Appeal number FTC/53/2013
[2014] UKUT 0013 (TCC)

Deduction of travel expenses – medical practitioner in private practice - travel between office at home and place of business – travel between other locations and place of business - whether "wholly and exclusively" for the purposes of a trade or profession – section 74 ICTA 1988 – section 34 ITTOIA 2005.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DR SAMAD SAMADIAN **Appellant**

- and -

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

TRIBUNAL: The Honourable Mr Justice Sales

Sitting in public at The Royal Courts of Justice, Rolls Building on 16/12/13

Joseph Howard, instructed by Stanbridge Associates Ltd, for the Appellant

Christopher Stone, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This case concerns the question of the extent of the right to deduct travel expenses when computing the profits of a trade or profession on which income tax is payable. It is an appeal from a decision of the First-tier Tribunal (Tax Chamber) (Judge Kevin Poole and Kamal Hossain FCA FCIB) ("the FTT"), [2013] UKFTT 115 (TC), in which the FTT decided certain issues of principle arising between the taxpayer, Dr Samadian, and the Respondent ("HMRC"). Unless otherwise indicated, references in square brackets are to paragraph numbers in the FTT's decision.

2. Dr Samadian is a consultant geriatrician who works in full time employment in the NHS at certain NHS hospitals (principally St Helier and Nelson hospitals in south London) and also maintains a private practice as a self-employed medical practitioner. This is a common pattern of working for senior medical practitioners. It is in relation to Dr Samadian's income from his private practice that the question of deduction of travel expenses arises.

3. For his private practice, Dr Samadian maintains an office at his home (where he does work relevant to that practice) and sees patients at consulting rooms hired by him at two private hospitals, St Antony's in North Cheam and Parkside in Wimbledon. He also occasionally conducts home visits. He uses a car to travel between these locations and to and from the NHS hospitals where he is employed.

4. In relation to some aspects of Dr Samadian's travel pattern, there is agreement between him and HMRC as to the question whether the expenses of particular journeys are or are not deductible, as expenses "wholly and exclusively" for the purposes of his private practice - see the table at [21], set out below:

	Journey	**Appellant's position**	**HMRC's position**
1	Between home and St Helier/Nelson hospital (NHS)	Not deductible	Not deductible
2	Between St Helier and Nelson hospitals (both NHS)	Not deductible (though could claim against employment income)	Not deductible (no view expressed on deductibility against employment income)
3	Between St Helier/Nelson hospital (NHS) and St Antony's/Parkside hospital (private)	Deductible	Not deductible

4	Between St Antony's and Parkside hospitals (both private)	Deductible	Deductible
5	Between home and St Antony's or Parkside hospitals (private)	Deductible	Not deductible
6	Between St Antony's or Parkside hospital (private) and patient's home or other care location (private)	Deductible	Deductible
7	Between home and patient's home or other care location	Deductible	Deductible
8	Between St Helier/Nelson hospital (NHS) and patient's home or other care location	Deductible	Not specifically addressed

5. However, as indicated by the table, there was an absence of agreement in relation to items 3, 5 and 8, namely (a) travel between the NHS hospitals and the private hospitals, (b) travel between home and the private hospitals and (c) travel between the NHS hospitals and a patient's home for a home visit. Since HMRC did not agree on the deductibility of expenses in relation to these journeys, Dr Samadian appealed to the FTT. The parties invited the FTT to decide issues of principle in relation to the deductibility of such expenses, which would then allow the extent of Dr Samadian's taxable income from his private practice to be determined and agreed.

6. The FTT found, among other things, that Dr Samadian had a place of business, in the sense of a "generally fixed and predictable" place at which he performs work in his private practice, at each of St Antony's and Parkside ([83] and [101]). It also found that he had "a place of business at his home, where he carried out part of the professional work necessary to his overall professional practice as well as the majority of the administration work related to it" ([92] and [101]).

7. The FTT ruled as follows: (a) travel expenses for journeys between the NHS hospitals and the private hospitals are not deductible ([96] and [104]); (b) travel expenses for journeys between Dr Samadian's home and the private hospitals are not in general deductible ([94] and [103]); and (c) travel expenses for journeys between the NHS hospitals and a patient's home are generally deductible, in the absence of some specific non-business object or motive in any particular case ([99] and [105]).

8. Dr Samadian appeals to the Upper Tribunal to challenge its rulings in relation to (a) (travel expenses for journeys between the NHS hospitals where he is employed and the private hospitals where he works in his private practice) and (b) (travel expenses for journeys between his home and the private hospitals). In each case, he says that the travel expenses are incurred "wholly and exclusively" for the purposes of his private practice and that the FTT erred in law in ruling to the contrary.

9. HMRC do not appeal against the FTT's ruling in relation to (c) (travel expenses for journeys between the NHS hospitals and a patient's home). They did, however, put in a Respondent's Notice to support the FTT's ruling on (b) (travel between Dr Samadian's home and the private hospitals) on the further grounds that "[Dr Samadian's] home was, properly understood, not a 'business base'" and also that the FTT made a finding of fact which no reasonable tribunal properly directing itself on the law and facts could have made, in identifying Dr Samadian's home as a place of business. In the event, at the hearing in the Upper Tribunal, Mr Stone for HMRC did not press the second of these further grounds. He was right not to do so: there was ample material before the FTT on which it could rationally conclude that Dr Samadian did indeed use his office at home as a place of business (in the sense that it was a place at which he carried out business activities relevant to carrying on his private practice). Mr Stone also explained that the Respondent's Notice had been served to introduce the first of the further grounds out of an abundance of caution, depending on how the argument developed on the appeal. His primary position was that the FTT had not determined that Dr Samadian's "business base" was his home, only that he had one of a number of *places* of business there; on the footing that the Upper Tribunal accepted this, it was not necessary or relevant for HMRC to rely on the further ground in their Respondent's Notice. On this point also, I consider that Mr Stone was correct. The FTT did not determine that Dr Samadian's "business base" was his home, only that he had one of a number of places of business there.

The Legislation

10. In the FTT and in this Tribunal, the parties were agreed that the legislation to be applied is that set out in section 74 of the Income & Corporation Taxes Act 1988 ("ICTA") in respect of the period up to 2004-05. Section 74 provides:

> "**74 General rules as to deductions not allowable**
>
> Subject to the provisions of the Tax Acts, in computing the amount of the profits or gains to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of –
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation;
>
> ...."

11. In respect of the year 2005-06 and subsequent years, the parties were agreed that the relevant legislation is that contained in section 34 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), as follows:

> "**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."

12. The FTT correctly directed itself that the effect of the old and new legislation is the same. In each case, the essential requirement is to establish whether the disputed expenses (or the money paid in respect of them) were incurred (or laid out) wholly and exclusively for the purposes of Dr Samadian's private practice: [28].

The FTT's Decision

13. The FTT's decision is clearly laid out. It is relevant to set out the main findings of fact, at [5] to [18] and [20], as follows:

> "5. The Appellant has been a medical practitioner since the 1970s. In 1990 he took up employment as a full time consultant geriatrician at St Helier, Nelson and Sutton hospitals in south London. He has remained there since that time (though now he works almost exclusively at St Helier hospital, holding just one NHS out-patient clinic per week at Nelson hospital in Kingston-upon-Thames). He lives in Sutton. He has a permanent NHS office with full administrative support (including a secretary, who also acts as secretary for him in his private practice during her spare time) at St Helier hospital. He carries out some teaching as part of his NHS duties.
>
> 6. In 1991 the Appellant started a private practice alongside his NHS work. From small beginnings, his private practice has grown to a significant size. He says this is because of two factors. First, two colleagues retired which created something of a gap in the market in the geographical area. Second, as he has no hobbies, family or family ties in the UK (he originates from overseas), he is able to spend as much time as he wants working in his private practice.
>
> 7. His detailed working arrangements have changed over time, but not in any way which is material for the purposes of this decision. Essentially the

Appellant holds weekly out-patient sessions at two private hospitals, St Antony's in North Cheam and Parkside in Wimbledon. Where necessary, he admits patients to hospital, usually St Antony's; those patients remain under his care as in-patients and he reviews their condition at regular evening ward rounds (usually six evenings per week at St Antony's). From time to time he also has other patients under his care who are looked after at home or other care facilities and he visits them as needed to review their condition and consider what further treatment is required.

8. The arrangements for his out-patient clinics at St Antony's and Parkside hospitals are as follows. There are out-patient consulting rooms available for hire on a sessional basis at the two hospitals, and the Appellant has a regular weekly slot at each of them. He is only permitted to use the rooms for the duration of the session (three hours), and other doctors use them for the rest of the time, on a similar basis. There is pressure on availability, and at least at St Antony's the continued availability of the room is linked to the extent of in-patient business generated for the hospital by the user in question. The room will often have the Appellant's name temporarily marked on it during his session by means of a removable name plate. A nurse is supplied by the hospital to provide general assistance and, where appropriate, a chaperone. In the room is a desk, chair, hospital computer (though the Appellant said he had no access to use the hospital's system), couch, blood pressure machine and a screen. There may occasionally be other medical instruments, but the Appellant generally uses his own (which he keeps at home).

9. The Appellant has no administrative support at the two private hospitals. They offer basic medical test/scanning/imaging facilities for patients, to which the Appellant does refer his patients (though for more sophisticated tests he will refer patients to NHS facilities). For test results or any other communication received by the hospitals for him, he shares a pigeon hole with all other doctors with surnames starting with "S". He has no office or secretarial support there, and no email account. He pays for the use of the consulting rooms, but that is the only interaction he has with the hospitals' accounting functions because he bills his patients (or their insurers) direct for his own services and the hospitals bill them direct for the tests and in-patient care they provide.

10. The Appellant will do basic examinations and take a history when he first sees his patient, generally at his out-patient clinic. Because of the nature of the field in which he practises, it is often important for him to take a "collateral history" from others, such as the patient's carer, relatives, GP, social services and the like. This helps him to build up a full picture of the case to enable him to structure his treatment plan properly. He will generally obtain any collateral history while working from his office at home, where he also does any necessary research and considers test results before deciding on the treatment plan. He then prepares the plan, generally in the form of a letter to the patient's GP, identifying what is wrong with the patient and what he

considers should be done. This work is all done at home, and generally takes longer than the initial patient consultation. He does not see patients at his home (except for the odd very rare occasion when someone turns up without an appointment, for example asking him to "look at my mother's blue leg").

11. When he considers it appropriate, he will arrange for a patient to be admitted for in-patient care (usually at St Antony's). When he is dealing with in-patients under his care (and he generally has six to eight such patients in St Antony's at any one time, though the number fluctuates greatly) he does so during the course of his ward rounds – which take place every evening except Sunday. If needed, he will attend on Sunday as well, or indeed at any other time in case of an emergency (subject to his NHS commitments). As well as assessing patients and arranging treatment, he also plans their discharge and deals with relatives. He does quite a bit of this "face to face" in the hospital, but it also requires further thought and work, which he does at home.

12. If the Appellant has patients under his care who are being looked after at home or some other location, he will visit them as necessary rather than on a regular basis. If a patient requires frequent or close monitoring, he or she will generally be admitted as an in-patient.

13. The Appellant receives referrals through various routes. If a GP or other doctor wishes to refer a patient to him, they may contact him by letter, telephone call or email. Letters may be sent to his home address, to St Helier hospital or (occasionally) to Parkside or St Antony's hospitals. Telephone calls may come through to his own mobile phone, his home telephone or his office at St Helier hospital. Emails would normally come to his private professional email address, which he receives at home.

14. In response to a referral, the Appellant arranges for his secretary to contact the patient and set up an appointment. This will usually be at Parkside or St Antony's, but may be at the patient's home or some other location where the patient is being cared for, depending on the circumstances.

15. The Appellant takes notes at the first consultation, which he subsequently has typed up by his secretary. These form the starting point for his own personal medical file on the patient, which he keeps at home. Where the patient is an in-patient at St Antony's, he will send copies of key medical documents to the hospital for retention on their clinical files, so that other medical professionals can see the full picture concerning that patient.

16. The Appellant does not discuss fees with his patients at all. That is dealt with completely by his secretary. Many of his patients are insured and his fees are met by the insurers. The Appellant's invoices are issued bearing his home address. He sends invoices to the patient, copying in the insurer where appropriate. All payments are received at home by him (whether paid by the insurer or the patient). He keeps all his business records there, and it is essentially his administrative centre as his bank statements are sent there, his

professional bodies communicate with him there and the insurers with whom he is registered also correspond with him there. He has a separate office at his home which is used wholly or mainly for conducting his private practice. He has a desk, a chair, a medical library, a filing cabinet (with his business and clinical records) and computer, as well as his medical equipment and prescription pads.

17. The Appellant does not have business cards showing any business address. When sending business correspondence (e.g. relating to invoicing) he puts his home address at the top of the invoice or other correspondence. When sending clinical correspondence (i.e. correspondence with other medical professionals about patients) he generally does so showing the St Antony's or Parkside hospital address and telephone number on the letter as well as his St Helier hospital address.

18. Whilst he is generally contacted as set out at [13] above, he can be contacted at St Antony's or Parkside by his secretary, GPs and other medical professionals who know his work routine, but only by asking the hospital switchboard or ward to "track him down". …

20. Typically, the Appellant would start his working day by travelling from his home to St Helier or Nelson hospitals (where he is employed under his NHS contract). From there, he would generally travel to one or both of St Antony's and Parkside hospitals later in the day (though on one day he travels from Nelson to St Helier first). At the end of his working day, he would travel home, possibly carrying out one or more patient home visits first. On Saturdays, he would travel from home to St Antony's and back. At any time when he was not involved on NHS business, he might be called to make an urgent patient visit, either at the patient's home, at St Antony's or elsewhere. His travel then would depend on where he was when the call came and what time of day it was."

14. The FTT reviewed the principal relevant authorities: *Newsom v Robertson* [1952] 1 Ch 7, *Horton v Young* [1972] 1 Ch 157, *Jackman v Powell* [2004] EWHC 550 (Ch) and *Mallalieu v Drummond* [1983] 2 AC 861; [1983] STC 665, HL. Although Mr Howard, who appeared for Dr Samadian, was critical of the FTT for referring to *Mallalieu v Drummond*, which had not been cited in argument before the FTT, I consider that the FTT was entitled to have regard to it, as a leading authority on the relevant "wholly and exclusively" test for deductibility of expenses of a trade or profession. *Mallalieu v Drummond* is illustrative of the proper application of that test. The application of that test was central in the present case, as the submissions for HMRC in the FTT made clear, and Dr Samadian had a fair opportunity to make submissions about it. The FTT's reference to *Mallalieu v Drummond* did not introduce any new issue for debate, and in the circumstances was not unfair to Dr Samadian.

15. The FTT gave a helpful summary of the authorities, which I gratefully adopt, as follows:

"Newsom v Robertson

30. In the first of the decisions the parties invited us to consider, *Newsom v Robertson* [1952] 1 Ch 7 and (1952) 33 TC 452, the Court of Appeal considered the case of a barrister in private practice. Mr Newsom (the barrister in question) claimed to deduct the costs of travelling between his chambers in London and his home in Whipsnade. This was on the basis that he carried out a good deal of his professional work in his well-equipped study at home, especially during court vacations (when he only visited his London chambers on rare occasions for conferences).

31. The Special Commissioners found that in court vacations the basis of Mr Newsom's professional operations moved from London to Whipsnade. In the High Court, Danckwerts J held that none of the travel expenses were deductible. The basis of this decision was that the reason the expenses had been incurred was because Mr Newsom wanted to live in the country; it followed that the travel to and fro had a mixed purpose (partly professional and partly "the requirements of his existence as a person with a wife and family and a home") and the expenses of that travel therefore failed the "wholly and exclusively" test.

32. In the Court of Appeal, Sommervell LJ took the view that the expenses of travel to and fro should be aggregated and treated together. He considered that Mr Newsom's chambers in London remained his "professional base" throughout the year. This does not seem to have been his reason for dismissing the appeal however. Instead, he found that the location of Mr Newsom's house "had nothing to do with" his practice. It was simply his home, and the fact that he did a significant amount of professional work there did not change that fact. Accordingly, he doubted that there was any professional purpose to the travelling, but if there was it was certainly subsidiary to the private purpose.

33. Denning LJ followed a slightly different line of reasoning. His judgment proceeded on the tacit assumption that every trade, profession or occupation has a single "base". On that assumption, all that was necessary was to identify the base and then it was quite clear that the cost of travel between the home and that base was not deductible. It was incurred, in his view, "for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively". He found that Mr Newsom's base was at his chambers in London and therefore he held that the commuting costs were not deductible.

34. Romer LJ approached the matter slightly differently again. He first reasserted the general proposition that normally, travel between home and work has as its object "not to enable a man to do his work but to live away from it." He then considered whether anything was changed as a result of a taxpayer doing work at home as well as at his normal place of work. He considered that it changed nothing, at least in Mr Newsom's case, essentially because if Mr Newsom had not travelled at all, he could have carried on his

profession perfectly satisfactorily from his chambers in London. He dismissed any suggestion that Mr Newsom might have had two places of business, but without elaborating on his reasons for doing so.

Horton v Young

35. Second, we were referred to the case of *Horton v Young* [1972] 1 Ch 157, in which the Court of Appeal considered the situation of a self-employed bricklayer. Mr Horton was the leader of a bricklaying team of three men. He had no yard or other business premises. He simply operated from his home in Eastbourne. He worked at seven different sites during the year in question, at distances of between 5 and 55 miles from his home. Mr Page, the main contractor for whom he worked, would visit Mr Horton at his home to agree the details of each job – the site and the rate of pay. Mr Horton used to collect the rest of the team in his car and take them to the site. Sometimes he had to travel between two sites on the same day.

36. Denning LJ compared this case with *Newsom* and said:

> "The present case is very different. Mr Horton's base of operations was Eastbourne. He claims his travelling expenses to and from that base. I think he is entitled to deduct them.
>
> ...
>
> On the finding of the Commissioners there is only one reasonable inference to draw from the primary facts. It is that Mr Horton's house at Eastbourne was the locus in quo of the trade, from which it radiated as a centre. He went from it to the surrounding sites according as his work demanded."

37. Salmon LJ, in agreeing that Mr Horton's house was his business base, recited that Mr Horton agreed all his contracts at his home, kept his tools and business books there and did his office work there. That was where he knew his only customer would come to seek him out. In addition, crucially, the sites where he actually carried out his bricklaying work were spread across a large area. He rejected the idea that Mr Horton may have had shifting bases of business, cropping up on each site at which he worked, due to the obviously large number and uncertainty of them.

38. Stamp LJ, also agreeing, pointed out how difficult it was to draw a line between what he called "itinerant" traders, whose business actually involved travel, and persons such as the barrister Mr Newsom. The implicit finding was that Mr Horton's trade was itinerant. Each case had to be examined on its own facts and decided by reference to the statutory criteria. He rejected the general proposition that the place or places at which a man carries out the work he has contracted for must necessarily be his place or places of business. He found that Mr Horton had "no place which you could call his place of business except his home": he entered into contracts there, he kept his tools

and other trading items there, and it was the only place where he was to be found.

Sargent v Barnes

39. The third case to which we were referred was *Sargent v Barnes* [1978] 1 WLR 823. This concerned a dental surgeon who travelled to his dental surgery from home by car every day, a distance of about 11 miles. He also maintained a laboratory where a dental technician worked, about 1 mile from his home and almost directly on the route between his home and his surgery. He stopped off at the laboratory every morning and evening, to pick up or deliver dentures and to discuss matters with his technician. He claimed to deduct the cost of travel between his surgery and the laboratory. The laboratory was set up in an outbuilding of Mr Barnes' father's house.

40. Oliver J in the High Court considered *Newsom, Horton* and other authorities and came to the conclusion that "it would in my judgment be a travesty to say that the taxpayer was in any relevant sense carrying on his practice as a dentist at [the laboratory]". He held that Mr Barnes' "base of operations where the practice was carried on" was at the surgery. Just because the journeys to the laboratory were "necessary" (as the General Commissioners had held), that did not mean the expense of them was incurred "solely or exclusively for the purposes of the practice". The journeys were in essence journeys between his home and his "base of operations" at his surgery and he was simply using the journey to and from his home to visit the laboratory. The essential character of the journey remained unchanged and for that reason it could not be regarded as satisfying the statutory test.

Jackman v Powell

41. The above cases were examined closely by Lewison J in the High Court in *Jackman v Powell* [2004] EWHC 550 (Ch), the fourth of the cases which the parties invited us to consider.

42. *Jackman* concerned a milkman who operated a milk round under a franchise agreement with Unigate at some distance from his home.

43. Every day, Mr Powell travelled 26 miles from his home to the Unigate depot, where he picked up his milk float and then went out on his round. He bought all his milk and other goods from Unigate and he rented his float from them. He kept both at the Unigate depot. After he had completed his round and prepared things for the following day, he drove home again.

44. He was registered for VAT, giving his home address as his place of business. He did all his office work at home, and kept all the business records there.

45. Lewison J held that it was not necessary in all cases to define the base of the trading operation (it was, he said, only Denning LJ in *Newsom* who had suggested this); however, in the case of Mr Powell, he went on to make a finding that the 35 roads of Mr Powell's milk round "plainly" amounted to his "base of operation". In the decision, however, he focused at some length on the reasons why Mr Powell's home could not be his base of operation (as the Special Commissioner had found) rather than on giving any particular basis for his finding that the round itself was “plainly” the base of operation.

46. The decision in *Jackman* therefore provides little assistance, beyond a statement that it is not always necessary to find a base of operation, the finding that a geographical area (rather than a single location) can amount to a base of operation and general observations about matters which Lewison J held to be insufficient to establish a taxpayer's home as his base of operation.

Mallalieu v Drummond

47. *Mallalieu v Drummond* [1983] STC 665, a decision of the House of Lords, was not specifically referred to by either party in argument, but it provides an important backdrop for the arguments. It was concerned with the precise interpretation of the wording of the statutory restriction in section 74(1)(a) Income and Corporation Taxes Act 1988 (which was at the time to be found in section 130(a) of the Income and Corporation Taxes Act 1970).

48. Lord Brightman (with whom three of the other Law Lords agreed) explained that the statutory words "expended for the purposes of the trade..." actually meant "expended to serve the purposes of the trade...", which in turn could be elaborated as "expended for the purpose of enabling a person to carry on and earn profits in the trade...". He went on to explain that:

> "[t]o ascertain whether the money was expended to serve the purposes of the taxpayer's business it is necessary to discover the taxpayer's 'object' in making the expenditure: see *Morgan v Tate & Lyle Ltd* [1955] AC 21 at 37 and 47. As the taxpayer's 'object' in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of s 130 except as a reflection of the taxpayer's state of mind at the time of the expenditure.
>
> If it appears that the object of the taxpayer at the time of the expenditure was to serve two purposes, the purposes of his business and other purposes, it is immaterial to the application of s 130(a) that the business purposes are the predominant purposes intended to be served.
>
> The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of

> the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home of his friend and attending professionally on him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was *a* reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend on his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition in s 130."

49. *Mallalieu* was concerned with a claim for expenses of maintaining suitable clothing for wearing in court by a barrister. Her evidence (which was accepted by the General Commissioners) was that her normal choice of clothes would be entirely unsuitable for use at work and her sole conscious motive in incurring the expenditure was to ensure that she could satisfy the relevant professional rules:

> "She bought such items only because she would not have been permitted to appear in court if she did not wear, when in court, them or other clothes like them. Similarly the preservation of warmth and decency was not a consideration which crossed her mind when she bought the disputed items."

50. Lord Brightman held that even though her sole conscious motive was to comply with the professional rules, that was not sufficient:

> "... she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist. In my opinion the commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion."

51. It followed that Ms Mallalieu's claim for a deduction failed, because although she had no conscious motive for incurring the expenditure which was

not a business motive, the facts were such that there must necessarily have been a non-business motive in her mind as well.

52. *Mallalieu* is important and helpful in clarifying the distinction between "object" or "motive" on the one hand and "effect" on the other, and in making clear that a court may look behind the conscious motive of a taxpayer where the facts are such that an unconscious object should also be inferred."

16. In relation to [52], I would only enter a slight qualification. I think it is more accurate to say, as Lord Oliver indicated in *Mallalieu*, that the absence of conscious motive on the part of the taxpayer does not in itself prevent a finding that the taxpayer's purpose, or part of the taxpayer's purpose, in making the expenditure in question was to promote a private purpose distinct from the purposes of the trade or profession in issue. Consideration of the taxpayer's purpose involves consideration of all the objective circumstances, of which their conscious motivation in making the expenditure is only one part (albeit an important part). I would not myself favour use of the phrase "unconscious object". I respectfully think that Jacob J was right to suggest that "a better expression might be 'unarticulated' purpose": see *Vodafone Cellular Ltd v Shaw (H.M. Inspector of Taxes*) [1997] STC 734; 69 TC 376 at 428. However, it is fair to say that the concepts of purpose, motive and intention do not have hard and fast boundaries, but shade into each other. In the event, nothing of significance on this appeal turns upon this qualification of the FTT's reasoning.

17. The FTT then summarised the rival submissions of the parties ([53]-[61]), before the section of the decision headed "Discussion" ([62]-[100]) in which it analysed the factual position and applied the principles of law it derived from the cases in order to arrive at the conclusions outlined above. The FTT focused first on the question of the deductibility of expenses of travel between Dr Samadian's home and the private hospitals, before turning to analyse the position in relation to travel between the NHS hospitals and the private hospitals and travel for home visits. This is a helpful ordering of issues which I also adopt below.

18. At [62]-[63], the FTT correctly directed itself that the only statutory test which fell to be applied was the "wholly and exclusively" test set out in section 74 ICTA and section 34 ITTOIA. The authorities provide guidance and illustrations from which it is possible to reason by analogy, but the FTT correctly recognised that it should not be distracted in its analysis from the critical question it had to determine, which was set by the statutory test.

19. It is common ground that the onus is on the taxpayer to show that any item of expense is properly deductible under section 74 ICTA and section 34 ITTOIA. At [64], the FTT observed:

"No specific evidence was put before us as to the Appellant's actual motive or object in making any of the journeys, beyond his assertion that the travel was all wholly and exclusively for the purposes of his business, which was based at his home. We were left to infer the object from that assertion and the undisputed facts."

20. In view of the challenges to the FTT's decision on this appeal, it is relevant to set out the following passages from the "Discussion" section of the decision, at [65]-[84] (dealing with *Horton*), at [88]-[94] (dealing with *Newsom* and *Mallalieu*) and at [95]-[97] (dealing with the issue of expenses of travel between the NHS hospitals and the private hospitals):

> "65. The object for each journey needs to be considered individually. However, where journeys are logically linked to each other then the factors that link them may well indicate a total or partial shared object for all of them (e.g. traditional commuting – see *Newsom*).
>
> 66. Patterns of travel whose sole or partial object is to enable a taxpayer to "live away from his work" (per Romer LJ in *Newsom*) will fail the "wholly and exclusively" test and will therefore be non-deductible under the "commuting principle".
>
> 67. There will not generally be doubt about where a taxpayer lives, but what is the place of a taxpayer's work for these purposes?
>
> 68. In 1970, Brightman J was able to paint a simple picture in *Horton*:
>
> > "In the majority of cases a self-employed person has what can properly be described as his place of business or base of operations. In the case of the medical practitioner, it is his surgery or consulting rooms; in the case of the shopkeeper it is his shop; in the case of the barrister it is his chambers, and so on."
>
> 69. In each of *Newsom, Horton, Sargent and Jackman* the taxpayer was found to have a single "business base" and that was where he worked for the purposes of the commuting principle.
>
> 70. In *Horton*, the taxpayer's single business base was at his home. Thus he did not live away from his work and the commuting principle had no application. All his business travel was deductible. In the other three cases, the business base was away from the taxpayer's home and therefore in each case the commuting principle applied to deny a deduction for the travel between the home and the business base.
>
> 71. But things now are less simple than in 1970. There is an almost infinite variety of methods of working for the self-employed in the current era. In a situation where a taxpayer's business activities are fragmented across a number of different locations (including his home) and he claims to deduct the cost of travel between those locations, it is much less straightforward to apply the "wholly and exclusively" test than it was in the four main cases we were referred to. In particular, judicial comments specifically made in the context of a single "business base" (as was found to exist in *Newsom, Horton, Sargent* and *Jackman*) need careful consideration before they are applied in the context of multiple "places of business".

72. As *Horton* is the only case we were referred to in which the taxpayer has succeeded in achieving a deduction for travel expenses to and from his home, and is the case which the Appellant seeks primarily to rely on, it requires closer examination.

A closer examination of Horton

73. What were the decisive features in *Horton*? Mr Howard argues they were that:

> (1) Mr Horton held himself out as trading from his home address and he negotiated and entered into his contracts there. The Appellant, he says, is in a similar position. He holds himself out as practising from his home address, to his patients, the insurance companies and his professional body; the formation of his contracts is "elusive" in its location and involves little or no negotiation and therefore as a factor carries little weight in this case.
>
> (2) Mr Horton kept his tools (the essential equipment for his business) at his home. The Appellant does the same with his medical instruments.
>
> (3) Mr Horton kept his books and records at his home. The Appellant does the same, both with his business records and his clinical records.

74. In addition, Mr Howard points to the fact that the Appellant carries out significant administrative and professional work at his home.

75. On this basis, Mr Howard argues that the Appellant's position is parallel or analogous to that of Mr Horton and all his travel to and from his home should therefore be allowable.

76. However we consider that Mr Howard's analysis misses an important point. Denning LJ held that Mr Horton's home was:

> "the locus in quo of the trade, from which it radiated as a centre. He went from it to the surrounding sites according as his work demanded."

Salmon LJ held that Mr Horton's home was:

> "the base from which [he] carried on his business".

Stamp LJ held that Mr Horton had:

> "no place which you could call his place of business except his home".

In other words, all three of the Lords Justices held that Mr Horton's home was the only place of business he had. That was why his travel to and from his home was deductible; as Salmon LJ put it:

> "Since 2 Penshurst Close was his business base and the place where his chief, and indeed only, customers knew that he was always to be found, it would be understandable that exclusively for the purposes of his business he would think it right to return to his base at night from any site on which he was working during the day."

77. When viewed in this way, we consider the analysis in *Horton* is put in its proper context. In our view, it is good authority for the limited proposition that a taxpayer who can establish that his business base is at his home and that he has no place of business away from it can generally (absent some non-business object or motive for the travel) claim a deduction for his travel between his home and the various places where he attends from time to time for the purposes of his business.

78. We acknowledge there is no particular significance attaching to the description "itinerant" under the legislation or the case law, but we consider it does provide a readily understandable shorthand description of the situation of a trader such as Mr Horton, whose travel expenses to and from his home will generally be deductible (though, following Brightman J in *Horton*, we acknowledge that this may not always be the case, for example where he lives in a place far removed from his operational area).

79. Why did the Court of Appeal not find that the building sites at which Mr Horton worked amounted to additional places of business? It was because of the lack of any fixed or regular place at which Mr Horton actually plied his trade. They were effectively holding that Mr Horton was itinerant (though only Stamp LJ used that word). In the judgment of Brightman J in the High Court (whose decision was confirmed by the Court of Appeal) a little more analysis was provided:

> "In my view, where a person has no fixed place or places at which he carries on his trade or profession but moves continually from one place to another, at each of which he consecutively exercises his trade or profession on a purely temporary basis and then departs, his trade or profession being in that sense of an itinerant nature, the travelling expenses of that person between his home and the places where from time to time he happens to be exercising his trade or profession will normally be, and are in the case before me, wholly and exclusively laid out or expended for the purposes of that trade or profession."

80. Lewison J in *Jackman* acknowledged this important point when he said (with reference to Denning LJ's comment set out at [76] above):

> "It seems to me that the phrase "according as his work demanded" is an important one. There is no predictability about Mr Horton's places of work when he was employed on a bricklaying contract. He would have to go wherever Mr Page's main contracts took him."

The application of Horton in the present case

81. The question then naturally follows – should this Appellant be treated in the same way as Mr Horton?

82. There are some important differences between this Appellant's case and that of Mr Horton.

83. Unlike Mr Horton, he has had a pattern of regular and predictable attendance at specific locations other than his home in order to perform significant professional functions as a clinician. He has negotiated an entitlement to avail himself of the facilities at those locations on a regular basis for the purposes of his business. His presence at St Antony's and Parkside was undoubtedly "temporary and transient" in the sense that he has only occupied consulting rooms or attended on ward rounds for comparatively short periods of time and without having any permanent base – he has never had a permanent office at either hospital with his "name on the door", so to speak. However his attendance at both locations has involved significant performance of professional functions of his clinical work (consulting with and treating patients) and has followed a pattern which, although it has changed from time to time, has been generally fixed and predictable. It is this pattern of regular and predictable attendance to carry out significant professional functions as more than just a visitor which, in our view, constitutes both Parkside and Saint Antony's as “places of business” from which he has been carrying on his profession throughout and accordingly negates any suggestion that his profession is "itinerant" (or entirely "home based") within the ratio of *Horton* as properly understood.

84. For these reasons, we consider that this Appellant falls outside the ratio of *Horton*. …

88. First, we consider it self-evident that if the activities of a taxpayer at his home are insufficient to constitute it as a place of business, his travel between his home and his place or places of business cannot be deductible. So were the activities of this Appellant sufficient to constitute his home as a place of business?

89. In *Newsom*, the Court of Appeal were primarily concerned with establishing where Mr Newsom’s “business base” was, and their comments about his activities at home must be read in that light. But the essence of their approach was to examine whether there was any particular business reason why Mr Newsom did his work at home rather than at his chambers.

90. Somervell LJ said that Mr Newsom's position was different from the Reading/London solicitor, because Whipsnade as a locality had nothing to do with Mr Newsom's practice. He could have made his home anywhere else and "everything would have gone on in precisely the same way".

91. Romer LJ's approach was similar (if a little more colourful):

> "The Appellant could, if he liked, carry on the whole of his profession in London, though he certainly could not do so at Whipsnade if only for the reason that the Courts of the Chancery Division do not sit there. It seems to me accordingly that it is almost impossible to suggest that when the Appellant travels to Whipsnade in the evenings, or at week-ends, he does so for the purpose of enabling him "to carry on and earn profits in his" profession let alone that he does so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London."

92. In our view, however, there are important differences between the situation of Mr Newsom and that of the Appellant. Whilst Mr Newsom would have been perfectly able to do all his professional work at his chambers in London, the Appellant would certainly not be able to do all his professional work at Parkside and/or St Antony's. His private practice required an office (for research, thinking, obtaining collateral histories, maintaining his clinical and business records and running his administration) and he had no office available to him at Parkside or St Antony's. No suggestion was made that he should have been able to use his NHS office at St Helier's to deal with all his private practice office work, and in any event that was not how he worked. We consider that unlike Mr Newsom the Appellant did indeed have a place of business at his home, where he carried out part of the professional work necessary to his overall professional practice as well as the majority of the administration work related to it. For sound business reasons, the way his private practice was organised required that he carry out a significant amount of professional and administration work in his office at home and that distinguishes it from Mr Newsom's study in Whipsnade.

93. As we find the Appellant does have a place of business at home, he does not fail the test mentioned at [88] above. But in our view that does not necessarily mean that his travel expenses to and from his home are deductible. The fact remains that the statutory test, when interpreted in line with *Mallalieu*, sets a very high bar for deductibility of travel involving a taxpayer's home. The only reported case of the higher courts in which this bar has been cleared is *Horton*, and we consider the present case falls short of *Horton* in the important respects we have outlined at [83] above.

94. We find that the Appellant must have a mixed object in his general pattern of travelling between his home and his places of business at Parkside/St Antony's. Part of his object in making those journeys must, inescapably in our view, be in order to maintain a private place of residence

which is geographically separate from the two hospitals. It follows that even though we find he has a place of business also at his home, his travel between his home and those two locations cannot be deductible, on the basis of the reasoning in *Mallalieu*. …

95. Clearly the "commuting principle" has no application in relation to this travel and matters are therefore somewhat less complicated. The only question is whether, on general principles, the regular travel undertaken by the Appellant between his NHS places of employment and Parkside/St Antony's satisfies the "wholly and exclusively" test.

96. We are here concerned with the normal costs of travel to get to and from places where the Appellant carries on his business. In *Newsom*, Romer LJ said:

> "Mr Newsom, in a letter to the Inspector of Taxes…..conceded that 'a man's profession is not exercised until he arrives at the place at which it is carried on'. In my judgment this proposition is, in general, true."

We consider this passage highlights the important distinction between travelling <u>in the course of</u> a business and travelling <u>to get to</u> the place where the business is carried on. In the case of the Appellant's travel between his places of NHS employment and Parkside/St Antony's, we consider the object of the travel is to put the Appellant into a position where he can carry on his business away from his place of employment; the travel is not an integral part of the business itself.

97. We therefore find that the travel between St Heliers/Nelson on the one hand and Parkside/St Antony's on the other is not deductible."

The Grounds of Appeal

21. Mr Howard put forward three grounds of appeal on behalf of Dr Samadian:

(1) The FTT erred in [83] in characterising the private hospitals as places of business from which Dr Samadian carried on his profession and in distinguishing *Horton* on that basis. Mr Howard submits that the FTT should have held that Dr Samadian had a single base of operations for his private practice, namely his home, and that expenses in relation to all travel between there and the places where he saw patients in the course of carrying on his private practice (the private hospitals and, on home visits, their homes) should properly have been treated as deductible, since on this footing *Horton* could not be distinguished;

(2) The FTT erred in [93]-[94] in holding that Dr Samadian must have had a mixed object in his general pattern of travelling between his home and his places of business at the private hospitals. Mr Howard submits that the FTT applied the "wholly and exclusively" test derived from *Mallalieu* too strictly, and improperly confused

inevitable and unavoidable effects of this travel (taking him away from and back to his home) with the intrinsic purpose of such travel, contrary to the guidance given in *Mallalieu* itself; and

(3) The FTT erred in [95]-[97] in concluding that the travel between the NHS hospitals and the private hospitals is not deductible. If the private hospitals are not places of business (see Ground (1) above), then Dr Samadian was not travelling to a place where the "business is carried on", and the relevant analogy should be with the position of the taxpayer in *Horton*, whose travel expenses to get to the locations where he carried out his bricklaying activities were all deductible. If, on the other hand, the private hospitals are places of business in the relevant sense, still the relevant analogy should be with the position in *Horton*.

I address these Grounds in turn.

Ground (1): Are the private hospitals places of business?

22. In my judgment, this Ground of appeal falls to be dismissed. There is no error of law by the FTT at [83] in its characterisation of the private hospitals as places of business in the relevant sense. I agree with the FTT's reasoning in that paragraph, with its analysis of *Horton* and with the reasons it gave for distinguishing *Horton*. I find there is little I can usefully add.

23. The FTT rightly focused on Dr Samadian having a number of places of business, rather than there being one single location which could be described as *the* base of his business. Although in some of the cases (and most prominently in the judgment of Denning LJ in *Newsom*) part of the reasoning proceeds by reference to locating the base of a taxpayer's business, such an analysis needs to be approached with caution. The statutory "wholly and exclusively" test does not depend upon identifying a single base of business, though in some circumstances it might be useful to do so to assist in the application of the test. The FTT rightly considered that it was not of assistance to do so in the present case. In the context of application of the statutory test in the circumstances of this case, the FTT was entirely correct in adopting the approach it did.

Ground (2): Did Dr Samadian have mixed private and business purposes in his general pattern of travelling between his home and the private hospitals?

24. This Ground of appeal requires more discussion. Mr Howard correctly submits that there is a limit to the circumstances, illustrated by *Mallalieu*, in which an inference can be drawn that the purpose of incurring particular expenses is to promote some private interest of the taxpayer as well as their trade or profession. The taxpayer in *Mallalieu* needed clothes to serve her private interest in being decently clothed, as well as for the purpose of her profession. But if this approach is pursued too far as a matter of pure logic, it is difficult to see how the incurring of *any* expenses could satisfy the "wholly and exclusively" test. Expenses to rent business accommodation, which are routinely and uncontroversially treated as deductible, could be said to be

necessary to serve the private interest of the taxpayer in having shelter from the elements while he works; the expenses of the medical consultant's flight to the South of France in the example given by Lord Brightman in *Mallalieu* at [1983] 2 AC 870F-871A (in the passage cited by the FTT at [48], set out above) could be said to be necessary to serve the private interest of the taxpayer in not falling out of the sky. Since the relevant statutory provisions contemplate that there will be cases of expenses which do satisfy the statutory test, it is clear that the provisions should not be interpreted or applied so strictly. Lord Brightman's explanation of the position regarding the journey to the South of France in *Mallalieu* supports the same view.

25. The "wholly and exclusively" test is to be applied pragmatically and with regard to practical reality. Private interests may be served by expenditure in the course of a trade or profession, but be so subordinate or peripheral to the main (business) purpose of the expenditure as not to affect the application or prevent the satisfaction of the statutory "wholly and exclusively" test. On the other hand, as the FTT correctly noted, the decision and reasoning in *Mallalieu* show that a reasonably strict test of focus on business purposes is applicable, and the language used in the relevant provisions likewise supports that view.

26. In my opinion, it is appropriate that in applying the statutory test the tax tribunals should be practical and reasonably robust in their approach. They should not be unduly distracted by logical conundrums which it is relatively easy to tease out of the statutory test by playing with examples and counter-examples, as the discussion in paragraph [24] above illustrates. They should bear in mind that it is desirable, as an aspect of the rule of law, that in broad terms like cases should be treated alike. Accordingly, they should be willing to draw analogies where it is sensible for cases to be grouped together for similar treatment, but at the same time should recognise that at some point the practical approach which is appropriate will require a clear line to be drawn, where the analogies which are pressed on them become remote from the paradigm cases where a particular tax treatment is clearly warranted.

27. At the hearing before me, there was, of course, discussion about a number of examples and counter-examples. The following should be mentioned here. First, one could imagine a situation in which Dr Samadian is at St Antony's private hospital preparing to see a patient, when he realises he needs his notes on the patient which are located in his office at home. He makes a special trip in his car to go home to collect the notes, and immediately returns to the hospital to see the patient. Always bearing in mind that the critical question is whether the expenses of the journeys are incurred "wholly and exclusively" for the purposes of Dr Samadian's private practice, it seems to me that these expenses would be deductible. The only reason he made the trip was to enable him to conduct his private practice properly. Both Mr Howard and Mr Stone agreed with this. (I should add that there was no evidence before the FTT of any trip between Dr Samadian's home and the private hospitals in fact being carried out for this unusual sort of reason, so the FTT cannot be criticised for not discussing such a possibility).

28. On the other hand, when Dr Samadian comes to the end of his working day at the private hospitals and makes the journey back to his home, it is in my judgment clear that at least part of his purpose in making the journey is to transport himself to his home to eat, sleep and carry on his private life in the usual way. That may often, in fact, be his sole purpose in making the journey, if he has no intention of carrying out any work in the evening. If he intends to work in his home office in the evening to conduct some part of his private practice, it will still be part of his purpose in making the journey.

29. Mr Howard submitted that in both cases the true analysis is that Dr Samadian is only returning home to undo the effects of his outward journey, ultimately to the private hospitals, which was itself carried out solely for the purposes of carrying on his private practice, and that his return to his home is just an inevitable, foreseen effect of his having had to make that outward journey (in line, he suggested, with the example given by Lord Brightman in his speech in *Mallalieu*). Mr Howard also submitted that in the latter situation Dr Samadian's return to his home is just an inevitable, foreseen effect of his home being located at his office (again in line with the example given by Lord Brightman in *Mallalieu*), while the sole purpose of the journey was to get to the office which happened to be located at his house.

30. I reject both these submissions. I do not consider that either of them represents a tenable view on the facts. Dr Samadian needs a home in which to live and carry on his private life, and it is an inevitable feature of his journey home in the evening from the private hospitals that part of his purpose was to get there in order to advance those private, non-business interests. I think this is an obvious case which speaks for itself, to adapt Lord Brightman's phrase in *Mallalieu* at [1983] 2 AC at 870D-E.

31. As Romer LJ said in *Newsom* ([1953] 1 Ch at 17), "… it could scarcely be argued that the cost of going home at the end of the day would be … eligible as a deduction". That position was not altered by the fact that, like Dr Samadian, Mr Newsom used his home at Whipsnade as a place to do work in his practice in the evenings: "He goes to Whipsnade not because it is a place where he works but because it is the place where he lives and in which he and his family have their home" ([1953] 1 Ch at 18). Danckwerts J was of the same view at first instance in *Newsom* (see the summary of his decision at [1953] 1 Ch at 8: "On any view … travelling between Whipsnade and Lincoln's Inn was due partly to the calls of his profession and partly to the requirements of his existence as a person with a wife and family and a home"). Somervell LJ doubted whether his journeys to and fro were for the purposes of his profession in any sense, but also agreed with the reasoning of Danckwerts J ([1953] 1 Ch at 14-15).

32. What, then, of Dr Samadian's outward journeys from home to the private hospitals? In my view these are made partly for the purpose of conducting his private practice at the hospitals and partly for the purpose of enabling him to maintain his home (the place where he lives and conducts his private life) at a location of his choosing - in accordance with his tastes and interests and for all the private reasons people have for choosing to live in a particular place - away from the places where he

carries on his business in the fixed and predictable way described by the FTT at [83]. Therefore, it cannot be said that the expenses incurred by Dr Samadian to undertake these journeys are incurred "wholly and exclusively" for the purposes of his private practice, and accordingly they also are not deductible expenses. Again, I think that this is an obvious case which speaks for itself.

33. Again, this view is directly supported by the judgments of Danckwerts J, Somervell LJ and Romer LJ in *Newsom*. In particular, as Romer LJ observed ([1953] 1 Ch at 17), since the travel expenses for the return journey home cannot be deducted, "it would be a curious result of [the statutory test] that the morning journey should qualify for relief but that the evening journey should not." In other words, in the context of the statutory scheme, the analogy between the return journey home and the outward journey is a powerful one, and the two cases should be grouped together. Romer LJ reasoned that the outward morning journey is undertaken to neutralise "the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it" (ibid.). This is the core of Romer LJ's reasoning in the case. He explained ([1953] 1 Ch at 18) that it meant that, as Danckwerts J had also held, it was not possible to come to the opposite conclusion.

34. Romer LJ also made reference to and approved, in general terms, Mr Newsom's concession that a profession is not exercised until the taxpayer arrives at the place at which it is carried on (ibid.). This can be a helpful way of looking at things in some circumstances, but in my view it is a statement which should be treated with some caution. If applied too rigidly, it would appear to disallow deduction of the taxpayer's travel expenses between the two places of work in Reading and London in the example given by Somervell LJ in *Newsom*, whereas both Somervell LJ and Romer LJ ([1953] 1 Ch at 13-14 and 18, respectively) considered them to be deductible. I think they plainly would be, on straightforward application of the statutory test: see also para. [27] above. No doubt this is why Romer LJ qualified his endorsement of Mr Newsom's concession by saying that it is true "in general". In the case of travel to a place of work from home (even a home where work is carried on, as in the case of both Mr Newsom and Dr Samadian) the proposition will be true, when read with the other reasons given by Romer LJ referred to above: it is only when the taxpayer gets to the place of work that he commences activity which is wholly and exclusively for the purposes of his practice.

35. It follows from this discussion that there is no error of law in the FTT's decision at [93]-[94]. The FTT was right to say that its reasoning and conclusion here were supported by the decision in *Mallalieu*.

36. For clarity, however, I should add that, with respect to them, I think the FTT was wrong to treat *Newsom* as distinguishable in the way it did at [92]. The FTT was not correct to say that "unlike Mr Newsom the Appellant did indeed have a place of business at his home." On the findings by the special commissioners, Mr Newsom used his home as a place where he worked for the purposes of his profession or

business. It was a settled and predictable place where he did work in his practice, and so in the language used by the FTT it was, as for Dr Samadian, a place of business at his home. The Court of Appeal in *Newsom* did not describe it as such, but that is because "place of business" is not a statutory term of art and the Court happened not to employ that language when discussing the situation at his home. The factual position in the case is clear. Similarly, I think the FTT was wrong in [92] to say that it was a point of distinction that Mr Newsom would have been able to do all his professional work in chambers. The fact is that he chose to do his professional work in two locations, just as the solicitor in Somervell LJ's example chose to do his professional work at two locations. It is not the fact that Mr Newsom could have arranged his affairs differently which is significant, but that he chose to use his home as a place of business and as a result could not claim that his travel away from and back to it satisfied the statutory "wholly and exclusively" test.

37. In the context of this appeal, this is an immaterial criticism. If considered correctly, *Newsom* is a case which provides further, direct and powerful support for the FTT's conclusion on this part of the case. *Newsom* and *Mallalieu* are closely aligned as authorities on the statutory test. Indeed, despite having incorrectly distinguished *Newsom*, the FTT in effect adopted the substance of the reasoning by the majority judges in *Newsom* at para. [94] of its decision.

Ground (3): Travel between the NHS hospitals and the private hospitals

38. As set out above in relation to Ground (1), the FTT did not err in its analysis in finding that the private hospitals were places of business for Dr Samadian.

39. In my judgment, there is no further basis on which the FTT could be said to have erred in law in this part of its decision. The analogy with *Horton* proposed by Mr Howard is not apposite.

40. I consider that the reasoning set out under Ground (2) above is readily adapted to cover the journeys between Dr Samadian's places of work for his NHS employment and the private hospitals. The NHS hospitals are places he goes to for the purpose of carrying out his employment duties to earn his salary, rather than for the purpose of his self-employed private practice. It is in Dr Samadian's private (non-business) interest that he goes to the NHS hospitals, just as it is in his private (non-business) interest that he returns home in the evening. So journeys from the private hospitals to the NHS hospitals are clearly not journeys which can satisfy the statutory "wholly and exclusively" test; and by similar reasoning to that set out under Ground (2), journeys from the private hospitals to the NHS hospitals also cannot satisfy that test.

41. In a typical case where Dr Samadian goes to the NHS hospitals first and then from there to the private hospitals, the reason he has to travel from the NHS hospitals to the private hospitals (rather than simply driving to the private hospitals from his home) is to neutralise the effect of his travel to his place of employment, or in other words to enable him to maintain both his employment and his private practice (to

adapt the language of Romer LJ in *Newsom*). Similarly, the analogy with travel from the private hospitals to the NHS hospitals in the context of the statutory scheme is strong, and brings out the same essential point, that the purpose of all these journeys includes a private purpose and hence cannot satisfy the statutory test.

42. At para. [96], the FTT relied on the statement of Romer LJ reviewed at paragraph [34] above. In my view, the FTT could properly take this as appropriate guidance in this particular context. There is no error of law in the reasoning of the FTT and the conclusion it came to was plainly correct.

43. Mr Howard submitted that, looking at the map showing the locations of Dr Samadian's home, the NHS hospitals and the private hospitals, the NHS hospitals lay on the course of his route to the private hospitals. It followed, he said, that stopping off at the NHS hospitals was analytically no different from a case in which Dr Samadian made a journey direct from his office at home to his place of work at the private hospitals, merely stopping for lunch on the way. In the stopping for lunch case, the stop would not change the "quality" of the journey overall (to use language taken from *Sargent v Barnes*) from a journey wholly and exclusively for the purposes of Dr Samadian's private practice. If the expenses of such a journey were deductible, the fact that he went to an NHS hospital en route should make no difference.

44. In my view, this submission fails at several points. First, the FTT made no findings of fact to this effect, and I was not persuaded by a cursory look at the map that this was in fact the position. Secondly, the essential foundation for the submission is that the travel expenses for the journey from Dr Samadian's home to the private hospitals are deductible; but it is clear from the reasoning above in relation to Grounds (1) and (2) that they are not. Thirdly, even if the expenses of such a journey were deductible, Mr Howard's submission would still fail, because part of Dr Samadian's purpose in making the first leg of the journey is his private purpose to carry out his employment duties at the NHS hospitals to earn his salary, and part of his purpose in dividing up the overall journey in this way is again to enable him to keep up his NHS employment alongside his private practice.

45. I do not consider that the stopping for lunch example provides a good analogy. If someone uses a journey between two places of work as an opportunity to stop for a quick bite to eat, that may well be a purpose which is so peripheral as not to affect the overall conclusion that the purpose of the journey is "wholly and exclusively" for the purposes of a trade or profession: see paragraph [25] above. But that could not be said of Dr Samadian's stop-over at an NHS hospital to perform employment duties. On the other hand, if someone decides to stop en route between two places of work at a fancy restaurant for a meal with a friend (or even alone), it is very doubtful that it could then be said that the journey was "wholly and exclusively" for the purposes of a trade or profession; *a fortiori* if the stop-over was to perform employment duties.

Conclusion

46. In my judgment, the FTT's decision was correct in all its essentials and this appeal should be dismissed. The FTT correctly applied sensible and coherent categories for treating travel expenses as deductible or non-deductible. I also think the categories applied would attract broad public acceptance. Travel expenses are treated as deductible in relation to itinerant work (such as Dr Samadian's home visits to patients). Travel expenses for journeys between places of business for purely business purposes are treated as deductible. Travel expenses for journeys between home (even where the home is used as place of business) and places of business are treated as non-deductible (other than in very exceptional circumstances of the kind discussed at paragraph [27] above). Travel expenses for journeys between a location which is not a place of business and a location which is a place of business are not deductible.

THE HON. MR JUSTICE SALES

TRIBUNAL JUDGE
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