[2015] UKFTT 0233 (TC)

TC04425

Appeal number: TC/2010/08903

INCOME TAX – deductions for accommodation – whether wholly and exclusively incurred for the purposes of the profession of actor – appeal dismissed – PROCEDURE – Upper Tribunal setting aside decision of FTT on appeal by HMRC and remitting case to FTT for fresh hearing – Whether at fresh hearing Appellant can challenge findings in the first FTT decision against which HMRC did not appeal and the Appellant did not cross-appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

TIM HEALY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS RAYNA DEAN FCA

Sitting in public in North Shields on 3 December 2014

Nichola Ross Martin, of Ross Martin Tax Consultancy Limited, for the Appellant

Oliver Conolly, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The Appellant is an actor. His home is in Cheshire. During tax year 2005-06, he performed in a musical in London. In his 2005-06 self-assessment tax return, he claimed expenditure of £32,503 for the rent of a flat near the theatre in London where he was performing, expenditure of £4,094 for subsistence, and expenditure of £4,080 for taxi fares. An HMRC enquiry into his self-assessment resulted in a closure notice dated 27 October 2009 finding that none of these three items was deductible by virtue of s 34(1)(a) Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

2. The Appellant appealed against that closure notice to the Tribunal. In a decision released on 30 March 2012 (*Healy v Revenue & Customs* [2012] UKFTT 246 (TC)), the Tribunal allowed the appeal in relation to the claimed expenses for accommodation, but dismissed the appeal in relation to the claimed expenses for subsistence and taxi fares.

3. HMRC appealed against that decision to the Upper Tribunal, contending that the First-tier Tribunal erred in law in concluding that the accommodation expenditure was deductible under s 34(1)(a) ITTOIA. In a decision released on 25 July 2013 (*Revenue and Customs v Healy* [2013] UKUT 337 (TCC) (the "Upper Tribunal's decision")), the Upper Tribunal allowed the HMRC appeal, set aside the decision of the First-tier Tribunal, and remitted the case to the First-tier Tribunal for a fresh hearing which applies the correct legal principles as identified by the Upper Tribunal in its decision. Consequently, this appeal came before the present Tribunal to undertake that fresh hearing.

Background facts

4. The parties have not disputed the following basic facts set out in the Upper Tribunal's decision at [14]-[16], which the Tribunal finds on the evidence to be established:

> 14. Mr Healy is a professional actor. He is well known for parts which have involved use of his "Geordie" accent. He has appeared in long running television series. His home is in Cheshire, where he has lived since 2001.
>
> 15. Mr Healy entered into a contract dated 9 December 2004 to appear in "Billy Elliot the Musical". The initial period of engagement was from 13 December 2004 to 17 September 2005, including a rehearsal period from 13 December 2004 until 24 March 2005 when live performances started. ...
>
> 16. During the rehearsal period, Mr Healy stayed with a friend of his rent-free in London from 13 December 2004 until 15 April 2005. On 15 April 2005, Mr Healy entered into a tenancy agreement to rent a flat just over a mile from the theatre, for a fixed term of 52 weeks, at a rent of £875 per week.

Mr Healy paid the council tax demand which was sent to him at another property. He claimed a total of £32,503 for accommodation expenses in 2005/6. This expenditure covered the 36 week period in which Mr Healy was performing at the Victoria Palace Theatre, rather than for the full twelve month period of the tenancy agreement.

Applicable legislation

5. Section 34 ITTOIA provides:

> **34 Expenses not wholly and exclusively for trade and unconnected losses**
>
> (1) In calculating the profits of a trade, no deduction is allowed for–
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> (b) losses not connected with or arising out of the trade.
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade.

Applicable legal principles

6. The Upper Tribunal's decision at [31]-[65] contains a detailed review of the relevant authorities, and at [66] summarises the principles that they establish:

> (1) The "exclusively" limb of the "wholly and exclusively test" entails examining whether the expenditure in question has a dual purpose. If the expenditure is not solely for a business purpose it will not be deductible …;
>
> (2) Expenditure on items that outside a business context simply meet ordinary needs can be regarded as having solely a business purpose such as food and drink in the context of business lunches …, hotel accommodation in the context of business trips or conferences …, accommodation for an itinerant trader …;
>
> (3) Consequently, there is a distinction between effects which are aimed at (the purpose of the expenditure) and those which are incidental to that aim; the latter do not necessary colour the former, even if they are inevitable …;
>
> (4) However, expenditure will not be deductible unless there is a clear connection between the expenditure incurred and the trade or profession in question …, and a distinction must be drawn between living expenses and business expenses …;
>
> (5) There are some categories of expenditure which by their nature cannot be said to have been incurred for a business purpose, such as relocation expenses to help setting up a comfortable home … or clothes which are necessary to maintain decency …;
>
> (6) In relation to accommodation costs it will often be the case that in that in the nature of things one of the purposes of the taxpayer in incurring the expenditure will be their ordinary needs for warmth and shelter … and this can be the case even if it is a contractual requirement of a trade that the taxpayer reside in a property at all times …;

> (7) Although the longer the period of time the accommodation in question is occupied the more likely it is that the private purpose will predominate … we have not identified any principle that rules out the deductibility of rental accommodation except in special circumstances;
>
> (8) The test concerns the subjective purpose of the taxpayer, which is a question of fact and determining whether the test is met will involve looking into the taxpayer's mind, save in obvious cases which speak for themselves …; and
>
> (9) The fact that an item of expenditure may be necessary for an individual to conduct his trade does not mean that it passes the "wholly and exclusively" test ...

7. The earlier decision of the First-tier Tribunal (paragraph 2 above) had found at [36] that:

> On balance I find that the need to find accommodation in London, so that he had somewhere to stay near the Victoria Palace Theatre, was wholly and exclusively in connection with his profession as an actor. He was not seeking a home in London. I do not find there was duality of purpose.

8. The Upper Tribunal found that this was not a correct application of the principles set out in paragraph 6 above, for the following reasons:

> 69. The correct approach to the "wholly and exclusively" test, as demonstrated by the authorities, is to consider it by reference to the dual purpose test. In this case this required the FTT to ascertain whether there was a dual purpose on Mr Healy's part in entering into the tenancy agreement for the flat in London for the duration of the Billy Elliot production. In that context, the FTT needed to consider whether in all the circumstances of the case, the sole purpose for renting the flat was in order to carry on his profession of an actor. In order to determine that issue it needed to consider whether the effect of his taking the flat, namely of providing him with the warmth, shelter and comfort that we all need was merely incidental to that purpose or was a shared purpose. If the former were the case the expenditure would have been deductible, if the latter there was a dual purpose and the expenditure would not be deductible.
>
> 70. It is clear that the FTT did not approach the test on this basis. Its finding as set out in paragraph 36 of the Decision, focused purely on the issue as to whether in taking on the tenancy he was seeking a home in London. It appears to us that the test applied by the FTT was to ascertain whether Mr Healy had moved his home to London and proceeded on the basis that if he had not, then the expenditure could be regarded as having been made wholly and exclusively for a business purpose.
>
> 71. This approach would explain why, in its decision refusing permission to appeal, the FTT commented that if a duality of purpose test was applied expenditure for hotel accommodation could never be deductible as it inevitably provided shelter and warmth. However, as discussed in paragraph 28 above, the duality of purpose test is the test to be applied to see if the expenditure can be deductible, and the cases show that duality of purpose will not be found where the sole purpose is a business purpose and the accommodation costs which result in the provision of warmth and shelter are purely incidental to that. Applied

> in that way, that is considering whether the warmth and shelter is merely an incidental aspect rather than a purpose in itself, creates no difficulty in finding that accommodation expenses can have a business purpose.
>
> 72. It is therefore clear that the FTT deliberately did not consider the question as to whether the shelter and warmth that inevitably follows from arranging accommodation was anything more than incidental to the business purpose that Mr Healy had in mind.

9. In relation to the circumstances of the present case, the Upper Tribunal said:

> 80. We do not accept … that the facts found inevitably lead to a conclusion that there was a dual purpose. … [E]ach case must be looked at on its own facts and we see no reason … why expenditure on rental accommodation is, except in special cases, in a different position to hotel or club accommodation. ...
>
> 82. Mr Healy as an actor may be offered a series of short term assignments away from his home in respect of which he may claim deductible hotel or other accommodation expenses, or he may obtain a longer assignment, such as that in Billy Elliot and decide to take a tenancy of a flat. If he in his own mind viewed those different circumstances on entirely the same basis, namely that the sole purpose of the accommodation was a business purpose, then in our view there is no reason why in principle he should not be able to deduct the expenditure in both cases. There is no hard and fast rule as to when the length of the assignment clearly tips the balance in favour of a conclusion that there is a dual purpose; it will be a matter of fact and degree in the particular circumstances.
>
> 83. It is therefore essential that the Tribunal in such a case should make a finding as to whether the taxpayer viewed the assignment as a short term assignment that might develop into a longer assignment or always saw it as a longer term assignment. Taking the terms of the performance contract and the tenancy agreement together (which Mr Healy seems to have done as the two week break clause in the tenancy agreement is consistent with the right in the performer's contract for the theatre to terminate the production on two weeks notice) he may all along have considered the assignment to be of a temporary nature.
>
> 84. In view of these factors we are unable to conclude that the application of the correct legal test would inevitably result in the expenditure not being deductible. ...
>
> 85. [I]t is necessary to establish on a subjective basis what was in Mr Healy's mind when he entered into the tenancy agreement.

The accommodation expenses: the evidence

10. The performer's contract entered into between the theatre company and the Appellant for his engagement in "Billy Elliot" is dated 10 December 2004 (the "performer's contract"). It states that the period of engagement shall be from 13 December 2004 to 17 September 2005 "or for the run of the production, whichever shall be the shorter, provided that the Manager shall give not less than 2 weeks' notice of the termination of the run".

11. The tenancy agreement for the flat dated 15 April 2005 states that its term is from 15 April 2005 to 13 April 2006. It contains an early termination clause

stipulating that the Appellant could terminate the lease by giving 2 months' prior notice in writing, provided that the notice period not end earlier than 15 October 2005.

12. The witness statement of the Appellant states as follows.

13. The Appellant is a self-employed actor, and this has been his sole profession and occupation for some 40 years. The type of work available to and undertaken by him varies considerably from month to month and year from year. He travels to wherever he needs to for work, in the UK and abroad, to work in studios, on stage and on location. Modern technology permits him to do some voiceover work without physically attending the studio that records him.

14. The Appellant has an office at his home in Cheshire where he regards himself to be based as an actor. It is there that agents contact him, and that he reads and learns scripts, and receives and signs and negotiates contracts, and deals with his correspondence. All correspondence from his accountants, bank, income tax and bookkeeping go to another address which he owns near Newcastle and which his sister-in-law lives in. This was his former residence, and is nearer to his father-in-law who maintains his books and records. The Appellant sometimes stays at that other address when working in the North East.

15. The terms and conditions of performance contracts vary. The contract for Billy Elliot, offered to him in 2004, was a standard performer's contract that provided for rehearsal for 3 months (13 December 2004-March 2005) followed by 6 months of performances. The first paid performance was on 24 March 2005. One never knows that a performance will open until it does, so the Appellant stayed with a friend during the rehearsal period. After that he had 3 weeks' holiday, during which he also did voiceover work. When the show opened, he was due to appear in it until 17 September 2005, or the run of the production, whichever was shorter. In about August 2005 he was asked to extend his contract, and he agreed to do so until December 2005.

16. Prior to the show opening, the Appellant decided to rent a flat as this would be cheaper than a hotel and would not have the same sort of security issues that arise in a hotel. There was no question of his being able to get home to Cheshire after each performance. The rental period of the flat was one year but it was a monthly contract and the Appellant could terminate it at will. The Appellant left the apartment in December 2005 when he left the cast.

17. During the period of his participation in the production, the Appellant returned home to Cheshire on Saturdays after the evening performance and returned back to London on Mondays. The Appellant's office remained at his home in Cheshire throughout, and he dealt with correspondence there over the weekends. He attended a small range of different promotional and charitable events during his time off.

18. The Appellant was not engaged exclusively under the Billy Elliot contract. During the period of the production, he also received royalty income and was engaged to work on a range of different projects at different locations. He preferred voiceover work as it was impossible at the time to juggle additional stage or acting work.

19. In examination in chief, the Appellant additionally stated as follows. Billy Elliot was such a brilliant piece of theatre, there was no question of it being a flop. There were eight performances a week, on Monday to Saturday nights and matinees

on Thursdays and Saturdays. He would be driven back home after the Saturday evening performance, spend Sundays in Cheshire with his two sons then return to London on Monday afternoons. In addition to performances, he had to be in London during the day for rehearsals and promotional activities. He needed to do a vocal warm-up for an hour and a half before performances, which he did in his London flat. He also attended a voice coach in London.

20. In cross-examination, the Appellant stated as follows. There was no risk of the production terminating early; it was a great piece of theatre. At the time that he entered into the tenancy agreement, he was confident that the production would last at least until September 2005. The Appellant confirmed that at the time that he entered into the tenancy agreement, it committed him to a tenancy period of at least 6 months. When asked why he had taken a 3 bedroom flat, he said that he knew how massive the show would be and that people would want to come and visit, so that he knew that he would need space for visiting family and friends. Family and friends did in fact come to visit. It was cheaper to host family and friends in a flat than in a hotel. He only thought about whether he wanted to extend his contract when he was 4 or 5 months into the contract. He was asked to stay on and agreed to stay until December 2005. The flat was originally rented unfurnished, but the landlord agreed to furnish it for him. The Appellant lived out of his suitcase while there.

The accommodation expenses: submissions of the Appellant

21. The Appellant was required to work and rehearse in London. He did not make a home in London or come to London to rest. The nature of the Appellant's profession is different to trades and professions that feature in earlier authorities and each case of this nature is to be determined on its own individual facts and circumstances. The Appellant's base of operations was in Cheshire. An actor having to travel away from his or her base of operations to perform in different theatres is no different to a barrister having to travel away from his or her chambers to appear in different courts, or to a bricklayer having to travel away from his or her base of operations to work on different building sites. The Appellant claimed expenses for his travel between Cheshire and London and HMRC did not disallow this claim. It was not possible for the Appellant to return home to Cheshire each night. The fact that he rented a 3-bedroom flat is immaterial, as the flat was within the £1,000 per week budget for expenses that he was paid by the theatre company, and cost no more than hotel accommodation would have cost. The additional bedrooms were merely an additional advantage. Alternatively, a proportion of the Appellant's expenses should be allowed under s 34(2) ITTOIA as determined by the Tribunal on a just and reasonable basis.

The accommodation expenses: submissions of HMRC

22. A critical consideration in the Upper Tribunal's decision was that the Upper Tribunal thought that the tenancy agreement had a two-week break clause which coincided with a two week termination clause in the performance contract. However, there is now further evidence before the Tribunal that the performer's agreement only permitted termination on 2 weeks' notice if the production run did not last until 17 September 2005, and that the tenancy agreement only provided for a two week break clause after an initial 6 month period. The Appellant therefore committed to leasing the flat for at least 6 months, and expected the production run to last at least until 17 September 2005.

23. This is the kind of case which speaks for itself as one in which expenditure is not wholly and exclusively for the purposes of the trade. Expenditure on hotels and clubs is generally only deductible in the context of relatively brief business trips. Two weeks would be a "short term assignment" but 6 months would not. The Appellant was not on any view an itinerant worker. It is for the Appellant to demonstrate that his purpose in incurring rental expenditure did not include the purpose of satisfying his ordinary needs of warmth and shelter. A *pied à terre* close to one's place of work is still "ordinary accommodation". In any event, there was a duality of purpose because one of the reasons for renting the three bedroom flat was to provide hospitality to family and friends.

24. As to the Appellant's argument based on s 34(2) ITTOIA, this argument should be rejected. Where expenditure on accommodation has a duality of purpose, apportionment cannot be made on the basis of the relative weight to be attached to each purpose, which would be an impossible exercise. Apportionment is only possible where an identifiable part or proportion of the expenditure is identifiable as being solely for purposes of the trade, such as an office within a residential property.

The accommodation expenses: the Tribunal's findings

25. On the basis of the evidence, the Tribunal finds:

(1) The Appellant is a self-employed actor. In that capacity, he undertakes engagements as a film, television and stage actor that require his presence in a variety of different locations.

(2) The Billy Elliot performer's contract did not oblige the Appellant to devote himself exclusively to that theatre production. The other commitments he could undertake were limited due to the demands of the theatre production, but he was at all material times free to undertake other commitments.

(3) At the time of entering into the performer's contract in December 2004, the Appellant anticipated that his participation in the production would last until 17 September 2005: he entertained no serious thoughts that the production run might end early.

(4) At the time of entering into the tenancy agreement in April 2005, the Appellant similarly anticipated that his participation in the production would last until 17 September 2005.

(5) In August 2005, the Appellant was invited to extend his contract until December 2005, and he did so. No further extensions were offered to or sought by the Appellant.

(6) The Appellant's involvement in the theatre production ended in December 2005, and he left the flat in London at the same time.

(7) Throughout the period of the performer's contract, the Appellant's home remained in Cheshire, where his wife and children resided. He returned to his home in Cheshire after the evening performances on Saturdays and returned to London in time for the evening performances on Mondays.

(8) It would not have been possible for the Appellant to travel back to his home in Cheshire after each performance and to return in time for the next. In order to perform his obligations under the performer's contract,

he needed to stay in London, or at least, somewhere much closer to London than his home in Cheshire.

(9) In the London flat, the Appellant was living out of a suitcase. His home in Cheshire remained the place where he continued to receive and deal 5 with correspondence in his profession as a self-employed actor.

(10) The rented flat had three bedrooms. While the Appellant had the flat, various family members and visitors stayed with him there during visits. Such visits were anticipated at the outset, and this was the reason for taking a 3 bedroom flat.

10 26. The rent for the flat was £875 per week. Although no evidence was presented as to London hotel prices at the material time, the Tribunal accepts the Appellant's submission that a suitable hotel could have cost the same or more. The performer's contact provided that in addition to his performance salary, the Appellant was entitled to receive £1,000 per week as "a contribution towards" his living expenses. That 15 clause is some indication of the theatre company's view of suitable living costs in London (albeit that the concept of "living expenses" is not confined to accommodation, and the theatre company's views are not in any sense authoritative for present purposes).

27. The Tribunal is satisfied that the expenditure on the flat was for the purpose of 20 the Appellant's trade as a self-employed actor. The question is whether that was the sole purpose (such that any other benefits from the flat were merely incidental to that exclusive business purpose), or whether the expenditure on the flat was also for another purpose (such that it had a dual purpose).

28. The parties' arguments before the Tribunal concentrated mainly on the question 25 whether the expenditure on the flat also had the purpose of meeting the Appellant's ordinary needs for warmth and shelter.

29. HMRC submit that this question must be answered affirmatively, based on the length of the period of the tenancy agreement. HMRC suggest that temporary accommodation on a business trip for a few days or a couple of weeks might be for 30 exclusively business purposes, but that a residential tenancy for many months cannot. HMRC point to the erroneous reference in the Upper Tribunal's decision at [83] to "the two week break clause in the tenancy agreement". HMRC argue that but for this mistaken understanding of the facts, the Upper Tribunal would have determined that the "wholly and exclusively" test is not satisfied, instead of remitting the case back to 35 the First-tier Tribunal.

30. The Tribunal does not accept that submission. The Upper Tribunal's decision states expressly at [82] that "There is no hard and fast rule as to when the length of the assignment clearly tips the balance in favour of a conclusion that there is a dual purpose; it will be a matter of fact and degree in the particular circumstances". It is 40 added at [80] that:

> 80. … we have found nothing that indicates that expenditure under a tenancy agreement that lasts for a period of nine months cannot be deductible. As we have indicated, each case must be looked at on its own facts .... Mr Conolly [the HMRC representative], rather 45 unconvincingly in our view, responded to our suggestion that if he were asked to appear in a nine month VAT fraud case in Newcastle, away from his home in London and he either stayed in a hotel or took a

> short term tenancy that he would have a dual purpose and his accommodation costs would not be deductible. Realistically, he would be likely to return home throughout that period at weekends or in other gaps in the hearing; he would in our view rightly see his accommodation in Newcastle as taken purely for the purpose of enabling him to appear in the case.

31. At the time of entering into the tenancy agreement in April 2005, the Appellant anticipated that he would be performing in Billy Elliot for another 5 months, until 27 September 2005. In accordance with the terms of the tenancy agreement, he could have terminated the tenancy on 15 October 2005, which would have been a month after his performer's contract was then due to end. Ultimately he had the flat for 8 months, until December 2005, which coincided with the end of his extended performance contract.

32. The Upper Tribunal also said at [82] that:

> Mr Healy as an actor may be offered a series of short term assignments away from his home in respect of which he may claim deductible hotel or other accommodation expenses, or he may obtain a longer assignment, such as that in Billy Elliot and decide to take a tenancy of a flat. If he in his own mind viewed those different circumstances on entirely the same basis, namely that the sole purpose of the accommodation was a business purpose, then in our view there is no reason why in principle he should not be able to deduct the expenditure in both cases.

33. However, the Upper Tribunal's decision also stated at [83] that "It is therefore essential that the Tribunal in such a case should make a finding as to whether the taxpayer viewed the assignment as a short term assignment that might develop into a longer assignment or always saw it as a longer term assignment". This sentence, which appears to distinguish a "short term assignment" from a "longer term assignment", at first sight seems difficult to reconcile with the statement at [82] that a "longer assignment" might subjectively be viewed by the taxpayer on entirely the same basis as a series of short term assignments.

34. Before reaching any concluded view on whether the expenditure on the flat also had the purpose of meeting the Appellant's ordinary needs for warmth and shelter, it is convenient to address another issue that arose only in the course of the hearing. This is the issue of whether the expenditure on the flat also had the purpose of enabling the Appellant to receive visiting family members and friends. For the Appellant, it was argued that the ability of the Appellant to receive visitors in the flat was also merely incidental to the Appellant's business purpose in incurring expenditure on renting the flat, rather than a purpose in itself. HMRC contend that this was in fact an independent purpose.

35. *Elwood v Utitz (1965) 42 TC 482* concerned a claim for expenditure on membership of clubs in London for the managing director of a company based in Northern Ireland. It was held in that case that the additional club facilities available to the managing director were incidental to the exclusive purpose of the expenditure, which was to secure suitable inexpensive accommodation for the managing director when transacting business in London. For the Appellant in the present case, it was argued that where accommodation is taken for purely business purposes, an incidental result may be that family friends and relatives can use the accommodation as well. It was argued that this could be true even if the accommodation is a hotel room, and that

in this case, it was no more expensive to rent the flat than it would have been to rent a hotel room.

36. The Tribunal does not accept this submission. The Tribunal must consider the Appellant's intentions at the time that he entered into the tenancy agreement. In his oral evidence, he said that he knew "how massive the show would be" and that he "needed space" for people who would want to come to visit. On the basis of his evidence, the Tribunal is satisfied that the Appellant from the outset was seeking to secure space for visitors as well as for himself, and that this was a consideration when deciding which particular flat to rent. The Tribunal considers that for purposes of s 34(1) ITTOIA, this was an independent purpose, and that the expenditure on the flat thus had a dual purpose of enabling the Appellant to perform his duties under the performer's contract, as well as enabling him to receive visitors in London. The latter purpose was not a business purpose. The fact that the three bedroom flat cost no more than a hotel is not material to this conclusion. For purposes of s 34(1) ITTOIA, the question is whether the expenditure *had* a dual purpose, not whether there was *additional expenditure* in order to meet an additional purpose.

37. The Tribunal concludes on the evidence before it that the Appellant from the outset had a dual purpose in incurring the expenditure on the rental of the flat. One purpose was a business purpose. The other purpose was a non-business purpose of having accommodation space in which he could receive visitors. The "wholly and exclusively" test in s 34(1) ITTOIA is therefore not satisfied. In the circumstances, it is ultimately not necessary for the Tribunal to reach a view on whether the expenditure also had yet a further non-business purpose of meeting the Appellant's ordinary needs for warmth and shelter.

38. There remains the Appellant's argument concerning s 32(2) ITTOIA. In *Caillebotte (Inspector of Taxes) v Quinn* [1975] 1 WLR 731 it was held that it is not possible to divide up the expense of a meal or a journey in the case of a meal or journey that has a duality of purpose. However, it was held that it is possible to apportion the use and cost of a room or car on a time basis, and to allow the expense of the room during the hours in which it is used exclusively for business purposes. At the hearing before us, Mr Conolly also accepted that it is possible to apportion on the basis of space, for instance where one room in a house is used exclusively as an office for business purposes (see for instance *Elwood* at 495).

39. In the present case, there was no evidence before the Tribunal as to the floorplan of the flat in question. The evidence is that it had three bedrooms. Presumably it also had a lounge, kitchen and bathroom. Visitors would presumably have used not only bedrooms, but also the lounge, kitchen and bathroom. Indeed, there was not even evidence before the Tribunal that one bedroom was used exclusively by the Appellant.

40. The Appellant has submitted that if there is a duality of purpose, a proportion of the expenses should be allowed, "to be determined on a just and reasonable basis by the Tribunal taking into consideration suitable methods of apportionment". However, the Tribunal has no general jurisdiction to reach decisions on the basis of what is "just and equitable". It must apply the law. For s 34(2) ITTOIA to apply, there must be an "identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade". On general principles, the burden is on the Appellant to identify the "identifiable proportion".

41. The Tribunal is not persuaded on the evidence before it that it has been established that there was any identifiable part or identifiable proportion of the amount spent on the rent for the flat which was incurred wholly and exclusively for the purposes of the trade.

5 42. It follows that the appeal is dismissed in relation to the expenditure on the flat.

The expenditure on subsistence and taxi fares

43. The earlier First-tier Tribunal decision (paragraph 2 above) dismissed the Appellant's appeal in relation to his claims for expenditure on subsistence and taxi fares. In the present proceedings, the Appellant sought to argue that these claims 10 should have been allowed.

44. HMRC submit that because the Appellant did not appeal against those findings in the earlier First-tier Tribunal decision, those findings are now *res judicata*.

45. The Appellant argued as follows. Although the Appellant did not appeal against the findings in relation to these other items of expenditure, if there was an error in the 15 earlier decision of the First-tier Tribunal relating to the approach to be taken in applying s 34(1) ITTOIA, then that error may have also affected the earlier First-tier Tribunal's decision in relation to the other claimed items of expenditure. The Upper Tribunal's decision (at [84] and [87]) was to "set aside" the earlier First-tier Tribunal decision. The Upper Tribunal did not indicate that it was setting aside the earlier 20 First-tier Tribunal decision only in part. Unless all items of expenditure are reconsidered in accordance with the Upper Tribunal's decision, there is a risk that there will be two decisions of the First-tier Tribunal, one of which is correct and the other which is wrong.

46. The Tribunal considers that the procedural argument of HMRC is correct. 25 Because the parties referred to no authority on this issue, the Tribunal does not rely on any. The Tribunal would merely observe that its own view is succinctly stated in the wording used by the Upper Tribunal (Lands Chamber) in *Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2013] UKUT 0264 (LC) at [36]:

> Permission to appeal and cross-appeal is necessary in order to prevent 30 the Upper Tribunal from being over-burdened with unmeritorious appeals. If a party could properly bring any matter before the Tribunal without first obtaining permission of either the [First-tier Tribunal] or the [Upper] Tribunal to cross-appeal that would drive a cart and horses through the procedures and result in the need for permission to cross-35 appeal being removed in practice. It could also lead to arguments that the appealing party, having been given permission to appeal on a particular point, could raise other points, without permission having been granted, on the basis that the same would be avoiding unnecessary formality and seeking flexibility in the proceedings. The 40 [First-tier Tribunal] or the [Upper] Tribunal are careful in ensuring that only those matters which have a realistic prospect of success are allowed to proceed to appeal. It is an important part of the management of the Tribunals work that permission stage exists and it would be wrong for parties to consider they can circumvent that requirement.

45 47. The Appellant did not seek to appeal against any of the adverse findings in the original First-tier Tribunal decision. The Upper Tribunal's decision states at [2]: "The

appeal before the FTT also related to certain expenses for subsistence and taxi fares. Mr Healy's appeal was dismissed in relation to those expenses and he did not pursue those claims any further." The Upper Tribunal's decision gave no consideration to the First-tier Tribunal's reasoning in respect of those other claims. When the Upper Tribunal "set aside" the original First-tier Tribunal decision, it is necessarily implicit that it did so only in relation to the claim in respect of the accommodation expenses, which was the one matter in respect of which HMRC had sought and been granted permission to appeal.

48. Accordingly, the Tribunal does not consider the Appellant's arguments relating to the claims for expenditure on subsistence and taxi fares.

49. For completeness, the Tribunal adds that it would have dismissed any appeal by the Appellant in relation to these other expenses in any event, due to the absence of sufficiently detailed evidence as to the amounts and purpose of the claimed expenditure.

Conclusion

50. For the reasons above, the appeal is dismissed.

51. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 28 May 2015