[2020] UKFTT 0416 (TC)

TC07893

INCOME TAX – ALLOWABLE EXPENSES – *Closure Notice — Penalty – Subcontractor staying away from home for 165 days – business base – Section 34 Income Tax (Trading & Other Income) Act 2005 "Wholly and exclusively" – appeal against Closure Notice dismissed – appeal against Penalty Notice allowed.*

Appeal number: TC/2019/00921 A/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr HAMISH TAYLOR **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
Mrs JANE SHILLAKER

The hearing took place on 13 October 2020. The Tribunal heard Mr Nathan McLaughlin, Accountant, for the Appellant and Ms Laurie Outten, Litigator, of HM Revenue and Customs' Solicitor's Office for the Respondents.

With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The issues for the Tribunal were narrow, the Tribunal decided a remote hearing was appropriate and so had granted the request. The documents to which the Tribunal were referred consisted of the agreed bundle as prepared by HMRC in electronic form.

The hearing was held in public.

DECISION

Introduction

1. The Appellant was engaged as a self-employed subcontractor by large engineering company. This appeal concerns the tax treatment of the accommodation and travel expenses he claimed between his home in Melrose, Scotland and an hotel in Swindon, England at which he lodged while working in the tax year in question. He maintained that the expenses so claimed were wholly and exclusively incurred in the course of his self-employment. HMRC disagree. HMRC's decisions, both dated 27 November 2018, which are under appeal are as follows:

Tax year	**Decision**	**Amount**
2016/17	Closure Notice Section 28(1)A Taxes Management Act 1970 ("TMA 1970")	£1,015.96
2016/17	Penalty Notice Finance Act 2007 Schedule 24 (suspended)	£1,115.35

On 6 April 2018 HMRC opened an enquiry into the Appellant's Self-Assessment ("SA") income tax return for the year ending 5 April 2017. A breakdown was requested of the self-employment expenses of £29,679 he claimed in his SA return. Correspondence and further enquiries followed and eventually the Closure Notice and Penalty Notice under appeal were issued.

The central issues

2. There were two main issues which required the Tribunal's decision, as follows:

> (a) Whether the Closure Notice disallowing much of the Appellant's expenses claim was correct; i.e., were the expenses claimed wholly and exclusively incurred by the Appellant for the purposes of his trade, and.
>
> (b) Whether in all the circumstances the Penalty Notice should stand.

The law

3. The main relevant legislation is as follows:

Section 9A TMA 1970: opening of enquiry

Section 28A TMA 1970: closing of enquiry and issue of closure notice

Sections 31, 31A and 50(6) TMA 1970: right of appeal and procedure

Section 34 Income Tax (Trading & Other Income) Act 2005 ("ITTOI Act 2005")

Schedule 24 Finance Act 2007: penalties

It is necessary to set out section 34 in detail:

"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."

4. An appeal may be brought against any assessment which is not a self-assessment (section 31(1)(d) TMA 1970). If the appellant notifies the appeal to the Tribunal, the Tribunal is to decide the matter in question (section 49D TMA 1970).

The Appellant's case

4. The Appellant's main contention was that his situation paralleled that of the successful appellant in *Horton v Young* (1971) 47 TC 60. The Appellant would not have been in Swindon had it not been for his work. As to the penalty, the Appellant had not ignored HMRC's letter dated 28 October 2018: in fact the Appellant's representative had written to HMRC on 2 November 2018 as had been acknowledged.

The Respondent's case

5. HMRC contended that the Appellant had chosen Swindon as his base for undertaking work at various sites. The Appellant lived in Melrose but carried out his trade primarily at sites around Swindon. The cost of travel between Melrose and Swindon, and the related cost of accommodation and subsistence were not allowable expenses, because they were not wholly and exclusively incurred for business purposes. Certain other travel and subsistence claims were however allowed.

6. In *Horton v Young* (above), the appellant had worked as a subcontractor bricklayer at various building sites within 55 miles of his home, worked at each site for three weeks or so, had no office on the sites, contracted for work, wrote up his books and kept his tools at home, and travelled to the sites in his car, in which he conveyed other members of the bricklaying team. HMRC submitted that in contrast the Appellant worked out of Swindon, not his home address in Melrose, so that travel and accommodation between Melrose and Swindon was not wholly and exclusively incurred as stipulated within section 34, ITTOI Act 2005. The Appellant had chosen Swindon as a convenient base for his work at different sites.

7. Moreover, in *Horton v Young*, Brightman J had placed qualitative limits on the distance that an itinerant taxpayer could live from the location at which his trade was

normally carried out. The judge gave the example of a commercial traveller living in London whose "patch" was Cornwall. The cost of travel between London and Cornwall would not be allowable even if the occupation were a travelling one.

8. As to penalties under Schedule 24, the inaccuracy in the SA return was caused by the Appellant's careless behaviour, i.e., his failure to take reasonable care in compiling his return. While the Appellant gave some assistance during the enquiry, he had not replied to HMRC's letter dated 26 October 2018. An 80% reduction was allowed for telling, helping and giving. The disclosure reduction was 15%. In all an 18% penalty was appropriate. There were no special circumstances to be considered. Suspension conditions had been offered but the Appellant did not accept so the offer was withdrawn. The appeal should be dismissed on all grounds.

Burden and standard of proof

9. The formal validity of the Closure Notice and of the Penalty Notice was not in dispute. It was then for the Appellant to show that the disallowed expenses were wholly and necessarily incurred within section 34, ITTOI Act 2005. The standard of proof is the normal civil standard, the balance of probabilities.

Evidence

10. A bundle of copy documents was served prior to the hearing by HMRC, incorporating the Appellant's documents, together with relevant authorities and legislation. The Tribunal will refer to specific documents as necessary below.

11. There was no dispute of fact as such and formal evidence was not required. Some of Mr McLaughlin's submissions included an element of evidence but this largely reflected what had already been said elsewhere in the correspondence. The essential facts are summarised at [1], above. The appeal turned on questions of law.

Submissions

12. Mr McLaughlin for the Appellant relied on the Notice of Appeal and the case set out in the correspondence with HMRC. The Appellant had considered his position and taken advice before claiming the expenses in dispute. The Appellant had been self-employed for many years and was CIS registered. There was more and better pay on offer in the south. The Appellant had to be on site and available at 6.30am and worked long days. The Appellant decided that he needed local accommodation and had chosen something basic. He had not claimed for his evening meals. The Appellant had stayed 165 nights in the tax year in question, 2016/2017. There was no dual purpose for the accommodation, unlike the accommodation costs disallowed in *Healy v HMRC* [2013] UKUT 0337 (TCC), where friends had stayed with the taxpayer in the flat he had rented while he had been working away. The Appellant had only been in Swindon for work. No one stayed with him. Mr Mclaughlin submitted that the appeal should be allowed.

13. Mr Mclaughlin told the Tribunal that the Appellant also worked locally in Melrose, and had an office with a computer there. He had also worked abroad.

14. Ms Outten for HMRC relied on HMRC's Statement of Case, which has been summarised briefly above. As to *Healy* (above), the analysis there set out showed that the Appellant could not demonstrate section 34 compliance. He had lodged in Swindon for his own convenience, to shorten travel distance from his home. Swindon had been a base. The appeal could not succeed.

Discussion

15. As already noted, there was no factual dispute. The relevant legal authorities were agreed, in particular *Healy.* There the Upper Tribunal (when remitting that case to the First-tier Tribunal) set out at [66] nine principles for guidance, while emphasizing that each case of this kind will turn on its own particular facts, concluding with the caution that the fact that an item of expenditure may be necessary for an individual to conduct his trade does not of itself mean it passes the "wholly and exclusively" test: *Newsom v Robertson (1952) 33 TC 452*, where Denning, LJ (as he then was) said that you must look to the base from which the trade is carried on. The Tribunal has considered the nine principles when determining the present appeal.

16. There was no suggestion by HMRC of any dishonesty on the Appellant's behalf, only carelessness. The expenses claimed were supported by receipts where appropriate. He took advice before completing his SA return. From the Appellant's point of view, it is possible to see why he believed his substantial expenses claim was justified. He would never have been in Swindon except in the course of earning his living. His hotel appears to have been chosen for economy rather than comfort. He made no claim for his evening meals.

17. The difficulty he faces, however, is that the main reasons he chose to lodge in Swindon as he frankly stated through his representative were to improve his opportunity to obtain rates of remuneration superior to rates in other parts of the United Kingdom known to him and (closely related) to reduce the journey time from his home in Melrose to his place(s) of work. As Mr McLaughlin pointed out, it would have been completely impractical for the Appellant to have travelled to the south west from Melrose on a daily basis. These were matters for the Appellant. Many will think his decision sensible. Nevertheless, it remains a leap for the accommodation and travel expenses between Melrose and Swindon to be allowable against profits/income, where the Appellant stayed in Swindon for some 165 nights and worked on a variety of subcontracts. It was not as if the Appellant was unable to live and work in Melrose. The Tribunal finds that the expenses claimed were not wholly and exclusively incurred within section 34, ITTOI Act 2005

18. In our view the situation was little different if at all from a taxpayer choosing to stay in an hotel closer to his/her workplace during the week so that he/she could spend longer at home, e.g., to help with childcare or to catch a later train, and then claiming those hotel expenses against his/her income. We understood HMRC to concede that had the Appellant gone to Swindon for a specific subcontract, the travel and accommodation costs for that would have been deductible. That in our view is certainly in accordance with usually accepted practice and HMRC's own guidance. Mr McLaughlin mentioned in argument that other clients of his firm had made claims

similar to that of the Appellant which had not been challenged, but the Tribunal has no details of those other cases to which client confidentiality applies and in any event that cannot assist the Appellant as the choice of claims to challenge is exclusively a question of priorities and resources for HMRC. The Tribunal has no general supervisory power.

19. The facts of the Appellant's situation are markedly different from those considered in *Horton v Young* (above) on which the Appellant had placed reliance. Mr Horton (the bricklayer) was working within a 55 mile radius from his actual home, not basing himself from lodgings nearer his various places of work for his own convenience and improved remuneration. A key point of the decision was the identification of the base of activities. It is clear that it was not intended to extend the existing interpretation of the predecessor(s) of Section 34 ITTOI Act 2005 (e.g., Section 137 Income Tax Act 1952) which have always tended to be interpreted by the courts in a restrictive manner.

20. Taking all matters into account, the Tribunal finds that the Appellant has been unable to show that the expenses disallowed by HMRC were wholly and exclusively incurred for his work. Thus the Tribunal finds that the Closure Notice stands and the Appellant's appeal on that issue fails.

21. As to the penalty, the Tribunal disagrees with HMRC and finds that the penalty evaluation was flawed. In the Tribunal's view the Appellant acted on an innocently mistaken understanding of section 34 ITTOI Act 2005. He had taken advice which was not "disqualified" see Finance Act 2007, Schedule 24, 3A(4). This may be termed a "grey" area of the law, which has a significant subjective element. As noted above, there was ample evidence that the actual expenses had been incurred by the Appellant and there were proper records. The Appellant participated in the enquiry. Although the penalty has already been suspended by HMRC and it is likely that the conditions of the suspension have been adhered to, such that it will stand, in the Tribunal's view the appropriate penalty rate in all the circumstances is 0%. The Tribunal so finds.

22. The appeal against the Closure Notice is dismissed. So far as it remains relevant, the Penalty Notice is reduced to 0%.

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.

TRIBUNAL JUDGE
JUDGE MANUELL

RELEASE DATE: 17 OCTOBER 2020