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Case Number: UT/2022/000047

**UPPER TRIBUNAL  
(Tax and Chancery Chamber)**

Hearing venue: Rolls Building  
Fetter Lane  
London  
EC4A 1NL

**Heard on: 16 May 2023  
Judgment date: 10 July 2023**

*INCOME TAX – employment income – section 336 ITEPA 2003 – deduction for rent of premises by doctor – whether obliged to incur the expenses as holder of the employment – whether wholly, exclusively and necessarily in the performance of the duties of the employment – appeal allowed*

**Before**

**MRS JUSTICE BACON  
JUDGE JONATHAN CANNAN**

**Between**

**THE COMMISSIONERS FOR HIS MAJESTY’S  
REVENUE AND CUSTOMS**

**Appellants**

**and**

**JAYANTH KUNJUR**

**Respondent**

**Representation:**

For the Appellants: Marianne Tutin, counsel, instructed by the General Counsel and Solicitor for His Majesty’s Revenue and Customs

The Respondent did not appear and was not represented

## DECISION

### Introduction

1. This is an appeal by HM Revenue & Customs (“HMRC”) against a decision of the First-tier Tribunal (Tax Chamber) (“**the FTT**”) released on 7 October 2021 (“**the Decision**”). The FTT allowed an appeal in part by Mr Jayanth Kunjur (“**Mr Kunjur**”) against various assessments and a closure notice charging income tax for the tax years 2012–13 to 2016–17 (“**the Assessments**”). The FTT also allowed an appeal in part against various penalty assessments for those years. HMRC challenges the decision of the FTT to allow the appeals against the Assessments. It does not challenge the decision of the FTT in relation to the penalties.

2. During the tax years in question, Mr Kunjur was a junior doctor working at St George’s Hospital, Tooting. Throughout those tax years his family home was in Southampton, where he lived with his wife and children. This appeal concerns expenditure which Mr Kunjur incurred on living accommodation which he rented in Colliers Wood, near to the hospital (“**the Premises**”). Mr Kunjur claimed relief for that expenditure in his tax returns for the relevant tax years. The FTT held that he was entitled to relief for a proportion of the expenditure by reference to the amount of time it considered that he spent at the Premises performing some of the duties of his employment.

3. The relevant provision providing relief from income tax is s. 336(1) of the Income Tax (Earnings and Pensions) Act 2003 (“**ITEPA 2003**”):

“(1) The general rule is that a deduction from earnings is allowed for an amount if—

(a) the employee is obliged to incur and pay it as holder of the employment, and

(b) the amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment.”

4. Shortly before the hearing of this appeal, Mr Kunjur withdrew his case on the appeal pursuant to Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008. He did so because he was concerned about his potential liability to costs if HMRC were to succeed. In the light of his withdrawal, HMRC has stated that it will not seek costs against Mr Kunjur in the event that its appeal succeeds.

### The FTT’s findings of fact

5. The facts found by the FTT are at §2 of the Decision. The relevant facts may be summarised as follows:

(1) Mr Kunjur was a practising dental surgeon and wanted to qualify as a maxillofacial surgeon. He accepted a position at St George’s Hospital and the period of his training was from 2012 to 2016.

(2) Mr Kunjur’s family was established in Southampton and it was not possible for him to move his family to London.

(3) Mr Kunjur’s contractual duties required him to be on-call two nights each week (not necessarily the same two nights) and one weekend in six in addition to his daily duties. When on-call, he would cover patients in all wards of the hospital and not just the maxillofacial patients. The FTT described these as his “formal on-call duties”. In addition, if any

maxillofacial patient required assistance during the night, it was normal for Mr Kunjur to be called for advice. The FTT referred to this as the “informal on-call duties”. Mr Kunjur received calls on most nights and regarded himself as permanently on-call.

(4) Mr Kunjur had to have accommodation within 30 minutes’ travelling time from the hospital to discharge the formal on-call duties. He also had to have appropriate and reliable telephone connections to be able to discharge all the on-call duties.

(5) Mr Kunjur had certain obligations as a doctor. The General Medical Council required doctors to “make the care of your patient your first concern”. He put the interests of his patients before those of his family and therefore rented the Premises. He stayed at the Premises during the week and one weekend in six to discharge his formal on-call duties. He drove home to Southampton each Friday and would return to Colliers Wood the following Sunday to begin work on Monday.

(6) Mr Kunjur did not regard Colliers Wood as an attractive place to live. He never invited his family to visit him in London.

(7) The FTT considered that it would have been unreasonable to expect Mr Kunjur, a mature dental surgeon of 17 years’ experience, to use residential accommodation available in the hospital which was used by undergraduates, or to find hotel accommodation. In particular, it did not consider that such accommodation would provide the “peace, quiet and stability that were necessary for Mr Kunjur to discharge his duties as a trainee maxillofacial surgeon”. The Premises were modest but provided Mr Kunjur with an appropriate place to sleep and study.

## **The Decision and HMRC’s appeal**

6. The FTT addressed the following issues in the Decision:

(1) Whether Mr Kunjur was obliged to incur the expenses of renting the Premises as the holder of an office or an employment.

(2) Whether those expenses were incurred wholly, exclusively and necessarily in the performance of the duties of the office or employment.

7. The FTT dealt with the second issue as two separate issues: (a) what the FTT described as the “wholly and exclusively test”; and (b) what the FTT described as the “in the performance of the duties test”. The FTT’s reasoning appears in the Decision under the following headings.

### *Obligation as the holder of employment to incur expenditure*

8. The FTT firstly considered at §§14–17 whether Mr Kunjur was obliged to incur the expenses as the holder of an office or an employment. The reference to an office does not appear in s. 336, but it appears in previous versions of the provision and is referred to in some of the authorities. Section 5 ITEPA 2003 provides that provisions in that Act expressed to apply to employments apply equally to offices.

9. The FTT considered that “the test” in this regard was objective in relation to the holder of an office. It went on to suggest that the test in relation to employees “may be subjective”, but in any event held that the objective test was satisfied. It stated at §14 that Mr Kunjur was subject to the professional obligation to place the interests of his patients above his own, and this was an obligation imposed on Mr Kunjur as an employee of St George’s Hospital. The FTT continued:

“15. Mr Kunjur’s formal on-call duties required him to be able to treat patients within 30 minutes of being called which duty meant Mr Kunjur could not perform them from Southampton and as it was not reasonable to expect Mr Kunjur to use the undergraduate accommodation or to uproot his family for the duration of the relatively short-term training contract, it was necessary for Mr Kunjur to rent accommodation in London.

16. Mr Kunjur was obliged to live close to the St George’s hospital to be able to perform his formal on-call duties. We accept Mr Kunjur’s explanation that in cases of traumatic head injury which was his specialism, it is imperative to treat patients very quickly and the rule of thumb used by doctors is that they should be able to get to the hospital and be ready to treat the patients within 30 minutes of being called. The accommodation in Collier’s Wood was within a 30-minute journey of the St George’s hospital.

17. Mr Kunjur was obliged to incur the expenditure on accommodation in Colliers Wood, as the holder of an employment.”

*Wholly and exclusively test*

10. The FTT described this test as follows:

“18. The wholly and [exclusively] test will only be met in respect of a particular expenditure, where there is no private benefit to the holder of the employment, other than a merely incidental benefit.”

11. The FTT went on to find that:

“19. Mr Kunjur obtained no personal benefit from the accommodation at the weekends when he was not on formal on-call.

20. Mr Kunjur did not derive any private benefit from the accommodation when he was on formal on-call and actually in attendance at the hospital. Nor did he gain private benefit when he was on informal on-call and was actually called for the duration of the call or when he went to the hospital during informal on-call.

21. Although Mr Kunjur did undertake research and prepare articles during the week as required by his employment, there was no requirement for him to be so close to the hospital on those nights and therefore it is impossible to say that he did not obtain any private benefit from the use of the accommodation while preparing those articles.”

12. The FTT concluded:

“22. We note that the expression wholly and exclusively is used in the computation of business profits in which context relief is allowed for a proportion of an item of expenditure that is in fact used for business purposes. We see no reason to adopt a different approach in the context of section 336.”

*In the performance of the duties test*

13. The FTT said this as to whether the expenditure was incurred by Mr Kunjur in the performance of his duties:

“23. When Mr Kunjur was on informal on-call and gave advice over the telephone from the accommodation, the accommodation and telephone was used in the performance of the duties for the duration of the calls. When Mr Kunjur was on formal on-call and was present at the hospital the accommodation was not being used in the performance of the employment. Being present at the accommodation waiting for a call is not the performance of the duties.

24. When Mr Kunjur carried out research to prepare articles as he was required to do as part of his employment, the accommodation was used for the performance of his duties.”

14. Having considered the three issues of the obligation as the holder of employment, the wholly and exclusively test, and the performance of the duties test, the FTT’s overall conclusion in §24 was as follows:

“We therefore conclude that a proportion only of the expenditure on accommodation will satisfy all three aspects of the test laid down by section 336, and the proportion will be determined by reference to the amount of time Mr Kunjur spent giving advice from the accommodation while on informal and formal on-call.”

### **HMRC’s grounds of appeal**

15. HMRC appeals with permission of the Upper Tribunal on three grounds, which correspond to the three issues considered by the FTT:

- (1) The FTT erred in law in its approach to the issue of whether Mr Kunjur was obliged to incur the expenses as holder of the employment; took into account irrelevant considerations; and/or reached perverse conclusions regarding the requirements of Mr Kunjur’s role, which materially affected its finding that he was obliged to incur the expenditure as the holder of an employment.
- (2) The FTT erred in law in its approach to the issue of whether the expenditure was wholly and exclusively incurred by Mr Kunjur in the performance of the duties of his employment; took into account irrelevant considerations; and/or reached perverse conclusions regarding the requirements of his role, which materially affected its finding as to his use of the accommodation.
- (3) The FTT erred in law in its approach to the issue of whether the expenditure was incurred in the performance of the duties of Mr Kunjur’s employment; and/or took into account irrelevant considerations.

16. HMRC applied to adduce further documentary evidence on this appeal, seeking to challenge the FTT’s finding that Mr Kunjur was required to live within 30 minutes’ travelling time from the hospital. The documents comprise NHS terms and conditions of service for junior doctors and consultants. HMRC contended that only consultants had to comply with the requirement of 30 minutes travelling time, and that junior doctors such as Mr Kunjur were not subject to such a requirement. In the event, it is not necessary for us to make any direction on that application, because we can determine the appeal without reference to the further evidence.

17. We consider each ground of appeal in turn. Since the test in s. 336(1) ITEPA 2003 is a cumulative one, the appeal will succeed if HMRC succeeds on any one of its grounds of appeal. For the reasons set out below, we consider that HMRC should in fact succeed on all three grounds.

*Ground 1: The FTT’s finding that Mr Kunjur was obliged to incur expenditure as holder of the employment*

18. The FTT was wrong to suggest at §14 that the test of whether an employee was obliged to incur the expenditure as holder of the employment may be a subjective test. There is no distinction between offices and employments in this regard. The test was described long ago by the House of Lords in the well-known case of *Ricketts v Colquhoun* 10 TC 118 where Lord Blanesburgh said at p. 135 in the context of the holder of an office:

“... the language of the rule points to the expenses with which it is concerning being confined to those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties, to expenses imposed upon each holder *ex necessitate* of his office and to such expenses only ... The deductible expenses do not extend to those to which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition.”

19. *Ricketts v Colquhoun* involved the travelling expenses of a practising barrister incurred when sitting as a recorder. The House of Lords held that the travelling expenses were attributable to the taxpayer choosing to reside in London and were not expenses he was “necessarily obliged” to incur in the performance of his duties as a recorder.

20. The objective nature of the test was confirmed by the House of Lords in *Owen v Pook* [1970] AC 244, at p. 263 where Lord Wilberforce stated that:

“[The test is] drafted in an objective form so as to distinguish between expenses which arise from the nature of the office and those which arise from the personal choice of the taxpayer. But this does not mean that no expenses can ever be deductible unless precisely those expenses must necessarily be incurred by each and every office holder. The objective character of the deductions allowed relates to their nature, not to their amount.”

21. *Pook v Owen* concerned a GP in Fishguard who also held part-time appointments at hospitals in Haverfordwest which required him to be on-call. He sought to deduct the cost of travel between Fishguard and Haverfordwest. The House of Lords held that having shown he performed the duties of his office in two places, the expenses incurred in travelling from one to the other were incurred in the performance of his duties. It is well-established that the reasoning in *Ricketts v Colquhoun* and *Owen v Pook* applies equally to offices and employments: see e.g. *Kirkwood v Evans* [2002] STC 231, §10 and *Lewis v Revenue and Customs Commissioners* [2008] STC (SCD) 895, §9.

22. The present appeal is concerned with the cost of renting the Premises and not with travelling expenses, for which there is now a separate code in ITEPA 2003. The FTT ought to have considered whether all doctors employed in the role for which Mr Kunjur was employed would be obliged to incur expenditure of that nature, or whether the rental of accommodation was a matter of personal choice for Mr Kunjur arising from his personal circumstances.

23. While the FTT suggested that the test for employees may be subjective, it appears to us that it intended to apply the objective test described in the authorities. It noted in particular that Mr Kunjur’s formal on-call duties required him to be able to treat patients within 30 minutes of being called. It considered that he was therefore “obliged” to live close to St George’s Hospital. It stated that it was not reasonable to expect Mr Kunjur to use undergraduate accommodation or to uproot his family from Southampton.

24. In our view, although the FTT thereby sought to apply an objective test, it did not do so correctly. It is clear that the reason Mr Kunjur had to incur the expenditure was not because he was obliged to do by reason of the nature of the employment. He did so because his family home was in Southampton. That was a matter of personal choice arising from his personal circumstances. Other employees in the same employment might live within 30 minutes of the hospital and would not be obliged to incur such expenditure. It is therefore irrelevant whether or not it was reasonable to expect Mr Kunjur to use other accommodation which was available to him, or to uproot his family: those are factors personal to Mr Kunjur.

25. We are therefore satisfied that the FTT erred in law in finding that Mr Kunjur was obliged to incur expenditure on the Premises as holder of the employment.

*Ground 2: The FTT's finding that the expenditure was "wholly and exclusively" incurred by Mr Kunjur in the performance of the duties of his employment*

26. It is well-established that the words "wholly and exclusively" limit relief in respect of expenditure which serves a dual purpose. No deduction is available where the expenditure is required for the performance of the duties but also serves another, personal purpose. Examples of expenditure which has been held not to have been incurred wholly and exclusively in the performance of the relevant duties include *Bolam v Barlow* 31 TC 136, which concerned additional costs incurred by an employee required to live within a reasonable distance of his place of employment, which was an expensive area; and *Hillyer v Leeke* [1976] STC 490 which concerned expenditure on office clothing. In the latter case, Goulding J stated that one purpose of the clothing was to provide cover and comfort, and at p. 493b that:

"... 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."

27. The FTT appears to have found that almost all Mr Kunjur's time spent at the Premises was spent in the performance of his duties. We doubt very much whether that is a correct analysis of the position, given that Mr Kunjur was living and sleeping at the premises. Leaving that to one side, however, the FTT clearly found that the Premises served a dual purpose, and there is no suggestion in the Decision that Mr Kunjur's personal benefit from using the Premises was merely incidental. Rather, the FTT considered that the expenditure could be apportioned between personal use and use in performance of the duties of the employment.

28. In our view the FTT erred in law in finding that the expenditure could be apportioned to identify an amount which was incurred wholly and exclusively in the performance of the duties. The position is similar to relief for expenditure incurred by self-employed individuals. In *Mallalieu v Drummond* [1983] STC 665 the House of Lords held that expenditure on appropriate court clothing was not incurred wholly and exclusively for the purposes of a barrister's profession. The position in that regard was held to be indistinguishable from *Hillyer v Leeke* in the context of employment income.

29. In *Mallalieu v Drummond*, the House of Lords at p. 668 recognised a possible distinction (depending on the facts) between the object of the taxpayer in making the expenditure and the effect of the expenditure. While the object may be exclusively to serve a purpose of the business, the effect may include a personal advantage; and in such a case that personal advantage will not necessarily preclude the exclusivity of the business purposes. The FTT did not, however, suggest in the Decision that it considered any personal advantage to Mr Kunjur to be merely an effect of the expenditure rather than the object of the expenditure, and (even had it done so) we do not consider that that would be an appropriate analysis on the facts. Mr Kunjur's object was clearly to provide himself with living accommodation during his working week for both employment purposes and personal purposes.

30. We are therefore satisfied that the FTT erred in law in finding that expenditure on the Premises was "wholly and exclusively" incurred by Mr Kunjur in the performance of his duties.

*Ground 3: The FTT's finding that the expenditure was incurred "in the performance of the duties" of Mr Kunjur's employment*

31. In *Elderkin v Hindmarsh* [1988] STC 267, Vinelott J was concerned with a living allowance paid to an engineer who was required to work at sites away from home for long periods. The amount of the living allowances did not exceed his additional expenses in living away from home, and he could not have done the work he was employed to do without incurring that additional expense. He had to find accommodation nearby to be ready for work the next day or if he was called out to meet some emergency. The judge held that the taxpayer was not entitled to deduct the expenditure because it was not incurred *in* the performance of his duties. The expenditure simply put him in a position to do the work he was employed to do. Vinelott J also quoted Viscount Cave in *Ricketts v Colquhoun*:

“[If an employee] elects to live away from his work so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment ... nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.”

32. There have been similar decisions in the context of expenditure on dietary supplements by a rugby player who was required by the terms of his employment to maintain a high level of physical fitness (*Ansell v Brown* [2001] STC 1166) and expenditure on child care (*Halstead v Condon* 46 TC 289). In both cases, it was held that the expenditure enabled the taxpayers to perform their duties but was not expenditure in the performance itself. In *Fitzpatrick v Inland Revenue Commissioners (No 2)* [1994] STC 237, Lord Templeman quoted with approval Rowlatt J in *Nolder v Walters* (1930) 15 TC 380:

“‘In the performance of the duties’ means in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office. A man who holds an office or employment has, equally necessarily, to do other things incidentally, and spend money incidentally, because he has the office. He has to get to the place of employment, for one thing ... Incidentally, he is obliged to do that, but it is not in doing the work of the office, which begins when he arrives, and sets to work to perform his duties.”

33. The FTT found at §§23 and 24 that when Mr Kunjur was on informal on-call giving advice over the telephone and when he carried out research which he was required to do as part of his employment, the Premises were being used in the performance of his duties. We accept that the Premises were being used whilst Mr Kunjur performed his duties, but expenditure on the Premises was not incurred in the performance of the duties. Rather, it was incidental expenditure which provided Mr Kunjur with accommodation from which he could, amongst other things, take calls and carry out research. It put him in a position to do the work he was employed to perform, but he did not incur the expenditure in the performance of the duties of his employment.

34. We are therefore satisfied that the FTT erred in law in finding that the expenditure on the Premises was incurred by Mr Kunjur “in the performance of his duties”.

## **Conclusion**

35. For the reasons given above, we are satisfied that Mr Kunjur was not entitled to any deduction from his earnings for expenditure on the Premises and we allow the appeal. We re-make the decision and dismiss Mr Kunjur's appeal against the Assessments.



**MRS JUSTICE BACON  
JUDGE JONATHAN CANNAN**

**RELEASE DATE: 10 July 2023**