[2019] UKFTT 511 (TC)

INCOME TAX – employment income – travel expenses – ss337-339 ITEPA 2003 – series of contracts of employment – ordinary commuting – permanent workplaces

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07307

Appeal number: TC/2017/07909

BETWEEN

PAUL NOWAK **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Leeds on 8 May 2019

Mr J Burgess appeared for the Appellant

Ms J Bartup of HM Revenue and Customs appeared for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against discovery assessments for tax years 2012-13 and 2013-14, and closure notices for 2014-15 and 2015-16. The appellant submitted self assessment tax returns for each tax year in order to claim what he considered were expenses deductible from earnings in connection with his employment income. HMRC considered that the expenses were not properly deductible and issued the assessments and closure notices. There was also a penalty notice for tax year 2015-16 but that penalty has now been cancelled and is not the subject of this appeal.

2. The sums subject to the assessments and closure notices may be summarised as follows:

Year	Description	Tax £
2012-13	Assessment	3,008
2013-14	Assessment	3,916
2014-15	Closure Notice	5,192
2015-16	Closure Notice	1,074

3. The tax assessed relates to claims for different types of deductible expenditure and includes student loan repayments, which the respondents say ought to have been included in the appellant's self assessment returns, and relatively small amounts which the appellant says may relate to accountancy fees. At the request of the appellant I agreed that this appeal should remain open in the event that he might wish to challenge the amount said to be due by way of student loan repayment or his entitlement to deduct sums for accountancy fees. Any application to rely on further grounds of appeal should be made within 28 days of the date of release of this decision.

4. The grounds of appeal refer only to travel expenses which the appellant maintains he is entitled to deduct from his earnings pursuant to s*338 Income Tax (Employment and Pensions) Act 2003* ("ITEPA 2003"). The tax assessed also relates to other items of expenditure for which a right to deduct has been claimed, including items described as "subsistence". In a letter dated 13 January 2017 the appellant's accountants stated that the appellant had abandoned his claim for relief for food and hotel expenses as he had no receipts. Further, the grounds of appeal make no reference to relief for food and hotel expenditure. The appellant confirmed during the hearing that he was not pursuing relief for subsistence and accommodation expenditure. This decision therefore deals solely with claims to deduct travel expenses.

5. *Sections 337 and 338 ITEPA 2003* provide relief for travel expenses as follows:

> "337(1) A deduction from earnings is allowed for travel expenses if—
>
> (a) the employee is obliged to incur and pay them as holder of the employment, and
>
> (b) the expenses are necessarily incurred on travelling in the performance of the duties of the employment.
>
> (2) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

338(1) A deduction from earnings is allowed for travel expenses if—

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

(b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.

(2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.

(3) In this section "ordinary commuting" means travel between—

(a) the employee's home and a permanent workplace, or

(b) a place that is not a workplace and a permanent workplace."

6. The terms "workplace" and "permanent workplace" are defined in s339 ITEPA 2003 as follows:

" (1) In this Part "workplace", in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment.

(2) In this Part "permanent workplace", in relation to an employment, means a place which—

(a) the employee regularly attends in the performance of the duties of the employment, and

(b) is not a temporary workplace.

This is subject to subsections (4) and (8).

(3) In subsection (2) "temporary workplace", in relation to an employment, means a place which the employee attends in the performance of the duties of the employment—

(a) for the purpose of performing a task of limited duration, or

(b) for some other temporary purpose.

This is subject to subsections (4) and (5).

(4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if—

(a) it forms the base from which those duties are performed, or

(b) the tasks to be carried out in the performance of those duties are allocated there.

(5) A place is not regarded as a temporary workplace if the employee's attendance is—

(a) in the course of a period of continuous work at that place—

(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

(6) For the purposes of subsection (5), a period is a period of continuous work at a place if over the period the duties of the employment are performed to a significant extent at the place."

7. Section 338 allows an employee in certain circumstances to claim travel expenses for journeys direct from home or lodgings to a temporary place of work, but not in the case of ordinary commuting as defined in s338(3). The issue in this appeal is whether the travel expenses claimed by the appellant relate to ordinary commuting.

FINDINGS OF FACT

8. During each of the relevant tax years the appellant lived in Pontefract and for at least part of each year worked for Weir Engineering Services Ltd ("Weir"). He was an "actuator technician" employed to work with electrical motors at various nuclear power stations throughout the country. The appellant has been employed in such roles over a period of some 5 years. He was separately contracted by Weir to work at a specific power station. A number of letters of "offers of temporary employment" were in evidence. These showed the commencement date of each contract and the site the appellant was contracted to work at, although the appellant did not always get a letter of offer of temporary employment for each site he worked at. It was also possible to identify the end date of each contract from P14s provided by Weir when the appellant left each employment. I accept the appellant's evidence that he would sign a contract occasionally before a contract commenced but more often than not it would be after the contract commenced and it would be back-dated. Start dates might change without the documentation being amended. Having said that the best evidence available as to when and where the appellant was contracted to work comes from the contract documentation and the P14s. The P14s suggest that the appellant had further contracts where no written offers of employment are available and this accords with the appellant's evidence, which I accept, that he worked at some sites on the basis of an oral agreement. There is no reliable evidence as to which other sites the appellant worked at and for what periods.

9. My findings as to when and where the appellant was employed by Weir may be summarised as follows:

Contracted Site	**Start Date**	**Leaving Date**	**Approximate Duration**
Heysham 1	2 August 2013	20 November 2013	3½ months
Torness	7 February 2014	6 April 2014	2 months
Ratcliffe	7 April 2014	25 September 2014	5½ months
Heysham 2	26 February 2015	12 April 2015	1½ months
Heysham 1	13 April 2015	22 May 2015	1 month
Torness	10 July 2015	25 August 2015	1½ months
Hunterston	1 October 2015	18 November 2015	1½ months
Hinkley Point	12 January 2016	11 March 2016	2 months

10. It can be seen therefore that in the period of 2 years and 7 months from 2 August 2013 to 11 March 2016 the appellant was employed by Weir for approximately 1 year and 6 months.

11. On each contract the appellant worked weekends and would have one day off every two weeks. He would live in lodgings close to the site where he was working. At the end of each contract Weir would give the appellant an estimate for a start date on his next contract. In periods between contracts when the appellant was not contracted to work for Weir he would return home and either work as a self-employed electrician or sign on at a Jobcentre in which case he would receive jobseekers allowance. He included jobseekers allowance on his self assessment returns.

12. Weir paid the appellant a casual lodging allowance of £30 per day which was not taxed at source. No lodging allowance was paid for the appellant's days off. The appellant has claimed deductions for costs of lodging over and above this allowance on his self assessment returns. HMRC have denied those claims and as stated earlier that part of the tax assessed is not challenged on this appeal.

13. As far as mileage is concerned, Weir paid the appellant a mileage allowance for travel from home to and from each site at the start and end of each contract. Every second day off, in other words once a month, Weir paid the appellant a mileage allowance to travel home and back to the site. It is not clear whether they also paid an allowance for travel between the appellant's lodgings and the site. The mileage allowance paid by Weir was 23p/mile and it was not taxed at source. The appellant contends that he is entitled to claim deduction for the difference between the mileage allowance paid by Weir and the 45p/mile which is HMRC's "approved amount".

14. The following mileages can be derived from schedules produced by the appellant's previous accountant to support the appellant's claim for relief based on information provided by the appellant:

2012-13

Site	Home to Site Mileage	Lodging to Site Mileage	Total Mileage
Hinkley Point	2,016	2,684	4,700

2013-14

No schedule produced

2014-15

Site	Home to Site Mileage	Lodging to Site Mileage	Total Mileage
Ratcliffe	1,288	2,632	3,920
Hunterston	2,560	2,646	5,206
Hinkley Point	3,444	1,144	4,588
Heysham	640	1,152	1,792

2015-16

No schedule produced

15. I was not taken to any evidence that the appellant had worked at Hinkley Point in 2012-13, or at Hunterston or Hinkley Point in 2014-15. It may be that these are examples of employments with Weir that were established orally.

16. Mr Burgess submitted that Weir was clearly treating the lodging and mileage allowances it paid to the appellant as non-taxable, which must have been because they did not involve "commuting" or travel from home a permanent workplace. Mr Burgess told me that at least 4 other employees in a similar position to the appellant had been the subject of HMRC enquiries and the outcome was that their claims for travel and subsistence expenditure had been allowed. No information was available in relation to those individuals and I cannot take it into account for the purposes of this decision. I must apply the law to the facts found in relation to the appellant's work for Weir.

17. Ms Bartup for HMRC contends that the treatment of payments made by Weir is irrelevant. HMRC contend that the appellant is not entitled as a matter of principle to claim relief for expenditure on lodgings and travel expenses between home and site over and above

what was reimbused by Weir. Even if that is wrong, the appellant has failed to provide sufficient evidence to satisfy me what expenditure has been incurred. No receipts have been provided and no contemporary records of mileage have been provided.

18. The way in which Weir has treated payments for lodging and travel expenses to the appellant as tax free has given me pause for thought. It suggests that Weir have not regarded the appellant as working at permanent workplaces. However, I must determine this appeal based on the evidence before me. Weir's treatment of payments made to the appellant is evidence that the appellant was working at temporary workplaces, but the direct evidence, to which I give more weight, indicates that they were permanent workplaces.

DISCUSSION

19. HMRC contend that the appellant's travel expenses were expenses of ordinary commuting. In particular, they contend that the appellant worked at each site pursuant to separate contracts of employment. As such, each site was a permanent workplace within s339 ITEPA 2003 at the time the appellant was working there and his travel from home or lodgings to that site was therefore ordinary commuting. .

20. The appellant's case is that the sites should not be treated as permanent workplaces. Further, even if they were permanent workplaces, there were occasions where during a contract the appellant was required to work at different sites. I was told that the appellant's bank statements would demonstrate that at various times he was required by Weir to work at various locations places other than the power station to which he was contracted to work. However, that evidence was not before me and I cannot make any findings of fact to that effect.

21. The only evidence to suggest that each site was a temporary workplace is the fact that Weir paid lodging allowances and mileage allowances without deduction of tax. That is not sufficient on its own to satisfy me that the sites were temporary workplaces. On the basis of my findings of fact I am satisfied that the appellant was employed by Weir pursuant to a series of separate contracts of employment. Each contract of employment required the appellant to work at a particular power station which, for the purposes of each employment was a permanent workplace. In relation to each employment, the site was a place the appellant regularly attended in the performance of his duties for that employment. It was the base from which his duties were performed and the tasks to be carried out by the appellant were allocated there. As such, the appellant's travel to and from each site was ordinary commuting within s338 and the appellant is not entitled to a deduction for the travel expenses he has claimed.

22. The two earlier tax years under consideration involve discovery assessments within *section 29 Taxes Management Act 1970* ("TMA 1970"). I am satisfied that during the course of enquiries into the later tax years, an officer of HMRC discovered that relief which had been given for travel expenses was excessive. I am satisfied that this was brought about by carelessness on the part of the appellant's accountants whom the appellant had told about the arrangements pursuant to which he was employed. HMRC are therefore entitled to make the discovery assessments under s29.

CONCLUSION

23. For the reasons given the appeal in relation to travel expenses is dismissed. As set out above, any application to raise further grounds of appeal in relation to student loan repayments or accountancy fees should be made within 28 days of the date of release of this decision.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 6 AUGUST 2019