[2021] UKFTT 0109 (TC)

TC08090

Expenses incurred in performance of employment duties

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02367

BETWEEN

DEREK STOREY **Appellant**

-and-

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

TRIBUNAL: JUDGE PARMINDER SAINI
MR JIM ROBERTSON

The hearing took place on 9 November 2020. With the consent of the parties, the form of the hearing was audio only and was attended remotely via telephone conference. The documents to which we were referred are described below in our decision.

It was directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Mr T McNally, Accountant for the Appellant

Mr A Barrett, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. On 20 June 2017, the Appellant sent in Self-Assessment tax returns for the years 2014/15, 2015/16 and 2016/17. A notice to file a tax return under Section 8 Taxes Management Act 1970 ("TMA") had not been issued for any of the returns.

2. The Respondent's right to enquire into the returns falls under Section 12D TMA 1970 which treats the returns as if they were delivered in response to a notice under Section 8 TMA. Furthermore, for the purposes of Section 9A TMA, the returns are treated as returns submitted following a Section 8 TMA notice, meaning the enquiries were validly opened for all years.

3. All three tax returns were in regards to the Appellant's trade as an employed Scaffolder and each included claims for employment related expenses.

4. On 20 June 2018, the Respondents opened Section 9A TMA enquiries into each of the returns from 2014/15 to 2016/17. Letters were issued to the Appellant and Agent who were asked to provide evidence of the expenses incurred and how they qualified as allowable expenses.

5. No response was forthcoming from the Appellant or Agent, therefore a letter was sent out on 24 July 2018 which stated that the Respondents intended to remove the claim for employment expenses and add employment benefits which were not included in the 2015/16 tax return.

6. A response was received by the Agent on 8 August 2018 which stated that between 2015 and 2017 the Appellant drove a car for his employment. A schedule of mileage was included and a schedule of expensed items for all years which was made up of tools and clothes. The Agent explained that the Appellant required specialist clothing for his job as a Scaffolder.

7. On 23 August 2018, the Respondents replied to the Agent and explained that a total of £31,890 of expenses had been claimed. The Agent was informed that more detail and evidence would be needed to support the claims.

8. The Agent sent a response on 7 September 2018 explaining that the Appellant could not give any further information. Mileage was kept to the best of the Appellant's memory. The Agent further explained that a van was also used in the period of claimed mileage.

9. On 12 October 2018, the Respondents sent a pre-decision letter to the Appellant, it stated that if the Appellant did not provide further information the following changes would be made:

- Car benefit of £555 and fuel benefit of £470 would be added to the 2015/16 return as per the P11Ds returned by the employer.
- Mileage for all years appeared to be calculated through HMRC's Approved Mileage Allowance Payment ('AMAP') rates. However there was insufficient evidence to support the figures claimed, likewise MOT evidence showed 38,343 miles completed from October 2013 to November 2017. Whereas the logs showed 60,062.12.
- The van used by the Appellant appeared to be a company van as per the registration plate.
- AMAP could not be claimed on a company vehicle.
- Food expenses had been claimed of £1,875 per year. This could only be claimed if there was allowable travel, which the Respondents had been unable to verify.

- A flat rate expense would be allowed in the amount of £140 for all years in regards to tools and associated costs. No receipts had been provided and it could not be ascertained whether the employer provided any tools.
- Accountancy fees of £500 had been claimed in the accounts for all years however this expense is not incurred in the performance of the Appellant's duties through his employment, it is an additional cost one that each and every jobholder would not incur. Therefore it would be removed.

10. On 31 October 2018, the Respondents issued the following:

Tax Year	Legislation	Description	Amount
2014/15	S28A TMA	Closure notice	£4,398.00
2015/16	S28A TMA	Closure notice	£4,573.20
2016/17	S28A TMA	Closure notice	£4,026.80
2014/15 to 2016/17	Sch24 Finance Act 2007	Penalty for errors	£2,339.63

11. On 20 July 2017 the Appellant was wrongly repaid £13,040 due to the incorrect figures being returned on his return, therefore the amount would need to be paid back. A Sch24 penalty had been charged for the inaccuracies, this was a prompted disclosure and the behaviour was classed as careless, the penalty range was therefore 15-30% of the Potential Lost Revenue ('PLR').

12. The Appellant had provided some assistance during the enquiry but had not replied to the letter dated 12 October 2018. The total deduction given for telling, helping and giving was 80%. The penalty amount was 18% of the £12,998 PLR, totalling £2,339.63.

13. On 5 November 2018, the Appellant's Agent appealed and requested a review.

14. On 23 November 2018, the Appellant sent a letter to the Respondents, outlining that he had not kept proper records but disputed the reduction of all of his claim.

15. On 21 January 2019, the Respondents sent their 'View of the Matter' to the Appellant, it stated that the Appellant had not sent any further information to change the Respondents opinion and therefore the decision was upheld.

16. On 19 March 2019, the Respondents sent their Review Conclusion upholding the decision.

17. On 15 April 2019, the Appellant appealed to the Tribunal. The Notice of Appeal stated that it was filed in time, that the appeal concerned allowable expenses and that the Appellant disagreed with the removal of his expenses and wished for them to be reinstated.

DOCUMENTS

18. We have been provided with and have duly considered the following documents in reaching our decision:

    (1) Tribunal Caseworker Everiss' Directions of 20 December 2019

    (2) Respondent's Documents Bundle (denoted as [RDB/]), numbering 169 pages

    (3) Respondent's Skeleton Argument, numbering 12 pages

    (4) Respondent's Authorities Bundle, numbering 190 pages

(5) CH170600 - Compliance Handbook - HMRC internal manual - Special reduction: What are special circumstances

(6) CH170900 - Compliance Handbook - HMRC internal manual - When special circumstances do not exist

(7) Gov.uk webpage entitled "Claim tax relief for your job expenses and Vehicles you use for work"

(8) EIM32080 - Employment Income Manual – HMRC internal manual - Travel expenses: travel for necessary attendance: definitions: temporary workplace: limited duration, the 24 month rule

(9) An Article from Wilkins & Co entitled "Do I need to keep petrol receipts as a sole trader?"

HEARING

19. At the outset of the hearing, the Respondent indicated that she did not wish to take issue with the lateness of the appeal and both parties asked that the appeal be treated in time. We acquiesced to this request and proceeded as if the appeal had been filed in time.

20. Mr McNally appeared for the Appellant who was not in attendance via telephone. Mr McNally acknowledged that there were no documents filed on behalf of the Appellant and indicated that the Appellant would be relying upon the Respondent's Bundle as it contained all relevant evidence. Both parties acknowledged that the mileage log was not in the Bundle however neither party indicated that we should see or have it or that it was relevant to our decision such that it should be produced.

21. The parties indicated that no further evidence was necessary or would be called.

22. The parties agreed that the issues before us were as outlined in the Respondent's Statement of Case at §§19-22, which read inter alia as follows:

(1) Whether the Appellant's expenses in regards to mileage were incurred in the performance of his duties of the employment?

(2) Whether the Appellant's mileage expenses meet the conditions of Section 231 for deduction?

(3) Whether expenses in regards to subsistence, tools and associated costs and accountancy fees were incurred wholly, exclusively and necessarily in the performance of the Appellant's duties of employment?

(4) Whether the Appellant has acted carelessly and therefore a Schedule 24 penalty chargeable?

FINDINGS OF FACT

23. Having heard submissions from both parties, we make the following findings in relation to the above issues.

Issue 1

24. First, we note that [RDB/42] is a log which purports to show the relief claimed, locations and mileage travelled per day. In relation to the log, the Respondent argued that there were inconsistencies in the log, such as there being no individual journeys or dates corresponding to the mileage as opposed to a total figure given for each month for mileage. No figure was also given for the 2014/15 tax year, and there were 60,000 miles that were claimed to have been driven between April 2015 and June 2017 on the Appellant's personal vehicle, a Vauxhall

Insignia. The Respondent also noted a disparity between the published MOT records for the Appellant's vehicle [RDB/169] showing 38,458 miles on the odometer as opposed to the purported mileage covered of 60,000 miles. In response to this issue the Appellant's accountant agreed that the records were not very clear and that we have no way of knowing what are the correct dates for the mileage incurred. When challenged with the discrepancy between the mileage log of 60,000 versus 38,458 miles, the Appellant also accepted these discrepancies were unanswerable but still argued that a reduction was due and not all mileage should be written off. In light of the above numerous discrepancies, we find that the mileage log is practically unusable such that it could assist in showing any extent of mileage covered.

25. The burden of proof falls upon the Appellant to show that the mileage claimed was in fact incurred. We note the absence of receipts and other forms of record-keeping that might assist in establishing that merely a reduction was due. The Appellant was directed to provide evidence in support of his appeal on 20 December 2019 but failed to do so, seeking instead to rely upon the Respondent's produced Documents Bundle. We also note that the Appellant did not provide a witness statement setting out details to substantiate the mileage covered, nor was there any extraneous or circumstantial material provided to corroborate the mileage log in any shape or form.

26. We find we are unable to answer the first issue of whether the Appellant's expenses in regards to mileage were incurred in the performance of his duties of the employment because we are unable to independently find on balance what mileage was probably incurred during the tax years in question. This is a prerequisite before we can begin to then unravel what mileage was incurred in the performance of the Appellant's duties.

27. Although the Appellant's accountant made submissions in relation to the Appellant being a site manager and needing to attend different sites in performing his duty, it was also accepted that no evidence was provided of being a site manager or needing to attend different sites and merely that a work vehicle was given to him.

28. We also note that although the Appellant's accountant believed the mileage log related to the personal vehicle and/or his company vehicle, he appeared unsure of this further important fact. Indeed, no evidence of the mileage incurred by the company vehicle during the same tax years was provided in evidence. It was open to the Appellant to provide corroborative information from his employer in relation to the sites worked at and where (for example, by reference to timesheets or site inspection documents completed by the Appellant on the dates in question etc.)

29. Although there is no duty upon the Appellant to keep receipts, plainly it is in one's self interest to do so, as otherwise a taxpayer might find it difficult on balance to establish the mileage incurred in performing their duties.

30. Additionally, we have not heard explanation from the Appellant as to why he used his own vehicle to perform his duties when he had the use of a company vehicle. We observe that usually one would not wish to unnecessarily put circa 60,000 miles onto a private vehicle as this would cause a reduction in the value of the vehicle through adding mileage and exposing it to needless usage when another company vehicle was at the Appellant's disposal.

31. Due to above discrepancies alongside the dearth of evidence provided by the Appellant to establish the mileage he covered, to any degree of reliability, nor that such mileage was incurred using his personal vehicle in the performance of the duties of his employment.

32. We find that we are unable to disagree with the closure notice in discounting the mileage log.

Issue 2

33. Turning to the second issue concerning whether the Appellant's mileage expenses meet the conditions of Section 231 for deduction, in light of the above findings, we find this issue is academic as we have not found that any mileage has been established, and in any event it has also not been established that any mileage was incurred by the Appellant in his personal vehicle in performing duties.

Issue 3

34. Turning to the third issue regarding whether expenses in regards to subsistence, tools and associated costs and accountancy fees were incurred wholly, exclusively and necessarily in the performance of the Appellant's duties of employment; the Appellant's accountant argued he had commuted to and from a temporary work location. He also argued that tools and work clothes were allowable as were food allowances if the employee left the house before 6am. It was also argued that accountancy fees for the accountant's app should also be allowed as it allowed the Appellant to track his journeys, costs and expenses. It was also argued that the Respondent could seek further information from the employer to check the Appellant's claimed site visits.

35. In relation the above arguments we find that the issue is again academic in light of our findings on issue 1, but in any event, no evidence of subsistence was provided or kept, such as till receipts, for example, which would normally have had time stamps printed upon them to show the time at which the food was purchased and where to determine if it qualified for food allowances. There was also no proof of the temporary work locations. We find that if the Appellant is a site manager as claimed it is unclear on balance that he would need allowances for tools as that work would presumably be carried out by the individuals working on the site. In relation to the accountant's app which the Appellant paid for use of, it is said that it can track journeys, costs and expenses. If that is so, it is unclear why no contemporaneous evidence from this app was produced to corroborate any of the Appellant's claims concerning his journeys, his costs and expenses incurred. Indeed, the app does not seem to be as helpful as keeping receipts would be and in any event, accountancy fees are not allowable as the Appellant was not required to hire an accountant as an employed person.

36. Having made the above findings, we pause to air our concern that HMRC should urgently publish detailed guidance to assist and cater for employees who find themselves falling a lacuna of having submit to expenses by way of self-assessment returns where there has been no consideration of the same by their employer etc. in calculating an employee's tax liability. It is not hard to envisage that there may be many tradesmen who incur expenses who might benefit from guidance as to how to keep records and the types of evidence they ought to submit, as well as educating these individuals as to the obligations that fall upon their employers so that they are made aware of not merely their obligations to the Respondent but their rights as well.

Issue 4

In relation to the fourth and final issue concerning whether the Appellant has acted carelessly and therefore a Schedule 24 penalty chargeable, the Respondent relied upon David Collis v. HMRC [2011] UKFTT 588 (TC) which states as follows at [29]: "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

37. We find that although it may appear that the Appellant has been careless, it would be easier to apportion such blame for carelessness if relevant above-mentioned guidance had been

published such that the Appellant could know of the level of record-keeping that would be expected of him, even if it may have seemed apparent to a reasonable person that more detail in his record-keeping was advisable. Given the above, we find that the penalty for carelessness in the sum of £2,339.63 should be suspended, subject to the condition that the remaining tax liability is settled forthwith.

DECISION

38. The Tribunal decides in respect of the matters for determination the following:

(1) The Appellant has not established the mileage incurred, nor that any mileage was incurred using his personal vehicle in the performance of his duties of employment;

(2) Owing to the outcome upon issue 1, this question is academic.

(3) The Appellant has not established that expenses were incurred wholly, exclusively and necessarily in the performance of his duties of employment?

(4) The Appellant has not acted carelessly given the absence of guidance and the Schedule 24 penalty is to be suspended subject to settlement of the remaining tax liability.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

PARMINDER SAINI
TRIBUNAL JUDGE

RELEASE DATE: 15 APRIL 2021