EMOLUMENTS – deduction of home to work travel – supply teacher – nature of the job required an office at home – travel not allowable

THE SPECIAL COMMISSIONERS

MARY JANE WARNER - Appellant
- and -
R J PRIOR (HM INSPECTOR OF TAXES) - Respondent

Special Commissioner: DR JOHN F AVERY JONES CBE

Sitting in public in London on 20 January 2003

Howard Dereham, Solicitor, for the Appellant

Raymond Hill instructed by the Solicitor of Inland Revenue for the Respondent

DECISION

1. This an appeal by Mrs Mary Jane Warner against an adjustment to a self-assessment for 1999/2000 in which she claims a deduction in computing her emoluments for expenses of travel from her home to the schools where she works as a supply teacher. The Appellant was represented by Mr Howard Dereham and the Inspector by Mr Raymond Hill.
2. There was an agreed statement of fact as follows:
    1. The Appellant lives in Faversham, Kent and is employed as a supply teacher by Kent County Council
    2. In the year ended 5 April 2000 she travelled 2494 miles in her own car travelling between her home and the various schools at which she taught.
    3. Her travel expenses, computed in accordance with Inland Revenue authorised mileage rates, total £1,122. This amount is not disputed.
    4. Approved supply teachers appear on a list maintained by Kent County Council. Schools in need of a supply teacher have access to the list and approach the Appellant directly.
    5. The Appellant does not have a long-term employment contract with Kent County Council but is employed on an "as and when needed" basis. When a school approaches the Appellant she will always know from the outset how long and where she will be teaching.
    6. She is paid by Kent County Council for the time she spends teaching but does not receive any travel expenses either from Kent County Council or from the school.
    7. Contracts to teach at particular schools may last for a few days or up to a whole term.

8. Under the regulations determining a schoolteacher's pay and conditions a teacher is required to perform two types of duty. There is directed time, which covers actual teaching time and there is additional time that will include, for example, marking work, the writing of reports and the preparation of lessons.
9. The Appellant carries out the bulk of her additional time in an office she maintains at home.

3. I also heard evidence from the Appellant and make the following further findings of fact. As a supply teacher, she has to step in to the shoes of a teacher who is unable to teach on a particular day or part of a day. Sometimes she is engaged the evening before she is required to teach. She teaches early years and may also teach Key Stages 1 and 2. She has a study in her home where she has all the material needed to prepare lessons, including a computer with the facility to contact the sources she requires including the QCA website. Unlike a permanent teacher she cannot plan ahead, she may have to teach pupils of different ages and needs to step into another teacher's shoes at short notice in the middle of a particular subject. When at school she has no classroom of her own in which she could work if she was not teaching at a particular time and at the schools she normally visits, there are no spare classrooms and other rooms can be taken up with other activities such as special needs lessons. After school hours rooms can be used by other teachers for meetings with parents. The school is locked about one and quarter hours after teaching ends. She prefers to finish work, such as marking, at the school but this is not always possible and she takes work home and brings it back in the morning even if she is not teaching there next day. She has no computer access at school as she does not have a password or the ability to obtain one. She sometimes manages to mark papers during the lunch break in the staff room but otherwise it is difficult to find a place to work. In particular, she has nowhere to leave papers even if she returns to teach the following day. A letter from Kent County Council obtained by the Inland Revenue Solicitor's Office stated that the head teachers at the schools where the Appellant normally teaches had informed them that the same facilities are provided for supply teachers as for permanent teachers. I prefer the Appellant's evidence on this point that she has in practice fewer facilities through not having any place of her own to work or keep papers. There is no contractual requirement about where she performs "additional time" (see paragraph 2(8)) duties. All these factors mean that as a practical matter she needs a place of work somewhere other than at the school, which in fact she has at her home.

The law

4. From 1998/99 section 198 of the Taxes Act 1988 reads:

"(1) If the holder of an office or employment is obliged to incur and defray out of the emoluments of the office or employment—

a. qualifying travelling expenses,...

there may be deducted from the emoluments to be assessed the amount so expended and defrayed.

(1A) 'Qualifying travelling expenses' means—

(a) amounts necessarily expended on travelling in the performance of the duties of the office or employment….

5. The test for the deduction of travelling expenses has accordingly changed from being one of "wholly, exclusively and necessarily" to one of "necessarily". It was not suggested that the earlier cases did not remain relevant to the new test since the difficult part of the test to satisfy is "necessarily".

Contentions of the parties

6. Mr Dereham for the Appellant contends that the Appellant has two places of work at her home and at whichever school she is sent to, that the place of work at home is objectively necessary to the performance of her duties, and accordingly that the expenses of travel between them is allowable.

7. Mr Hill for the Inspector contends that the Appellant has only one place of work at the school where she is at any time teaching, in which case any travel is from home to work and is not allowable; or that even if she has two places of work, at home and at the school, this fact alone is insufficient to establish entitlement to deductibility of the expenses of travel between them. The expenses of travel between two different places of work are allowable only when the duties are required to be performed in two specific locations.

Reasons for the decision

8. I have found that the Appellant has a place of work outside the school and that it is objectively necessary having regard to her duties for her to have a place of work somewhere else, which is in fact at her home. Does this mean that she is entitled to deduct travelling expenses between the two places of work? One starts with the principle that travel between home and work is not deductible, as is illustrated by the well-known case of *Ricketts v Colquoun* 10 TC 118. *Owen v Pook* 45 TC 571 establishes an exception to the rule and so it is necessary to examine the principle that this case establishes. The facts were that Dr Owen, a medical practitioner in Fishguard where he also resided, was appointed to a part-time appointment at a hospital in Haverfordwest 15 miles away. He was on stand-by duty on certain nights and weekends when he was required to be accessible to the hospital by telephone. He claimed a deduction from his emoluments from the hospital for the cost of travelling between Fishguard and the hospital. Lord Pearce, one of the majority, approved the finding of the Commissioners that the travel expenses were incurred in the performance of his duties:

"It was as a doctor practising in Fishguard that the Appellant was appointed to his stand-by duties. He was to stand by in Fishguard. In Fishguard on the telephone he undertook his responsibilities to the patient and the hospital." (page 591F)

Lord Wilberforce said:

"Unless a suitable retired doctor could be appointed (and that case might be different) the Committee would have to appoint a doctor with a practice of his own and also with suitable obstetric and anaesthetic experience; he might live and practise within 15 miles or one mile or 100 yards of the hospital: the choice in the matter, if any exists, does not lie with the

doctor, who is there in his practice, but with the Committee, which decides, however near or far he works, to appoint him and to require him to discharge a part of his duty at his practice premises." (page 596H)

Lord Guest said:

"In the present case there is a finding of fact that Dr Owen's duties commenced at the moment he was first contacted by the hospital authorities. This is further emphasised by the finding that his responsibility for a patient began as soon as he received a telephone call and that he sometimes advised treatment by telephone. It is noteworthy that under clause 19(b)(3)(iv) of his terms and conditions of service the hospital is referred to "where his principal duties lie". There were thus two places where his duty is performed, the hospital and his telephone in his consulting room." (page 590D)

The minority, Lord Donovan and Lord Pearson, decided that on the facts that the doctor had only one place of employment.

9. Lord Wilberforce was the only member of the House of Lords who sat both in that case and in *Taylor v Provan* 49 TC 579. In that case he described the decision of the majority in *Owen v Pook*:

"The basis of the decision of the majority in that case (the minority holding the opposite) was that the nature of the office, or employment, of part-time anaesthetist and obstetrician required the doctor to work partly at his surgery and partly at the hospital." (page 612H)

10. *Taylor v Provan* is an unusual case in that only the particular taxpayer could do the work. As Lord Reid states: "It was impossible for the companies which contracted with him to get the work done by anyone else. That I regard as the essential feature" (page 606A). Lord Morris said: "The office or employment was very special. There was probably no one else who could have filled it. It was an office created to be held by one particular person, i.e., a person living in Canada who had unique and unrivalled experience and knowledge in regard to arranging mergers of brewery companies" (page 609D). Lord Salmon said: "The English companies required Mr Taylor's services and no one else's" (page 623H). It followed that any travel from where he was based in Canada or the Bahamas was objectively necessary to performance of the duties. He would not have given up his work in these places any more than Dr Owen would have given up his practice in Fishguard.
11. The issue is accordingly whether the majority in *Owen v Pook* decided that having two places of employment meant that travel between them was allowable or whether there were other factors that made it allowable in the particular circumstances of these cases. Lord Reid in *Taylor v Provan* said that two places of work were not sufficient on their own:

"The question whether he had two places of work was the main question at issue. But I do not see how consistently with the main ratio in *Ricketts'* case that could in itself be sufficient to justify the decision…. I think that the distinguishing fact in *Owen's* case was that there was a part-time employment and that it was impossible for the employer to fill the post otherwise than by appointing a man with commitments which he would not give up. It was therefore necessary that whoever was appointed should incur travelling expenses." (page 605D, F)

12. I agree with Mr Hill that the principle established by the majority in *Owen v Pook* is that the doctor was appointed because he worked in Fishguard which at 15 miles was a reasonable distance to enable him to perform his emergency duties, he would stand by so that he could be contacted at Fishguard, and if necessary he would start his work in Fishguard by giving instructions on the telephone. If one considers what would have happened if he had moved to another practice it is obvious that the hospital appointment would not necessarily continue. He might be too far away. His place of work in Fishguard, where, in the days before mobile phones, he could be contacted, and nowhere else, was essential to his appointment.
13. This reading of the principle in *Owen v Pook* is consistent with the understanding in later cases. In *Miners v Atkinson* 68 TC 629 the Special Commissioners had found that "It was not necessary for the work which Mr and Mrs Miners carried out at 4 Sandringham Road to be done at that precise address. It could have been done anywhere" (page 634G). That passage was approved by Arden J at page 644D. In *Kirkwood v Evans* [2002] STC 231 Patten J at page 243b said that the taxpayer, a homeworker who visited his employer's premises in Leeds one day a week, was not unique and the location of his home from which he worked every other weekday was historical and was unconnected with any term of his employment: "The necessity of travelling to Leeds is dictated by his choice of the place where he lives and not by the nature and the terms of the job itself."
14. In the present case, I have found that the nature of the Appellant's job in practice requires that she does some work otherwise than at school. But the location of that other place of work at her home has no bearing on her appointment to her job or her ability to perform it. If she moved, at least within the Kent area, there is no evidence to suggest that Kent County Council would have any objection. The result would be that she might have further to travel to some schools and less far to travel to others. It would make no difference to her ability to do the job. The significant factor is that her secondary place of work at home is dictated by where she lives and not by the requirements of the job itself. In contrast, Dr Owen was appointed because he worked in a particular place, Fishguard, where he could be contacted by the hospital in emergencies and from which he could reach the hospital in a reasonable time. The location of his secondary place of work was dictated by the hospital job. I do not consider that the Appellant has brought herself within the exception to the rule that travel from home to work is not allowable.
15. Accordingly I dismiss the appeal in principle.

J F AVERY JONES

SPECIAL COMMISSIONER

SC3040/02

Authorities referred to in skeletons or argument and not referred to in the decision:

Arthur B Knap v Morton, Special Commissioners 24 November 1998

Brown v Bullock 40 TC 1

Kerr v Brown, Special Commissioners 23 September 2002