Employment – Auctioneer agreed with employer to work from his home – Agreement specifying salary and commission – No payment attributed to use of office at home – Wife joint owner of house but not mentioned in agreement – Entire payment held to be emoluments within Sch E – No part Sch A – TA 1988 s.15(1) – Appeal dismissed

THE SPECIAL COMMISSIONERS SpC 00304

M J AINSLIE Appellant

- and -

S P BUCKLEY

(INSPECTOR OF TAXES) Respondent

Special Commissioner: THEODORE WALLACE

Sitting in London on 5 November 2001

The Appellant appeared in person

Mr E Banns, deputy district inspector appeared for the Respondent

DECISION

1. This is an appeal against amendments by the Revenue to Mr Ainslie's self-assessments for the three years 1996/97, 1997/98 and 1998/99.

2. During those years Mr Ainslie was employed by Andrews & Robertson, chartered surveyors, on terms set out in a letter dated 25 January 1995 a copy of which he signed.

3. He was an experienced auctioneer and valuer of property having worked for many years for local authorities and then for Barnard Marcus & Co.

4. Under the agreement he was required to work from his home. He was paid a monthly salary and commission on a sliding scale based on the sales at each property auction. The payments were made under PAYE. No payment was attributed under the agreement to the provision by him of the office.

5. His house was owned jointly with his wife. His returns were rendered on the basis that part of the payments in each year was in respect of the provision of office accommodation by himself and his wife jointly and was assessable under Schedule A rather than Schedule E, one-half being assessable on his wife. The returns were not produced and I was not told what figures were actually entered.

6. His self-assessment was amended on the basis that the entire payment by Andrews & Robertson represented his Schedule E emoluments, albeit with a modest deduction for expenses.

7. The agreement with Andrews and Robertson was originally made orally and was confirmed some seven weeks later in the letter to which I have already referred. This was produced to the Revenue for the first time at the hearing before me.

8. Clauses 1 to 6 were as follows:

"1. Appointment: Your appointment in the Auction Department as a professional Director is confirmed for the initial period of six months commencing 5 December 1994.

2. Duties: Your duties involve the securing of business for the Auction Department and servicing such business and other auction lots as agreed within the team. Such work is under the supervision of the Auction/Agency Partner and on

occasions you may be requested to provide experienced assistance on other professional matters.

3. Salary: Salary will be paid monthly by direct credit at the rate of £1,666.00 per month or pro rata.

4. Commission: Commission will be payable on each Auction from the 15 February 1995 sale where proceeds exceed £1 million : based on an average sales commission of £15,000 per £1 million of sales, the rates will be:

Between £1m and £2m (£15-£30,000) 10%

Between £2m and £3m (£30-£45,000) 12.5%

Over £3m (in excess of £45,000) 15%

Commission is calculated to the 6th day of each month (the firm's financial year running to the 6th April) and payment will be included with the subsequent monthly salary credit following actual completion and payment of fees.

5. Place of employment: You will be required to work from your home at 112 Cleveland Road Ealing until further notice. It is understood that attendance at the Auction offices at Camberwell Green will be required from time to time in addition to attendance at the actual Sales.

It is the intention of the Partnership to expand the Auction department to enlarged premises providing sufficient new business is forthcoming to justify the investment and in the event of this occurring, you will be required to attend the new offices on a normal day to day basis with regular hours of attendance to be agreed.

In the interim, you have been provided with a telephone and a Facsimile machine at your home solely for business purposes, the running costs of which will be met by Andrews & Robertson.

6. Hours of work: It is agreed that you will work such hours as are necessary but no more than 35 hours per week and any excess will be at your discretion."

The remaining clauses dealt with holidays, a mileage allowance for his entertainment of clients, membership of the firm's BUPA scheme, professional indemnity and planning enquiry work for another firm (which was academic in the event).

9. Mr Ainslie was the only witness. From his evidence and the documents I find the following facts.

10. Mr Ainslie was an experienced property auctioneer. His qualifications were FRICS and FBIM. For many years he

worked for the Inner London Education Authority, becoming director of property and serving on the management board. He later worked as property director for the London Boroughs of Wandsworth and of Hammersmith and Fulham. He was heavily involved in the sale of surplus buildings including schools. He retired from Hammersmith in 1989/90 through ill-health.

11. After a break he resumed work with Barnard Marcus & Co for £40,000 a year working at their Hammersmith office where he was clearly successful. In 1994 he was considering retirement being 62 and enjoying an index-linked pension from Hammersmith of £29,000 a year.

12. He was approached by two firms, one of them being Andrews & Robertson who are chartered surveyors, auctioneers and valuers. In 1994 their residential property sales were £8.5 million, less than a tenth of those of Barnard Marcus.

13. Their office was in Camberwell, an awkward journey from his home in Ealing. An office in Hammersmith was considered but it was agreed that he would provide an office at his home. He started working for Andrews & Robertson in December 1994 following an oral agreement, later reduced to writing as set out in paragraph 8 above. From the written agreement it is clear that the arrangement for him to work from home was an interim measure.

14. In a letter to the Inland Revenue in February 1997, Andrews & Robertson stated that he was required to work from home and that apart from two telephone lines and an ansaphone/fax machine, which they had provided, he had to provide all the facilities to enable him to work from his home "which is treated as being a satellite office." They stated that it was agreed that his fixed salary and commission would cover his costs of providing facilities at his home.

15. In a letter to the Revenue dated 9 August 1999 the Appellant wrote,

"5. I have valued the payment for the cost of providing facilities at my house [as an office] at £4,000 p.a. to cover the provision of the room and other facilities and all outgoings rates, water rates, electricity, gas, cleaning, external and internal repairs, decoration etc. etc. etc."

He wrote that half of this should be attributed to his wife and suggested a deduction of £500 for costs from his half.

16. In January 2001 Andrews & Robertson wrote the following letter to Mr Ainslie. Question (c) referred to was "did you make any payment for the use of Mr Ainslie's

house and if so how much?"

"With reference to your letter regarding the IR issues, the short answer to the new question (c) is: Yes, payment was made with the package described as salary and commission, but the amount was not separately identified or determined within the total package.

If I can remind you of the background; you were not prepared to join A&R if it meant a 1½ hour journey each way each day to Camberwell and besides we did not have a proper room for you. John and you therefore investigated leasing an office next door or close to your previous office at Hammersmith where you worked with Barnard Marcus. The cost at £10,000 pa plus fitting out plus running costs on a 7/14 years lease was too expensive for a deal which in the first instance was only for six months.

Accordingly we mutually agreed that you would provide an office at 112 Cleveland Road and work from there. If and when it proved feasible to take an office Hammersmith/Putney/wherever, you were to attend at such office. In practice the office at 112 Cleveland Road proved so efficient and economic, besides being a useful promotional tool, that we continued with the arrangement for the 5/6 years you were with us until your retirement and transfer over to a pure consultancy role in June 2000.

As to the question of 'how much', we only discussed the overall package of £1,666 per month plus a sliding scale commission and not the details of that package.

This package included a retainer for your name and professional advice on general auction matters plus a retainer for professional advice in other branches of the firm, plus a payment for use and all other costs of your house as our Ealing satellite office plus commission for securing and servicing new business. Of course this had regard to what you called working part-time only i.e. not exceeding 35 hours per week so that you could go off and have a round of golf mid week. When you transferred to a pure consultancy role in June 2000 we agreed a retainer of £500 per month for your name and for day to day auction problems. Any other work we required and attendance at auction was to be paid at the hourly rate of £50. The office at your house was not needed and any fee for new business would have been negotiated."

Mr Banns accepted the contents of this letter as accurate.

17. Mr Ainslie was unable to say whether he told Andrews & Robertson that his house was owned jointly with his wife. However, his wife must have been aware of the arrangement. No question of any payment to her, secretarial or otherwise, arose. The payments by Andrews & Robertson were made by direct credit to the joint bank

account of Mr and Mrs Ainslie. Mr Ainslie said that he and his wife shared everything.

18. When the payments to Mr Ainslie were agreed there was no discussion as to what part of the package represented provision of the office.

19. I now turn to the house which is in Ealing and which Mr Ainslie said was worth £250-300,000 in 1994. It has three double and two single bedrooms, a lounge, dinning room, kitchen/breakfast room and two bathrooms with WCs. Following the agreement with Andrews & Robertson, one of the double bedrooms was adapted for an office. It was redecorated with new carpeting and curtains. Built-in cupboards were installed and a purpose-built work station. The bedside tables were used for computer and telephones. There were two desks. The folders for auctions were laid out on the double bed, one folder for each property of which there were 67 at one auction. The telephones were separate from the domestic line.

20. Mr Ainslie said that one desk was for a secretary but in fact he did not have one. The dining-room and lounge were occasionally used for meetings with clients, but most meetings were at the clients' own premises or entertaining at a restaurant.

21. He obtained a number of new clients including Halifax and Nationwide Building Societies for sales of repossessed properties. Other clients included local authorities and housing associations.

22. Sales were at public venues such as the Connaught Rooms. Some unsold properties were sold afterwards. Andrews & Robertson's Sales rose sharply when he joined them from £8.5 million in 1994 to £24.7 million in 1995 and £87.5 million in 1999. Much of the increase was generated by him due to his extensive contacts. For the most part he worked at home, often until midnight before a sale. A factotum employed by Andrews & Robertson brought material to and from their office to Mr Ainslie.

23. Under the agreement Mr Ainslie was paid commission on their total sales per auction in excess of £1 million (the average before he joined them). His commission did not depend on whether he introduced the work; if a sale was below £1 million he got nothing even if he had introduced all the work.

24. Mr Ainslie submitted that the whole of the payments under paragraph 3 of the agreement with Andrews & Robertson (£20,000 a year) was attributable to the provision of an office and ancillary facilities in the home jointly owned by his wife. He said that this was assessable under Schedule A and not Schedule E and that the effect of section 282A of the Taxes Act 1988 was that half was his

wife's income. He said that the total outgoings on the property were £4,000 a year, that 25 per cent should be attributed to the office and one-half (his share) was therefore £500.

25. He argued that £14,000 of the £20,000 was directly attributable to the office. He arrived at this figure in two ways. One was by subtracting the £500 a month retainer agreed in June 2000 (see paragraph 16 above) from £20,000. The other was to add the £4,000 a year outgoings on his home to the rental of an office in Hammersmith (see also paragraph 16). He said that the balance being £6,000 was in reality for his home, that his was only achieved by the exploitation of his home as an office and also fell under Schedule A.

26. Mr Ainslie said that those considerations were in his mind when the original agreement was made and would have been in the mind of the person negotiating with him. He accepted that there was no actual mention of them.

27. While I accept that Mr Ainslie believed what he told me, I can only conclude that he has confused the actual facts with what he wanted them to be. The attribution of £20,000 a year to the office is clearly contrary to his letter of August 1999 (paragraph 15 above). The argument as to the £500 a month retainer I regard as untenable, if only because it would have involved him providing his services free unless sales topped £1 million per auction.

28. Under the agreement the payment of £1,666 was described as salary, a word clearly inappropriate to a payment for a licence and ancillary office services. There was a requirement to work from his home but no express requirement to provide an office. Indeed paragraph 5 envisaged his attendance for regular hours at new offices if acquired.

29. There was clearly no express agreement to attribute all or even part of the salary to provision of an office. Mr Ainslie argued that such attribution should be implied. His argument was that an office was needed to enable him to carry out his duties. It was not just a case of working at home, there were extensive files to be kept for each auction, a fax, computer and telephone lines. These could not just be moved from room to room. A room dedicated to office use was needed. I accept this and I accept that his must have been obvious to Andrews & Robertson from the outset. There was no express provision in the agreement for any payment by Andrews & Robertson for the use by Mr Ainslie as their employee of accommodation in his house. The use clearly involved the Appellant in some expense but apart from the telephone and fax there was no provision for reimbursement.

30. That however is as far as it goes. The payments to Mr

Ainslie clearly took account of this; they may also have taken account of the travel costs thereby avoided by him.

31. The agreement clearly gave Andrews & Robertson some rights over land under section 15 of the Income and Corporation Taxes Act 1988 Act, Schedule A paragraph 1(1). I do not accept Mr Banns' submission that it did not. There was of course no lease but there was a contractual licence. Mr Ainslie could of course change the room. Andrews & Robertson had no right to use the room otherwise than through Mr Ainslie : they could not install another employee without his agreement. They would however clearly be entitled to entry to look at the files which were their property. Furthermore they were entitled to use the room through Mr Ainslie as their employee.

32. The fact is however that Andrews & Robertson did not make any independent agreement with Mr Ainslie with payments for the officer user, nor did they attribute any part of the payment to such user. Furthermore they treated the whole of the salary and commission payments as arising from his employment. In my view the parties treated the office user as incidental to his employment.

33. Under section 19 of the 1988 Act tax is charged under Schedule E "in respect of any office or employment on the emoluments therefrom" falling under any of Cases I to III. The crucial word is "therefrom", see Hochstrasser v Mayes [1960] AC 376; 38 TC 673, see per Lord Radcliffe at 38 TC 707. He said that a payment is assessable "if it has been paid to him in return for acting as or being an employee." This was cited by Lord Reid in Laidler v Perry [1966] AC 16; 42 TC at page 363. He said,

"We must always return to the words of the statute and answer the question – did this profit arise from the employment? The answer will be no if it arose from something else."

Both of the above passages were cited by Lord Templeman in Shilton v Wilmshurst [1991] 1 AC 684; 64 TC 15 107.

34. Mr Banns relied in particular on Beecham Group Ltd v Fair [1984] STC 15; 57 TC 733 where a salesman was paid £2 a week for garaging the company car. Walton J dismissed the appeal against the Special Commissioners' decision that the payment was an emolument.

35. I am not sure that I would have regarded the last case as binding authority if there had here been a separate agreement with a specific payment for an office involving use by persons in addition to Mr Ainslie. That however was not the case here. There was a single agreement providing for a salary with no element attributed to office use and no rights otherwise than to use by Mr Ainslie. It is to be noted that the agreement contained no provision for the payment

under clause 3 to be varied if new offices were acquired under clause 5. Furthermore it contained no reference to the Appellant's wife.

36. In my judgment the office user was incidental to the employment, no separate consideration was attributed to the officer user and the payments made arose from the employment. The appeal is dismissed.

THEODORE WALLACE

SPECIAL COMMISSIONER

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