type of work."

Conclusions drawn from statute and case law

69. Ms Davies has invited us to find that fitness is a human need, in the same way as food, shelter or clothing, and that there is an inescapable duality of purpose in fitness training. Ms Davies referred us to passages in *Parsons* to support her submission that fitness training must meet the additional requirement of being of a "special character dictated by the occupation" as well as being for the purposes of the trade. HMRC's contention is that this means that the

fitness training must be specifically dictated by an employer, organisation or other person. Ms Davies also suggested that the fitness training should something specific to the taxpayer's occupation, citing the fact that other taxpayers also run and weight train for personal fitness.

70. At this point it is important to make the obvious but relevant point that the test in section 34 does not include the word "necessarily". The test for a deduction from earnings is whether employment expenses were incurred "wholly, exclusively and necessarily in the performance of the duties of the employment", but there is no requirement a taxpayer to establish that a trade expense was necessarily incurred. We accept that the application of the test in section 34 requires careful consideration where the expenditure concerns a human need, such as food, clothing or health, but the test remains whether the purpose is "exclusively" by reference to the trade and this should not be confused with "necessarily". Applying section 34 in this case requires the Tribunal to consider whether the exclusive purpose of the taxpayer's specific fitness training is to meet the physical necessities of the occupation, but it does not require the fitness training to be specified or expected by a third party, employer or other organisation.

71. With regard to Ms Davies' submission that Mr Osborne's fitness training exercises are not of a specific character for the occupation, we consider that the test is not by reference to what the expenditure is called (fitness training, medical treatment or clothing), but its purpose, taking account of the circumstances and degree. In this sense, a comparison can be made with a medical operation or cosmetic dentistry considered in *Parsons*.

72. In conclusion, we consider that section 34, as interpreted in the three decisions cited by HMRC, requires the Tribunal to make detailed findings of fact about the fitness training and how it relates to the physical necessities of the occupation, as well as the taxpayer's motive in incurring expenditure. Having made these findings, the Tribunal may then conclude on the taxpayer's purpose or purposes in accordance with the guidance provided by Lord Brightman in *Mallalieu*. The Tribunal should take account of the fact that the purposes for which expenditure is incurred may go beyond the taxpayer's conscious motive. The Tribunal may find that the taxpayer has an unavoidable secondary or private purpose, especially as fitness concerns the needs of a human being. Having reached its conclusions on the taxpayer's purpose or purposes, the test in section 34 is applied to preclude relief if the expenditure is not incurred wholly and exclusively for the purpose of the trade. This will be the case if there is duality of purpose, but the existence of an incidental or unavoidable private advantage will not necessarily preclude the exclusivity of the business purpose.

Application of law to our findings of fact

73. We have therefore gone on to conclude what the purpose of Mr Osborne's expenditure on fitness training was, applying our conclusions on the law to our findings of fact.

74. Our first conclusion is that Mr Osborne has established that his only purpose in undertaking his fitness training is to enable him to work as a saturation diver. The evidence of his work, drills and direct testing of the lung and heart function support his claim that his fitness training is dictated by his occupation as a matter of physical necessity. It is the intensity, frequency and combination of all of the exercises that Mr Osborne includes in his fitness training that evidence his purpose of meeting the physical necessities of saturation diving. The physical necessities of saturation diving dictate Mr Osborne's fitness training methods, their duration and location.

75. Our second conclusion is that Mr Osborne would not fitness train for 2-3 hours per day if he did not need to do it for the purpose of working as a saturation diver. We accept his evidence that he has been told that his cartilage/joint pain is attributable to the cumulative effect of his years of working as a saturation diver, and that his fitness regime is designed to

cause the minimum additional damage, and the optimum effect to allow him to continue working in this occupation for longer. His fitness training regime is far removed from his personal physical needs because of its effects, and is extreme by any measure, but if the training were reduced to 'reasonable' or less damaging levels it would not meet his needs as a saturation diver. Fitness training is not of a fixed degree, quantity or universal design that can be compared without looking at the facts of the specific case. It is not reasonable to infer that in his circumstances, Mr Osborne undertakes this level of training because of a subconscious motive of keeping fit as human being. Any improvement in his fitness is incidental and entails unavoidable body stress. There is no duality of purpose in Mr Osbourne's expenditure on fitness training.

76. Section 34 requires us to consider whether Mr Osborne's expenditure on fitness training incurred was incurred wholly and exclusively for the purposes of his occupation as a saturation diver. We have concluded from our findings of fact that Mr Osborne has established that his expenditure on fitness training meets this test.

DECISION

77. For the reasons set out above, Mr Osborne's appeal is allowed. HMRC must now recalculate the 2016/17 assessment and penalty (if it has not been cancelled following its suspension) to reflect the deductibility of the fitness expenditure.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

78. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

Release date: 25 September 2020

APPENDIX

The extracts set out in this Appendix are key aspects of the industry guidance and requirements for saturation divers:

1. The Health and Safety Executive's standards and guidelines document for the Medical examination and assessment of commercial divers ("MA1") includes the following guidance:

> "This document contains Health and Safety Executive (HSE) standards and guidelines for the medical examination and assessment of working divers. They are primarily for use by HSE Approved Medical Examiners of Divers (AMEDs) in performing fitness to dive medicals for the purposes of the Diving at Work Regulations 1997."
> "Diving is a high hazard, high risk activity and there are specific regulations on diving at work to control the risks. The Diving at Work Regulations 1997 (DWR) cover all dives when one or more divers are at work in the diving industry, whether employed or self-employed. They apply to everyone from the client to the diver undertaking work for the client. All persons involved have a responsibility to take measures to safeguard the health and safety of those taking part in the diving project as well as their own."
> "Under DWR, all divers at work must have a valid certificate of medical fitness to dive, issued by an AMED."
> "Professional diving can be very demanding, both physically and mentally, and divers need a good level of physical fitness. This is particularly important for underwater emergencies where a diver may need to rescue a colleague."
> "There is no lower or upper age limit for medical fitness to dive. However, a diver must retain the physical and functional capacity to undertake work underwater even if offset by greater experience. This will normally require greater than average fitness as age increases."
> "Working divers should be able to achieve a minimum VO2 max of 45 ml/kg/min."

2. The International Marine Contractors Association (IMCA) Guidelines for regulating Commercial Diver Fitness includes the following guidance*:*

2.1 "7. I The Compelling Need for Commercial Divers to be Medically Fit

> Diving is an activity which places unavoidable physical, physiological and psychological stresses upon participants. When people dive they are exposed to stresses that are unique to the underwater environment, i.e. terrestrial counterparts of the stresses do not exist, or they are ordinarily so minimal that they go unnoticed while a person is on land. When stresses cause harm to an individual, they are labelled pathological.
>
> Many stresses for divers arise from the physical properties of water, including its density, pressure, viscosity and thermal conductivity. In comparison to the terrestrial environment all of these physical properties are greatly increased during immersion:
> ♦ Density - Water density is approximately 775 times greater than air.
> ♦ Pressure - The hydrostatic pressure (weight of the water column) effects of the underwater environment are due to the density of water. Descent through the water column leads to a rapid increase in ambient pressure for divers. A few feet of descent in water is equivalent to many hundreds of feet of descent in the atmosphere.

♦ Viscosity - The density of water means that it is also considerably more viscous (thicker) than air, and this greater viscosity causes resistance when moving through water. Water is in fact some 790 times more viscous than air and provides 12 times the resistance to exercise performed on the surface.
♦ Thermal conductivity - The specific heat of water is one thousand times greater than that of air. As a result, water conducts heat away from an object about 25 times as rapidly as air. This is why immersion in cold water is so challenging to the body's heat-conserving mechanisms.
The well-known hazards of diving stem from the physical properties of water. There is an ever-present risk of drowning, decompression sickness, barotrauma, and gas toxicity when diving. In comparison to working on the surface, there is also an increased risk of hypothermia and exhaustion when working underwater. The very act of breathing gas at great pressure means that the work capacity of divers is greatly reduced because of the increased work of breathing the dense gas. In addition to fatigue and exhaustion, currents, swells, waves, surges and turbulence may also cause traumatic injuries to divers. In order to meet the rigours of the underwater environment, it is essential that commercial divers are medically fit people. …"
"Confirmation from Divers that they are Fit to Dive

The diving industry expects and requires divers to:

♦ Take reasonable care of their own health and safety and the health and safety of other persons who may be affected by their acts or omissions at work;
♦ Co-operate with their employers in the employers' efforts to deliver safe diving projects;
♦ Inform their supervisor of any medications they are taking;
♦ Do all that they can to ensure that they are medically fit when they report for diving duties, and that they are also physically fit enough to carry out the tasks they may be reasonably expected to undertake while underwater safely, efficiently and without undue fatigue;
♦ Have a valid certificate of medical fitness to dive issued by a competent medical examiner of divers;
♦ Have undergone any pre-dive medical checks specified by the diving contractor in its own procedures;
♦ Declare in writing that they feel they are medically fit and sufficiently physically fit for diving duties;
♦ Report any concerns they have over their own fitness to dive to the diving supervisor;
♦ Report any concerns they have over the fitness to dive of other divers to the diving supervisor."

2.2 The following extract explains the meaning of the references to a "diving doctor":

""6.2 Suitable Doctors The physiology of diving and the problems encountered by an ill or injured diver are not subjects which most doctors understand in detail. For this reason it is necessary that any doctor who is involved in any way with examining divers or giving medical advice in relation to divers has sufficient knowledge and experience to do so (Ref. DMAC 17).

2.3 The following extract sets out the annual and pre/post saturation testing requirements for saturation divers:

"Medical Checks

All divers at work must have a valid certificate of medical fitness to dive issued by a suitable doctor. …

The certificate of medical fitness to dive is a statement of the diver's fitness to perform work under water and is valid for as long as the doctor certifies, up to a maximum of 12 months. The medical examination looks at the diver's overall fitness for purpose. It includes the main systems of the body - cardiovascular system, respiratory system, central nervous system - and ears, nose and throat, capacity for exercise, vision and dentition. …"

"In addition to the annual assessments of fitness to dive carried out by medical examiners of divers, IMCA international code of practice for offshore diving (IMCA D O 14), section 6.4.2 recommends the following:

"6.4.2 Responsibility of the Supervisor

"Before saturation exposure, the supervisor will need to ensure that the divers have had a medical examination within the previous 24 hours. This will confirm, as far as reasonably practicable, their fitness to enter saturation. In addition, on completion of the saturation diving period a post-dive medical may be carried out. The medical examination will be carried out by a nurse or a diver medic. The content of the examination and the format of the written or electronic record will be decided by the diving contractor and will be specified in the contractor's diving manuals."

2.4 .The following extract explains the difference between direct testing and indirect testing:

"Accurately measuring V02 max involves a physical effort sufficient in duration and intensity to fully tax the aerobic energy system. In general, clinical and athletic testing, this usually involves a graded exercise test (either on a treadmill or on a cycle ergometer) in which exercise intensity is progressively increased while measuring ventilation and the oxygen and carbon dioxide concentration of the subject's inhaled and exhaled air. V02 max is reached when oxygen consumption remains at a steady state despite an increase in workload.

The use of a modern metabolic cart during a graded exercise test provides a very accurate direct method of measuring an individual's V02 max (2% confidence)…

Fortunately, indirect methods of estimating an individual's V02 max are available. While they are not as accurate as direct exercise testing protocols, …], indirect exercise-testing protocols are used successfully by many organisations (e.g. the military, police and fire services) for routine monitoring of staff physical fitness levels."

3. Extract from a letter from Ingrid Eftedal PhD, Faculty of Medicine, Norwegian University of Science and Technology

"Safety in saturation diving depends profoundly on diver fitness. The underwater work environment, with high ambient pressure, altered breathing gas composition and blood circulation during water immersion, puts particular strain on the circulatory system - i.e. the heart, lungs and blood vessels. To limit ensuing risks, the divers must maintain high aerobic fitness. Maximum uptake capacity - V02 max - is an internationally acknowledge measure of aerobic capacity, used to evaluate divers' fitness. Required V02 max levels for saturation divers are set by the diving industry; each individual diver must uphold their V02 max through regular training and are subjected to regular tests to confirm their fitness to dive. Science supports the importance of physical training throughout a saturation diving career."