TC02814

Appeal number: TC/2012/09694

INCOME TAX – deductibility of travelling expenses – whether travel to a permanent workplace – sections 338 and 339 Income Tax (Earnings and Pensions) Act 2003- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NIGEL RATCLIFFE **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
TOBY SIMON

Sitting in public at Cambridge on 4 July 2013

The Appellant appeared in person

Joanna Bartup for the Respondents

DECISION

Introduction

1. This is an appeal against amendments to the Appellant's self-assessment for the tax year 2008/09. The appeal raises the question whether during 2008/09 the Appellant worked at permanent or temporary workplaces and whether the Appellant is able to claim mileage allowance for travel to and from these workplaces.

Facts and background

2. The Appellant claimed expenses of £21,020 against his employment income in his tax return for the tax year 2008/09.

3. These expenses related to journeys that the Appellant made in his own motor car. He intended to claim relief based on an Approved Mileage Allowance Payment rates for the 20,920 miles that he travelled. This would have resulted in a claim for relief on mileage costs of £6,730 (10,000 miles at 40 pence per mile and 10,920 miles at 25 pence per mile). The Appellant accepts that he incorrectly claimed relief on mileage costs of £20,920 and that he intended to claim relief for £6,730. HMRC have accepted that £2,241 of expenses relate to travel in relation to temporary workplaces under a retainer contract (see below) so that, as we understand it, the actual amount in dispute is £4,489.

4. During the tax year relevant to this appeal, the Appellant worked as a material controller for Granite Services International Inc ("GSI"). His job was to look after and prepare all the tools required for the shutdown of power stations. Essentially, therefore, the Appellant worked at different power stations in the UK as the need for his services arose. The Appellant worked for GSI from 1999 to 2009, although as we shall see he worked under a series of different limited duration contracts with (at least as regards the period under appeal) some periods of unemployment.

5. During 2008/09 the Appellant was employed by GSI under three separate contracts. One of these contracts was a "retainer contract". Under a retainer contract the Appellant was required to work at various sites to be designated by GSI during the currency of the contract. The other two contracts were "short term contracts". Between these contracts, the Appellant was not employed by GSI. The details were as follows:

3 March 2008 – 31 October 2008	Retainer Contract
1 November 2008 to 23 November 2008	Not employed by GSI
24 November 2008 to 18 December 2008	Short Term Contract
19 December 2008 to 5 January 2009	Not employed by GSI
6 January 2009 to 23 May 2009	Short Term Contract

6. The terms of both retainer and short-term contracts were very similar (although the remuneration under a short-term contract was higher than under a retainer contract). For present purposes, the main difference between the two types of contract was that a short-term contract specified the power station at which the Appellant was to report for work. Mr Ratcliffe told us that a new contact was issued for each power station project. A retainer contract contained no such specification and GSI was able to designate the sites at which the Appellant was required to work from time to time. Both the retainer contract and the short term contracts provided that any previous employment did not count as part of the Appellant's period of continuous employment.

7. Under the retainer contract the Appellant had two job postings in the tax year 2008/09. From 6 April 2008 to 31 August 2008 and from 23 September 2008 to 23 October 2008 he was assigned to work at Medway power station. Outside these periods, but during the currency of his retainer contract, the Appellant was unassigned or at home.

8. The short-term contract from 24 November to 18 December 2008 specified that the Appellant had to report to Brigg power station and the short-term contract from 23 6 January 2009 to 23 May 2009 required him to report to Medway power station. All his work under each of these contracts was performed at these respective power stations.

9. The Appellant’s claim for relief in relation to all three contracts covered the cost of journeys between his home and his lodgings (usually a hotel) near the power station at which he was working and between his lodgings and his workplace (i.e. the relevant power station).

10. HMRC took the view that under a retainer contract the Appellant attended a temporary workplace but that whilst working under the two short term contracts he attended a permanent workplace.

11. Accordingly, HMRC denied the Appellant's claim for relief in relation to the mileage costs for journeys he made whilst working under the two short term contracts. This reduced his claim for relief from £6,730 to £2,241, resulting in additional income tax of £1,795.60. HMRC accepted, however, that expenses incurred in relation to his retainer contract related to his travel to and from a temporary workplace and were, therefore, allowable.

12. The nature of the Appellant's duties was essentially the same whether he worked under a short term or a retainer contract.

The law

13. Section 388 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA”) provides that an employee cannot claim the cost of "ordinary commuting". Section 338 (1) – (2) provide:

> "(1) A deduction from earnings this 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."

14. Section 338 (3) defines the concept of "ordinary commuting" and provides:

"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."

15. Section 339 (1) ITEPA defines "workplace" as "a place at which the employee's attendance is necessary in the performance of the duties of the employment."

16. Section 339 (2) ITEPA specifies the meaning of "permanent workplace" as follows:

"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).

17. Section 339 (3) defines "temporary workplace" as:

"… A place which the employee attendance 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)."

18. Section 339 (4) explains the difference between a permanent workplace and a temporary workplace, as follows:

"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 the duties are allocated there."

19. Section 339 (5) restricts the meaning of a temporary workplace, providing as follows:

> "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."

Discussion

20. The Appellant argued that he had been employed by GSI for 10 years and has the same rights as permanent staff. Although his contracts varied slightly he did the same work under both types of contract.

21. HMRC argued because the short term contracts specified that the Appellant had to report to a particular site, the effect of section 339 (4) (b) ITEPA was that the power station specified in each contract constituted the Appellant's permanent workplace. In addition, the power station specified in a short term contract could not be a temporary workplace by virtue of section 339 (5) (a) (ii) ITEPA. HMRC referred to decisions of this Tribunal in *Reita v HMRC* [2010] UKFTT 299 (TC) and *Sathesh-Kumar v HMRC* [2011] UKFTT 489 (TC).

22. In our view, HMRC were correct to treat each short term contract and each retainer contract as a separate contract of employment. In effect, with some periods of unemployment, the Appellant worked for GSI under a series of contracts of limited duration.

23. The terms of the Appellant's two short term contracts each required that he report to a particular power station. The Appellant acknowledged that all his duties under a short term contract would be performed at that power station i.e. the power station to which his short-term contract required him to report. In our view, HMRC were, therefore, correct to content that the power station specified in each short term contract constituted the Appellant's permanent workplace. The short term contracts, by requiring the Appellant to report to a specified power station, allocated the tasks to be carried out in performance of those duties to that power station for the purposes of section 339 (4) (b) ITEPA. Moreover, this conclusion is reinforced by the fact that, because the Appellant worked at one power station for the whole of the duration of a short term contract (which, as we have found, constituted a separate contract of employment), section 339 (5) (a) (ii) ITEPA expressly excludes that workplace being treated as a temporary workplace.

24. Although we accept that the essence of the type of work performed by the Appellant under retainer contracts and short term contracts was the same, this is a

case where the contractual provisions in each type of contract determines the tax treatment as a matter of tax law.

25. Finally, we should note that the Appellant referred to a letter from HMRC dated 24 February 2005 which, he contended, demonstrated that HMRC had accepted that his travel expenses on short-term assignments were eligible for relief against income tax. This letter was based on information supplied in a letter dated 24 November 2004 from Global Turbine Services Inc (the former name of GSI) which stated:

> "Mr Ratcliffe commenced employment with GTSi in August 1999. Since that date he has completed a number of short-term assignments within the UK at various locations. As GTSi have a number of work sites located within the UK it is necessary for our employees to travel to these sites as required."

26. The letter then gave the locations and dates at which the Appellant worked between 1999 and 2004.

27. HMRC's letter of 24 February 2005 referred to GTSi's letter of 22 November 2004 and stated:

> "This shows that between 4 January 2018 April 2003, although you were employed on short-term assignments, you did travel to various sites during this period. This allows a claim for travel expenses in principle. What are required details of travel and the calculation of the claim for each tax year."

28. As Mrs Bartup pointed out, GTSi's letter of 22 November 2004 contains no reference to different types of contracts e.g. retainer contracts and short term contracts and conveys the impression (in the absence of any indication to the contrary) that the Appellant was employed on one single contract. Accordingly, HMRC's letter of 24 February 2005 proceeded on a misunderstanding of the facts and could not be relied upon by the Appellant. However, we note that HMRC decided not to impose any penalties in this matter because of the approach taken in that letter.

Decision

29. For these reasons, we dismiss this appeal.

Rights of appeal

30. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 2 August 2013