[2013] UKUT 0337 (TCC)
Appeal number: FTC/51/2012

Income Tax – deductions for rent payable under tenancy agreement for a nine month period whilst actor appeared in stage production - were these wholly and exclusively incurred for the purposes of his profession – incorrect test applied by First-tier Tribunal – case remitted

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

TIM HEALY **Respondent**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JUDGE JOHN CLARK

Sitting in public in London on 25 and 26 April 2013

Oliver Conolly, Counsel, instructed by the General Counsel of Solicitor to HM Revenue and Customs, for the Appellant, the Commissioners of Her Majesty's Revenue and Customs ("HMRC")

Dennis Wren, Tax Manager, Bowker Orford, Chartered Accountants for the Respondent, Tim Healy ("Mr Healy")

DECISION

Introduction

1. This is HMRC's appeal from a decision of the First-tier Tribunal (Tax Chamber) (the "FTT") allowing Mr Healy's appeal against a decision of HMRC made following an enquiry into Mr Healy's self assessment of tax for the year 2005 – 06 ("the Decision").

2. Specifically, HMRC's decision was that Mr Healy was not entitled under section 34(1)(a) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") to deduct certain expenses relating to accommodation in the sum of £32,503 which had been included in his self assessment. The appeal before the FTT also related to certain expenses for subsistence and taxi fares. Mr Healy's appeal was dismissed in relation to those expenses and he did not pursue those claims any further.

3. Mr Healy contends, as was found by the FTT, that the accommodation expenses, representing the rent payable under a tenancy agreement for a period of nine months whilst Mr Healy was appearing in stage production in London, were incurred wholly and exclusively by Mr Healy for the purposes of his profession.

4. HMRC contend that the FTT erred in law in failing to consider, or consider properly, whether Mr Healy had a dual purpose in incurring the expenditure in question, namely to meet his ordinary needs for warmth and shelter as well as his stated business purpose. They contend that had the FTT applied the correct test plainly it would have found that such needs were included amongst the purposes of the expenditure and accordingly the appeal should be simply allowed rather than remitted to the FTT to be decided again.

Adjournment application

5. The parties were notified on 17 September 2012 that this appeal had been listed for hearing on 25 and 26 April 2013. HMRC then attempted to agree case management directions with Mr Healy's representatives, Bowker Orford, but received no response as a result of which HMRC submitted draft directions which the Upper Tribunal approved on 30 January 2013 (the "Directions"). Among other things, the Directions provided for skeleton arguments to be filed, HMRC to file by 11 April 2013 and Mr Healy no later than one week later.

6. Bowker Orford continued to ignore communications sent by HMRC regarding compliance with the Directions, and in particular the provision by Bowker Orford of Mr Healy's list of documents. Consequently, after enquiries from the Tribunal, Bowker Orford stated in an email dated 6 March 2013 that they were still awaiting to hear from Mr Healy with his instructions as he had a concern that if HMRC were successful on the appeal he would potentially be liable for their costs, HMRC having declined to indicate that they would not seek to recover their costs if successful under the Rees Principle. It would appear that on 27 March 2013 HMRC provided Bowker

Orford with details of their potential costs following which Bowker Orford received instructions to proceed with the appeal and instruct counsel.

7. On 11 April 2013 HMRC served their skeleton argument but on the same day Bowker Orford applied for the hearing to be adjourned on the basis that they had only recently been instructed to progress with the appeal and there was insufficient time to instruct counsel to represent Mr Healy.

8. This application, which was contested by HMRC, was refused on the papers on 15 April 2013 on the basis that no good reason was given for the delay in giving instructions to Bowker Orford and Bowker Orford had been slow and unresponsive in replying to communications from HMRC and the Tribunal.

9. The application was renewed by Mr Wren at the outset of the hearing on 25 April 2013. Mr Wren explained that Mr Healy had delayed giving formal instructions to proceed after the hearing dates had been fixed because of his concerns about the costs implications and he then became engaged on other matters, including having to deal with his divorce. On 11 April Bowker Orford approached counsel to appear form Mr Healy but counsel indicated there was now insufficient time to prepare. Mr Wren regretted the lengthy indecision on Mr Healy's part and the failure to respond to communications between September 2012 and March 2013.

10. After carefully considering the factors in favour of an adjournment, namely that the case raised an important point as to the extent to which accommodation costs could properly be deductible for income tax purposes and that it would therefore be highly desirable for the Tribunal to hear detailed argument from both parties on the issue, we dismissed the application.

11. In our view the application disclosed no good reasons outside the control of Mr Healy or his advisers which would justify an adjournment; in particular no good reason was given why there was such a long delay in reaching a decision to proceed and why there had been no earlier communication with HMRC and the Tribunal on the issue. To adjourn the matter at such a late stage would cause a significant delay in finalising the matters and would be likely to result in an increase in HMRC's costs. We therefore concluded that it was in the interests of justice to proceed with the hearing.

12. In the event, in the absence of counsel, Mr Wren listened to Mr Conolly's submissions and the discussion between Mr Conolly and the Tribunal and made some very helpful submissions of his own.

Relevant Facts

13. The facts on the accommodation issue were not in dispute. They are set out in paragraphs 7 to 13 of the Decision and can be summarised as follows.

14. Mr Healy is a professional actor. He is well known for parts which have involved use of his "Geordie" accent. He has appeared in long running television series. His home is in Cheshire, where he has lived since 2001.

15. Mr Healy entered into a contract dated 9 December 2004 to appear in "Billy Elliot the Musical". The initial period of engagement was from 13 December 2004 to 17 September 2005, including a rehearsal period from 13 December 2004 until 24 March 2005 when live performances started. The run in fact continued until 13 December 2005.

16. During the rehearsal period, Mr Healy stayed with a friend of his rent-free in London from 13 December 2004 until 15 April 2005. On 15 April 2005, Mr Healy entered into a tenancy agreement to rent a flat just over a mile from the theatre, for a fixed term of 52 weeks, at a rent of £875 per week. Mr Healy paid the council tax demand which was sent to him at another property. He claimed a total of £32,503 for accommodation expenses in 2005/6. This expenditure covered the 36 week period in which Mr Healy was performing at the Victoria Palace Theatre, rather than for the full twelve month period of the tenancy agreement.

Relevant Legislation

17. The statutory provisions which govern whether a self employed person may deduct expenses from his profits are contained in section 34 of ITTOIA which provides as follows:

> "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."

18. Section 32 of ITTOIA makes it clear that section 34 applies to professions as it applies to trades.

19. As correctly identified by the FTT in paragraph 23 of the Decision, the use of the words "wholly and exclusively" means that expenditure which serves both a business purpose and a private purpose cannot be allowed in full because such expenditure has a dual purpose. Nevertheless, as we shall see, the case law establishes that where the business purpose predominates and the personal element is merely incidental to the business purpose the expenditure satisfies the "wholly and exclusively" test.

The Decision of the FTT

20. Before the FTT Mr Healy argued that he was an "itinerant worker" who worked in a variety of venues even when Billy Elliot was on in London. This was on the basis that his wife and family remained in Cheshire while he was working on the Billy Elliot production and his address for correspondence and communication remained as the address in Cheshire. He argued that he did not move to London and his base remained in Cheshire.

21. HMRC did not accept that Mr Healy was an itinerant worker but contended that he moved to London as his base for the period of his involvement in the Billy Elliot production. Consequently, they contended that he did not show that the expenditure on accommodation was wholly and exclusively incurred for the purposes of his profession.

22. The FTT referred to various authorities addressing the question of duality of purpose. It observed that the word "itinerant" was not used in the statute but referred to the judgment of Stamp LJ in *Horton v Young (HM Inspector of Taxes)* (1971) 47 TC 60 who, after stating that it was difficult to draw a line or indicate a theoretical difference between expenses of travelling to and from home in cases such as itinerant bricklayers like the taxpayer in that case and persons who work partially from home and partially in an office away from home, stated at page 73:

> "The facts of such cases are infinitely variable and one must, in my judgment look at the facts of each case and decide whether the expenses are money wholly and exclusively laid out or expended for the purpose of the trade or the profession."

23. The FTT correctly established therefore that each case will turn on its own facts and did not decide the appeal on the basis of any perceived principle that Mr Healy was an "itinerant worker" who worked in a variety of locations but maintained his base in Cheshire.

24. The FTT did, however, in paragraphs 33 to 34 of the Decision, find that Mr Healy had chosen to live in Cheshire and did not consider moving to London but found it necessary to find accommodation in London for so long as he was appearing in Billy Elliot. Although the FTT found that it would have been possible for Mr Healy to return to Cheshire every night, his performances would have suffered. He could also have stayed in a hotel in London, but the FTT accepted that actors do not keep social hours and there would be housekeeping and security risks if, as an actor, he did so.

25. On the basis of these findings the FTT concluded in paragraph 36 of the Decision as follows:

> "On balance I find that the need to find accommodation in London, so that he had somewhere to stay near the Victoria Palace Theatre, was wholly and exclusively in connection with his profession as an actor. He was not seeking a home in London. I do not find that there was a duality of purpose."

26. It would appear from the FTT's reasoning, and in particular its reference to the fact that Mr Healy could have stayed in a hotel, that the expenses incurred by way of rent under a tenancy agreement, albeit for a period of nine months, should be treated on the same basis, it being the case that HMRC routinely accept that hotel expenses incurred by self-employed persons working away from home meet the "wholly and exclusively" test.

27. This is supported by the reasoning of the FTT in its decision refusing HMRC permission to appeal dated 11 June 2012 where, after stating that it was not necessary to find that Mr Healy was an itinerant worker, it observed in paragraph 4 of that decision :

> "If the question of "duality of purpose" took precedence over the test of "wholly and exclusively" no expenditure on hotel or bed and breakfast accommodation could ever be found to be deductible as they inevitably provide shelter and warmth."

28. With respect to the FTT, its reasoning here is somewhat confused as the "duality of purpose" test is used to ascertain whether expenditure can be regarded as "wholly and exclusively" incurred for the purposes of the trade or profession; if duality of purpose is present the expenditure cannot meet the statutory test.

29. Nevertheless, it would appear that the FTT recognised that hotel accommodation could be deductible notwithstanding the fact that it provides shelter and warmth, and it would appear that it treated the expenditure under the tenancy agreement as falling into the same category.

30. Mr Conolly's essential criticism of the FTT's decision is that it did not consider whether the fact that Mr Healy required warmth and shelter for the relatively lengthy period he stayed in the flat in London meant that the business purpose ceased to predominate, this creating a duality of purpose which would mean that the expenditure would not be deductible.

The authorities

31. Mr Conolly helpfully referred us to a number of cases to support his primary submission that duality of purpose is present where the business purpose of the expenditure in question ceases to be the sole purpose of the expenditure, but where the expenditure is merely incidental to the business purpose the expenditure will not be regarded as having a duality of purpose and it will be deductible.

32. *Bentleys, Stokes & Lowless v Beeson (HM Inspector of Taxes)* 33 TC 491 concerned the deductibility of expenditure incurred by a solicitors' firm on lunches (and occasional dinners) for the firm's clients (the expenditure was both on the lunches consumed by the partners of their firm and their guests). Romer LJ, who delivered the judgment of the Court, identified that the expenditure had to be solely for a business purpose in order to be deductible, holding at page 504 of the judgment as follows:

> "It is, as we have said, a question of fact. And it is quite clear that the purpose must be the sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act."

33. On the facts it was held that the expenditure on the lunches was deductible:

> "…we can find nothing in any of the Commissioners' findings of fact as set forth in the Stated Case which tends to indicate that the secondary or "impure" motive which inspired the lunches was that of social hospitality. The whole drift of the facts as found and set forth by the Commissioners, in pursuance of their statutory duty to state them, is towards the business character of these lunches, and no fact indicative of a social character is mentioned from first to last." (Page 507)

34. We accept Mr Conolly's submission that this case is authority for the propositions that (i) the test of whether expenditure is wholly for trade purposes is subjective, that is what was the motive on the part of the taxpayer in making the expenditure, and (ii) expenditure on items that in normal circumstances simply meet ordinary needs, such as the need to have lunch, can in some circumstances be properly described as having solely a business purpose.

35. In *Newsom v Robertson (H M Inspector of Taxes)* (1952) 33 TC 452 the facts were that a barrister had a law library and office at his home. Although the barrister did a considerable amount of work at home (particularly during the Court vacations when he rarely travelled to chambers) the Court of Appeal held that he was not entitled to deduct his travel expenses to and from his home.

36. Denning LJ's reasoning was that a distinction had to be drawn between business and living expenses:

> "A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purpose of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purpose of his living there and not for the purposes of his profession, or at any rate not wholly or

> exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense." (Page 464)

37. Romer LJ accepted that the travel expenses were necessary to enable the barrister to exercise his profession but explained that was not the relevant criterion:

> "Now it is, of course, true that on days when Mr Newsom has to appear in Court in the Chancery Division the expense of this journey to London from Whipsnade is incurred for the purpose of enabling him to do so in the sense that if he did not come to London he could not earn his brief fee. But if this view of the position were sufficient to justify the deduction of his fares to London for income tax purposes every taxpayer in England whose profits are assessable under Schedule D could claim as a permissible deduction his expenses of getting from his place of residence to his place of work." (Page 465)

38. We accept Mr Conolly's submission that this case is authority for the propositions that (i) a distinction must be drawn between living expenses and business expenses and (ii) that a distinction must be drawn between an expense that is necessary to enable a profession to be carried out, and that which is wholly and exclusively incurred for the purposes of the profession.

39. In *Elwood (H M Inspector of Taxes) v Utitz* (1965) 42 TC 482 an individual resident in Northern Ireland, instead of staying in hotels on business visits to London, became a member of London club, in order to save money. In the two years in question, he visited 14 times (staying 43 nights) and 12 times (staying 29 nights). It was conceded that had such expenditure been incurred on hotels, it would have passed the "wholly and exclusively" test. Because the moneys were expended on a club membership, HMRC argued that the purpose of the expenditure must have included the following objects listed by the High Court judge thus:

> "the prestige, status, social standing, and opportunities for political and personal contacts which the club provides, and is clothed with entitlement to all the amenities and facilities which the club offers" (cited at page 494).

40. The Court of Appeal of Northern Ireland accepted that these consequences followed from club membership but held that they were incidental. Lord MacDermott CJ first held that the "wholly and exclusively" test related to the subjective purpose of the taxpayer:

> "In their ordinary significance these adverbs [wholly and exclusively] seem to me to demand in this context at least some consideration of the purposes and objects which the particular individual or individuals concerned had in mind" (page 496).

41. He went on to say:

> "There is nothing new about the proposition that incidental effects, no matter how inevitable, do not necessarily colour the purpose or intent behind the acts that produce them" (page 496).

42. We accept Mr Conolly's submission that this case is authority for three propositions as follows:

(1) expenditure on hotels can be "wholly and exclusively" for business purposes;

(2) there is a distinction between effects which are aimed at (the purpose of the expenditure) and those which are incidental to that aim;

(3) expenditure on such hotel accommodation can be exclusively for business purposes, even though it is inevitable that such accommodation will provide warmth and shelter which, say, a park bench will not, warmth and shelter being incidental effects of the expenditure.

43. We have already mentioned *Horton v Young* in paragraph 22 above, in the context of the arguments put forward in the FTT that Mr Healy was an itinerant worker. In any event, as we have found, the FTT's reasoning did not depend on a finding that Mr Healy was an itinerant worker and we do not find that the case assists us except in relation to the passage from Stamp LJ's judgment cited in paragraph 22 above which emphasises that each case is to be decided on its own facts.

44. In *Caillebotte (H M Inspector of Taxes) v Quinn* (1975) 50 TC 222, the High Court considered whether or not the difference between the cost incurred by a carpenter on lunch eaten at work and the cost of lunch eaten at home was deductible. It held that it was not. Templeman J gave the following examples to illustrate the distinction between effects of expenditure which are incidental and those which are not:

> "The cost of tea consumed by an actor at the Mad Hatter's Tea Party is different, for in that case the quenching of a thirst is incidental to the playing of the part. The cost of protective clothing worn in the course of carrying on a trade will be deductible, because warmth and decency are incidental to the protection necessary to the carrying on of the trade. There is no such connection between eating and carpentry" (227).

45. As submitted by Mr Conolly, this case is another illustration of the distinction between incidental and non-incidental effects. Even in cases of activities which are normally undertaken for the purposes of living, such as eating and wearing clothing, it may in the particular circumstances of the case prove possible to find that those effects are incidental to the purpose of the trade. However, we accept that in each such instance there must be a clear connection between the expenditure incurred and the trade in question.

46. *Mason v Tyson (H M Inspector of Taxes)* (1980) 53 TC 333 is more directly relevant to the circumstances of this appeal as it relates to the deductibility of expenditure on accommodation. A chartered surveyor had an office in Hackney, and sometimes worked into late in the evenings, on which occasions he stayed overnight in a room above the office, as travelling back to his home in Kensington would have

been "*unreasonably fatiguing*" (page 335). He claimed that he was entitled to deduct the cost of refurbishing the room. Walton J held:

> "It seems to me quite clear that the money spent on redecorating the flat was not laid out for the purposes of the profession. It was laid out in order to have a suitable place where Mr Mason could spend his evenings on those occasions when he wished to "live above the shop". Of course, in one sense – and a very important sense indeed – without that Mr Mason could not have done so much work, or could not have done it so brilliantly, and therefore the practice would have suffered. But I do not think that anything which is laid out merely for the purpose of preserving the person who is carrying on the trade or business in health, strength and refreshment, to enable him so to carry it on, can properly be said to be "wholly and exclusively laid out or expended for the purposes of the … profession". It must in part, of necessity, be laid out and expended on ordinary human physical needs" (page 340).

47. It is clear in this case that Walton J saw the purpose of the flat as being for the purpose of preserving the well-being of the occupant and that being so it would not be said to be wholly and exclusively laid out or expended for the purpose of the profession. As a result the use could not be classified as incidental to the business purpose and therefore it had a dual purpose and the expenditure was not deductible.

48. Mr Conolly submits that this case is authority for the proposition that only in exceptional circumstances, such as when a flat is used as a quasi-office, will rental expenditure be deductible. He relies on the following (obiter) passage of Walton J at page 341 of his judgment:

> "Although I can envisage situations in which it might be essential for the purpose of the practice to maintain a flat where, in times of emergency or in times of instructions being received from countries with time systems different from the English time system, a partner would have to be (as it were) on duty all night, and although I can thus see that under those sort of circumstances the flat might very well be other than a domestic matter, it seems to me that, on the finding (which I think the General Commissioners were entitled to come to) that the flat was equipped and maintained solely to provide the Appellant with somewhere to live and sleep, any expenditure upon that purpose also falls within s 130(b). Therefore, under one or other of those two subsections it appears to me that that sum also cannot be allowed as a deduction."

49. Mr Wren submits that the case does not go so far as this; he draws a distinction between the comparatively small distance between Hackney and Kensington that Mr Mason chose not to travel each evening and Mr Healy's circumstances where he had no choice but to arrange accommodation to enable him to perform the role of Billy Elliot.

50. *Mallalieu v Drummond (H M Inspector of Taxes)* (1983) 55 TC 330 was a House of Lords case concerning the deductibility of expenditure by a female barrister

on her professional clothes (not the wig and gown). Lord Brightman's speech, with which the majority agreed, first set out the familiar dual purpose test as a consequence of the "exclusively" limb of the "whole and exclusively" test:

> "The effect of the word "exclusively" is to preclude a deduction if it appears that the expenditure was not only to serve the purposes of the trade, profession or vocation of the taxpayer but also to serve some other purposes. Such other purposes, if found to exist, will usually be the private purposes of the taxpayer" (page 365).

The subjective nature of the test was re-stated:

> "As the taxpayer's "object" in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the Commissioners need to look into the taxpayer's mind at the moment when the expenditure is made" (page 365).

However, a distinction must be made between the object of the taxpayer and its effect as demonstrated by this passage:

> "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"

51. Lord Brightman then turned to the inference drawn by the High Court from the fact that the sole conscious purpose of the taxpayer in incurring expenditure on professional clothes, led to the conclusion that the expenditure was deductible. Lord Brightman then explained why the expenditure was not deductible even if the sole conscious purpose of the expenditure was a business one. Lord Brightman said:

> "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" (page 379).

52. Lord Brightman went on to consider when expenditure on clothing might be deductible:

> "It was inevitable in this sort of case that analogies would be canvassed; for example, the self-employed nurse who equips herself with what is conveniently called a nurse's uniform. Such cases are matters of fact and degree. In the case of the nurse, I am disposed to think, without inviting your Lordships to decide, that the material and design of the uniform may be dictated by the practical requirements of the art of nursing and the maintenance of hygiene. There may be other cases where it is essential that the self-employed person should provide

> himself with and maintain a particular design of clothing in order to obtain any engagements at all in the business that he conducts. An example is the self-employed waiter, mentioned by Kerr LJ, who needs to wear "tails". In his case the "tails" are an essential part of the equipment of his trade, and it clearly would be open to the Commissioners to allow the expense of their upkeep on the basis that the money was spent exclusively to serve the purposes of the business. I do not think that the decision which I urge upon your Lordships should raise any problems in the "uniform" type of case that was so much discussed in argument. As I have said, it is a matter of degree" (page 370).

53. In relation to normal professional clothing, as opposed to uniforms and specialist types of clothing, there will inevitably be a dual purpose as the taxpayer needed to wear the clothing concerned simply to be clothed.

54. In *MacKinlay (H M Inspector of Taxes) v Arthur Young McClelland Moores & Co* (1989) 62 TC 704, the House of Lords considered "the deductibility for the purposes of income tax payable under Sch D Case II of what may be conveniently described as "relocation expenses" paid out of partnership funds to two of the partners" (page 750, per Lord Oliver). One of the partners had relocated from London to Southampton and the other from Newcastle to Bristol. Lord Oliver summarised the judgment of Vinelott J in the High Court:

> "It was not, he observed, seriously open to question that if Mr Wilson and Mr Cooper had each been sole traders (if such a description is permissible in the case of chartered accountants) and had moved their respective residences in order to enhance the interests of their respective professional practices, the expenditure incurred in finding a new home and moving to it could not qualify as expenditure incurred solely for the purposes of the practices so as to permit its deduction in the computation of their professional profits as sole traders. In searching for, acquiring and moving to new residences, whatever their motives, they could not possibly be said to be acting as accountants in the course of professional practice. They would be simply individual citizens establishing private residences in places convenient to them and, as Vinelott J observed, the expenditure would be distinguishable from that incurred by Mr Mason in *Mason v Tyson* 53 TC 333, in repairing and redecorating a flat above his office so that he could, if he wished, work late" (pages 753-4).

55. Lord Oliver provided the following observations on *Mallalieu v Drummond:*

> "Your Lordships have been referred to what may be regarded as a seminal decision of this House in *Mallalieu v Drummond* [1983] 1 AC 861 and much arguments has been addressed to the question whether the purpose of the particular payment falls to be ascertained objectively or by reference only to the subjective intention of the payer. For my part, I think that the difficulties suggested here are more illusory than real. The question in each case is what was the object to be served by the disbursement or expense? As was pointed out by Lord Brightman in *Mallalieu's* case, this cannot be answered simply by evidence of

> what the payer says that he intended to achieve. Some results are so inevitably and inextricably involved in particular activities they cannot but be said to be a purpose of the activity. Miss Mallalieu's restrained and sober garb inevitably served and cannot but have been intended to serve the purpose of preserving warmth and decency and her purpose in buying cannot but have been, in part at least, to serve that purpose whether she consciously thought about it or not. So here the payment of estate agents' fees, conveyancing costs and so on, and the provision of carpets and curtains cannot but have been intended to serve the purpose of establishing a comfortable private home for the partner concerned even though his motive in establishing a home in that particular place was to assist him in furthering the partnership interests. Nobody could say with any colour of conviction that in purchasing new curtains he or his wife was acting upon partnership business" (page 757).

56. We accept Mr Conolly's submission that this case is, for present purposes, authority for the following propositions:

(1) the costs of relocating from one place to another are not deductible;

(2) implicit in (1) is the principle that expenditure on normal accommodation is not deductible; and

(3) the wholly and exclusively test is subjective, but certain items of expenditure cannot but be for private purposes.

57. Nevertheless, Mr Conolly accepted that the FTT found as a fact in this appeal that Mr Healy did not move home but found convenient accommodation near to the place he was working for the duration of the run of Billy Elliot, so that the question of what is meant by "normal accommodation" remains open.

58. In *Prior (Inspector of Taxes) v Saunders* (1993) 66 TC 210, the High Court considered the case of a self-employed ceiling-fixer who was employed as a sub-contractor in London for over three years. He lived in various addresses in London, but claimed that he was based in Bournemouth. The General Commissioners found that his base was in London but allowed part of his accommodation expenses (£20 out of £25) on the basis they related to the storage of his tools. In the High Court, it was held that no part of the accommodation expenses were deductible as "it was paid out principally in the way of rent for the taxpayer's accommodation" (at page 219, per Sir Mervyn Davies). Mr Conolly submitted that in this case it was clearly assumed that the default position with regard to expenditure on rental accommodation is that it is not deductible.

59. We do not regard the case as going that far; on the facts of the particular case whilst it was assumed that the rent for the accommodation alone in London was not deductible, the taxpayer did not seem to be seeking a deduction for his accommodation generally, but only for part of it on the basis that the tools of his trade were stored there, so the issue as to the circumstances in which rent for accommodation generally might be deductible did not arise.

60. In *McClaren v Mumford (Inspector of Taxes)* (1996) 69 TC 173, the High Court considered whether expenditure incurred by a publican on residential accommodation above a pub was deductible or not. His tenancy agreement with the brewery required him to reside at the premises at all times. Rimer J (at page 186) accepted HMRC's analysis, set out as follows:

> "As to whether the expenditure in this case was in fact for a dual purpose, Mr Brennan submitted that it is irrelevant that the taxpayer's only conscious motive in signing the tenancy agreement was to provide himself with a trade to earn his living or that it was incurred in consequence of the signing of the tenancy agreement. The private element of his expenditure was not incurred for the purpose of earning the receipts of the taxpayer's business, but served the non-business purpose of satisfying his ordinary human needs" (page 185).

61. Mr Conolly submits that the case is authority for the proposition that even where it is a requirement of a tied pub tenancy that the publican lives on the premises at all times, such expenditure does not pass the wholly and exclusively test. Mr Wren observes that again the factual scenario in this case is different; the taxpayer moved his furniture from Broadstairs to the pub premises which indicated he intended to make it his home.

62. In the recent First-tier Tribunal decision *Sean Reed v HMRC* [2011] UKFTT 92 (TC), the FTT held that an individual who worked as a scaffolder was an "itinerant trader" and that his base of operations was Grimsby. He worked in a variety of places including Birmingham, and rented a flat in Birmingham for the occasions when he worked there. It was held that his rental expenditure was deductible. Mr Conolly submits that this case is distinguishable on the following basis. It was held that the taxpayer was an itinerant worker whereas no such finding was made by the FTT in this case. The taxpayer worked in a variety of locations, including York, and indeed had spent more time in York than in Birmingham in one of the tax years in issue (see paragraph 19 of the decision). He also returned to his home in Grimsby 90 times a year (paragraph 14 of the decision). Mr Conolly accepts that whilst it is not an invariable rule that itinerant workers are allowed their accommodation expenses, in some cases this is clearly possible. Mr Conolly submits where the worker is itinerant, there is scope to be more generous in allowing deductibility of accommodation expenses because the business purpose is more obviously overwhelming where the worker takes on a succession of short term jobs.

63. Finally, in *Hanlin v HMRC* [2011] UKFTT 213 (TC) the taxpayer claimed, *inter alia*, overnight accommodation costs of £4,800 for staying in Dungeness during the week (48 weeks 4 nights each week, £25 per night) whilst maintaining a home in Coventry. The taxpayer had been working on a particular contract in Dungeness for some seven or eight years. The FTT found that the accommodation expenses were not deductible. It found clear differences between the taxpayer in this case and the bricklayer in *Horton v Young*. At paragraph 38 of its decision the FTT stated:

> "The most striking of those is what Lewison J referred to as the lack of "predictability about Mr Horton's place of work when he was

> employed on a bricklaying subcontract. He would have to go wherever Mr Page's main contracts took him". There is a clear contrast between that situation and this Appellant's full time working in one place for a period of years, however precarious he maintains his position to have been on a day to day basis."

64. The FTT summarised its understanding of the position regarding deductibility of accommodation expenses in paragraph 32 of its decision as follows:

> "The general starting point is that food and accommodation are normal human requirements, irrespective of any business purpose; they have an intrinsic duality of purpose (business/private) and therefore no business deduction can be made for the cost of them. However, HMRC accept that where a business trip necessitates one or more nights away from home, accommodation costs and associated reasonable meal and subsistence costs are deductible, on the basis that any private purpose is in such circumstances merely incidental to the predominant business purpose."

65. The FTT accepted HMRC's analysis on this point. However, we can understand why on the facts of this case, where the taxpayer claimed not to have moved his home for a period of eight years why the FTT found the expenses not to be deductible. We remind ourselves that each case depends on its own particular facts and we find no general principle in this or the earlier cases to suggest that the expense of renting accommodation can never, except in the most exceptional cases, be deductible.

66. In our view the following principles can be derived from this analysis of the authorities:

(1) The "exclusively" limb of the "wholly and exclusively test" entails examining whether the expenditure in question has a dual purpose. If the expenditure is not solely for a business purpose it will not be deductible (*Bentleys, Stokes & Lowless, Mallalieu v Drummond*);

(2) Expenditure on items that outside a business context simply meet ordinary needs can be regarded as having solely a business purpose such as food and drink in the context of business lunches (*Bentleys, Stokes & Lowless)*, hotel accommodation in the context of business trips or conferences (*Elwood v Utitz*), accommodation for an itinerant trader (*Sean Reed)*;

(3) Consequently, there is a distinction between effects which are aimed at (the purpose of the expenditure) and those which are incidental to that aim; the latter do not necessary colour the former, even if they are inevitable (*Elwood v Utitz* and the third passage from *Mallalieu v Drummond* cited in paragraph 50 above);

(4) However, expenditure will not be deductible unless there is a clear connection between the expenditure incurred and the trade or profession in question (*Caillebotte v Quinn, MacKinley v Arthur Young, McClelland Moores)*, and a distinction must be drawn between living expenses and business expenses (*Newsom v Robertson*);

(5) There are some categories of expenditure which by their nature cannot be said to have been incurred for a business purpose, such as relocation expenses to help setting up a comfortable home (*MacKinley v Arthur Young, McClelland Moores*) or clothes which are necessary to maintain decency (*Mallalieu v Drummond*);

(6) In relation to accommodation costs it will often be the case that in that in the nature of things one of the purposes of the taxpayer in incurring the expenditure will be their ordinary needs for warmth and shelter (*Mason v Tyson*, *Prior v Saunders*) and this can be the case even if it is a contractual requirement of a trade that the taxpayer reside in a property at all times (*McClaren v Mumford*);

(7) Although the longer the period of time the accommodation in question is occupied the more likely it is that the private purpose will predominate (*Hanlin*) we have not identified any principle that rules out the deductibility of rental accommodation except in special circumstances;

(8) The test concerns the subjective purpose of the taxpayer, which is a question of fact and determining whether the test is met will involve looking into the taxpayer's mind, save in obvious cases which speak for themselves (*Mallalieu v Drummond*); and

(9) The fact that an item of expenditure may be necessary for an individual to conduct his trade does not mean that it passes the "wholly and exclusively" test (*Newsom v Robertson*).

67. We therefore now turn to consider whether the Decision discloses an error of law in the FTT's approach to the facts it found in this case in the light of these principles.

Discussion

68. We accept Mr Conolly's submission that the FTT failed to apply the "wholly and exclusively" test properly and in doing so made an error of law.

69. The correct approach to the "wholly and exclusively" test, as demonstrated by the authorities, is to consider it by reference to the dual purpose test. In this case this required the FTT to ascertain whether there was a dual purpose on Mr Healy's part in entering into the tenancy agreement for the flat in London for the duration of the Billy Elliot production. In that context, the FTT needed to consider whether in all the circumstances of the case, the sole purpose for renting the flat was in order to carry on his profession of an actor. In order to determine that issue it needed to consider whether the effect of his taking the flat, namely of providing him with the warmth, shelter and comfort that we all need was merely incidental to that purpose or was a shared purpose. If the former were the case the expenditure would have been deductible, if the latter there was a dual purpose and the expenditure would not be deductible.

70. It is clear that the FTT did not approach the test on this basis. Its finding, as set out in paragraph 36 of the Decision, focused purely on the issue as to whether in taking on the tenancy he was seeking a home in London. It appears to us that the test applied by the FTT was to ascertain whether Mr Healy had moved his home to London and proceeded on the basis that if he had not, then the expenditure could be regarded as having been made wholly and exclusively for a business purpose.

71. This approach would explain why, in its decision refusing permission to appeal, the FTT commented that if a duality of purpose test was applied expenditure for hotel accommodation could never be deductible as it inevitably provided shelter and warmth. However, as discussed in paragraph 28 above, the duality of purpose test is the test to be applied to see if the expenditure can be deductible, and the cases show that duality of purpose will not be found where the sole purpose is a business purpose and the accommodation costs which result in the provision of warmth and shelter are purely incidental to that. Applied in that way, that is considering whether the warmth and shelter is merely an incidental aspect rather than a purpose in itself, creates no difficulty in finding that accommodation expenses can have a business purpose.

72. It is therefore clear that the FTT deliberately did not consider the question as to whether the shelter and warmth that inevitably follows from arranging accommodation was anything more than incidental to the business purpose that Mr Healy had in mind.

73. In the light of our finding that the FTT made an error of law we need to consider whether we can simply allow the appeal, or whether we should set the FTT's decision aside and remit the matter for a fresh hearing.

74. Section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provide:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either –
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

75. We are clear that there was an error of law by the FTT which was material to the conclusions in the Decision. Accordingly we have power to set aside the Decision.

76. Mr Conolly submits that we should simply allow the appeal. He does so on the basis that had the FTT taken into account the ordinary needs of Mr Healy for warmth and shelter it would inevitably have found that such needs were included amongst the purposes of the expenditure. He submits that there is nothing in the facts found by the

FTT to suggest that Mr Healy's purpose in incurring rental expenditure was anything other than for meeting his ordinary needs for warmth and shelter and on any view those purposes formed part of his purposes.

77. In effect, Mr Conolly submits that the length of time for which the flat was rented, namely nine months, means that Mr Healy must have had the purpose of providing warmth and shelter, after that length of time. Thus on this analysis it is similar to the position in *Hanlin* where the taxpayer had rented accommodation in Dungeness for a number of years so that the warmth and shelter aspect could not possibly be purely incidental to the business purpose and must have become a dual purpose.

78. In view of the length of time for which the tenancy continued, Mr Conolly submits that it is only necessary for the Tribunal to enquire into the subjective intentions of the taxpayer where the facts are not obvious and speak for themselves (see principle (8) in paragraph 66 above). This, he submits, is closely related to principle (5) in that paragraph which is that some types of expenditure cannot but be for a non-trade purpose. There is no recorded decision of a court or tribunal finding that rental accommodation in anything like the circumstances of this case could be deductible. There is authority that hotel expenses on business trips and accommodation at professional conferences can sometimes be deductible, but in his obiter remarks in *Mason v Tyson* on the types of expenditure on accommodation which might qualify for deductibility, Walton J made it clear that the circumstances would have to be such that the flat had a very tight connection with the working life of the person incurring the expenditure, so as to render it a quasi-office. There is no basis for assimilating the facts of this case to such a necessarily exceptional category of cases.

79. Mr Wren submits that there are a number of factors that indicate that the flat was rented solely for a business purpose. He observes:

(1) The tenancy agreement, although for a twelve month period, had a break clause enabling it to be terminated on two weeks notice to take account that the production could have ended at any time. The tenancy agreement clearly had a close nexus to the business purpose, namely the appearance in the production as long as it lasted, whether that be long or short.

(2) The fact that Billy Elliot was performed in London for a nine month run did not mean the rental expenditure was not deductible; if the production did a countrywide tour for a week at a time in different places and Mr Healy stayed at a series of different hotels, on the basis that HMRC recognise short stays in hotels constitute a business expense, Mr Healy would have been entitled to deduct his hotel expenses; and

(3) Mr Healy did not furnish the flat with any of his belongings in contrast with the position in *McClaren v Mumford*.

80. We do not accept Mr Conolly's submissions that the facts found inevitably lead to a conclusion that there was a dual purpose. As we have indicated in our summary of the principles derived from the authorities, we have found nothing that indicates

that expenditure under a tenancy agreement that lasts for a period of nine months cannot be deductible. As we have indicated, each case must be looked at on its own facts and we see no reason, as suggested by Mr Conolly, why expenditure on rental accommodation is, except in special cases, in a different position to hotel or club accommodation. Mr Conolly, rather unconvincingly in our view, responded to our suggestion that if he were asked to appear in a nine month VAT fraud case in Newcastle, away from his home in London and he either stayed in a hotel or took a short term tenancy that he would have a dual purpose and his accommodation costs would not be deductible. Realistically, he would be likely to return home throughout that period at weekends or in other gaps in the hearing; he would in our view rightly see his accommodation in Newcastle as taken purely for the purpose of enabling him to appear in the case.

81. Neither do we accept that the facts speak for themselves as they did in *Mallalieu v Drummond*. That was a case involving clothing and we understand that, unconsciously, Miss Mallalieu would have been aware that she needed to wear clothes to remain decent. We regard accommodation which was only taken in response to an offer of a specific engagement far from home rather than for any other reason as being of a different character; it does not have to be the case that Mr Healy, whether consciously or not, had the purpose of satisfying his need for warmth and shelter in taking on the flat. Likewise the position is different to that of relocation expenses incurred to assist a person who is making a permanent move to work in a particular office away from his current base.

82. Mr Healy as an actor may be offered a series of short term assignments away from his home in respect of which he may claim deductible hotel or other accommodation expenses, or he may obtain a longer assignment, such as that in Billy Elliot and decide to take a tenancy of a flat. If he in his own mind viewed those different circumstances on entirely the same basis, namely that the sole purpose of the accommodation was a business purpose, then in our view there is no reason why in principle he should not be able to deduct the expenditure in both cases. There is no hard and fast rule as to when the length of the assignment clearly tips the balance in favour of a conclusion that there is a dual purpose; it will be a matter of fact and degree in the particular circumstances.

83. It is therefore essential that the Tribunal in such a case should make a finding as to whether the taxpayer viewed the assignment as a short term assignment that might develop into a longer assignment or always saw it as a longer term assignment. Taking the terms of the performance contract and the tenancy agreement together (which Mr Healy seems to have done as the two week break clause in the tenancy agreement is consistent with the right in the performer's contract for the theatre to terminate the production on two weeks notice) he may all along have considered the assignment to be of a temporary nature.

.

84. In view of these factors we are unable to conclude that the application of the correct legal test would inevitably result in the expenditure not being deductible. It is therefore clear that we need to exercise our powers under section 12 TCEA and in our view we should set aside the decision. The question is then whether we should remake the decision on the material before us or remit the case to the FTT.

85. As we have found, it is necessary to establish on a subjective basis what was in Mr Healy's mind when he entered into the tenancy agreement. We have set out above some of the issues that need to be explored in that context. Not having Mr Healy before us we are unable to carry out that exercise. That is properly a matter for the FTT.

86. Therefore the case should be remitted to the FTT. We see no reason why the matter should not be remitted to the same judge. However, we note that the Decision was made by a judge sitting alone and in view of the further findings of fact that need to be made in our view it would be desirable for the judge to sit with a member, although the composition of the FTT in any particular case is properly a matter for its President.

87. Accordingly, we set aside the Decision and remit the case to the FTT for a fresh hearing which applies the correct legal principles as we have identified them in this decision.

TIMOTHY HERRINGTON
JUDGE OF THE UPPER TRIBUNAL

JOHN CLARK
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 25 JULY 2013