



TC02169

Appeal number: TC/2010/02003

INCOME TAX – Employment income – Deductions – Local authority councillor – Home expenses – Child minding expenses – Subscriptions and publications – Whether deductible – ITEPA 2003 s.336

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

P A LORBER

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE SIR STEPHEN OLIVER, QC
RICHARD THOMAS**

Sitting in public in London on 9 February 2012

The Appellant in person

Brian Morgan for the Respondents

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DECISION

5 **Background**

1. This appeal relates to a decision of HMRC contained in a letter of 19 November 2009. The letter identifies as one of the points at issue – “Whether the expenses claimed in your role as Councillor can be deducted from the allowances paid to you, as holder of that office, for the purposes of computing your taxable profits in the years to 3 April 2003 and 2004 respectively”.

2. That point at issue (the “Councillor Expenses” issue) was listed for hearing on 25 November 2010. It had been one of three points to be determined at that hearing. The Tribunal addressed the other two points. These related to, first, the taxation of income of spouses as regard jointly held property and, second, the application of the “taxation of settlor” provisions. The Tribunal’s decision on these two points was issued on 3 February 2011 (TC00977). Both of those points involved extensive fact-finding exercises. The Tribunal was left with inadequate time to do justice to the Councillor Expenses point. The Councillor Expenses point covered the deductibility of expenses incurred by the Appellant, Mr P A Lorber, in his capacity as a local councillor. There were four categories of such expenses. Those were (i) home expenses, (ii) child minding expenses, (iii) subscription and publication expenses, and (iv) communication expenses.

3. We issued a written decision on 9 February 2011 (TC00986) covering the Councillor Expenses issue. Mr Lorber asked for a review of the decision. The Tribunal subsequently decided that that decision, so far as it related to home expenses, child-minding expenses and subscriptions should be set aside on grounds of irregularity. Regarding the “home expenses”, the Tribunal accepted Mr Lorber’s claim that, as HMRC had only produced their suggested figures on the day of the hearing, he had had inadequate time to respond properly. Regarding the “child care” expenses and “subscriptions and publications” expenses, the Tribunal took the view that the inadequacy of time available for the hearing amounted to an irregularity in the proceedings.

4. In the short time available to deal with the Councillor Expenses issues at the hearing on 25 November 2010, the evidence relating to the expenses was delivered in the form of letters between Mr Lorber and HMRC. The explanations were vague and unreliable. Consequently our conclusion, as regards the relevant parts of the decision that we have now set aside, was that Mr Lorber had failed to satisfy us that any of the expenditure (other than that conceded by HMRC) was deductible. To be sure that we would receive detailed and relevant evidence at the subsequent hearing of the appeal, Directions were issued on 28 July 2011. The Directions contained the following paragraph:

“3. Not less than 28 days before the hearing date the Applicant shall lodge with the Tribunal centre (and send to HMRC):

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- (i) a witness statement that covers in detail the circumstances in which each item of expenditure has been incurred and specifying each such item and
 - (ii) a summary of his reasons why, as a matter of law, his claims should be allowed..

As the issues will depend on first hand evidence, the correspondence with HMRC relating to these matters can be ignored.”

10 5. Mr Lorber chose to continue corresponding with HMRC and did almost nothing to comply with direction 3 set out above. Instead he sent an e-mail to the Tribunal on 22 January 2012. In this Mr Lorber told the Tribunal that he wished the Tribunal to deal with (i) the “Correct expenses to be included in the calculation in allowing his expenses”, (ii) “deductions for essential child care costs to enable me to attend evening meetings and thus perform my duties as a Councillor” and (iii) “Subscriptions to my Councillor Support Association”.

15 **Home Expenses**

20 6. Mr Lorber claimed that in the two years in question, 2003 and 2004, he had maintained a house which had one room dedicated exclusively to his activities as a local councillor. Consequently greater amounts in respect of water rates and household insurance premiums had been spent than would have been the case had he not performed those activities as a local councillor.

25 7. Mr Lorber’s e-mail of 22 January 2012 explained that he and HMRC had been in correspondence in an attempt to reach a negotiated compromise. He had written on 10 August 2011 and then again on 29 August 2011 and had received a reply on 14 September. He had written again on 25 September 2011 challenging the HMRC calculation on the home expenses. HMRC had apparently replied on 7 December 2011 accepting minor errors in correcting their figures. They had not accepted his contention that water rates and home insurance should be taken into account. They had apparently sent him “Schedule E instructions” (which we take to be a reference to their internal, though publicly available, Employment Income Manual, the “Manual”) justifying their position. Their instructions state – “Water Rates are a flat charge. So no part of the charge can be said to be incurred exclusively for business use”. HMRC have, observed Mr Lorber, used this incorrect statement to deny relief for these expenses. “Water Rates”, he points out in the e-mail, “are not a flat charge – they are calculated in relation to rateable value of the property and therefore if an individual needs an extra room as a study in their home to perform their Councillor duties the property would have a greater rateable value and thus a greater cost – which in my view should be taken into account”. This position is supported by the HMRC explanation for allowing Council Tax/Rates as an allowable expense. The HMRC guidance in the Manual on this states – “A room set aside exclusively for business contributes to the value of the house. Therefore a deduction can be given for a proportion of the Council Tax”. That, observes Mr Lorber in the e-mail, is an odd explanation as Council Tax is exactly the same type of charge as Water Rate and could equally be described as a flat charge. How, he observes, can one by allowable

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and the other not? HMRC are simply wrong in their analysis and their internal instructions are clearly flawed.

5 8. The e-mail goes on to deal with Home Insurance (contents and buildings). These, he observes, fall into a similar category as insurance companies quote on the basis of the number of rooms in a person's house. If a person is a Councillor requiring an extra room for a study and use of other parts of the house for Council related meetings they will inevitably require more space and incur higher insurance costs. Home insurance includes an element of Public Liability cover besides specific insurance for furniture and fittings situated in a study.

10 9. Our problem was that we had no evidence to back up those assertions. Mr Lorber's appeal, as we have already noted, relates to the two twelve month periods ending in 2003 and 2004. We observed in our earlier decision (which has now been set aside) that HMRC had allowed one-sixth of Mr Lorber's home expenses and that these had comprised council tax, gas and electricity bills. We accepted Mr Lorber's
15 evidence that he had used one bedroom in his house as an office. In addition he had used other rooms in the house for meetings with his colleagues and visits from constituents. In our earlier decision we noted that HMRC accept that some of the councillor's home expenses are "necessarily incurred" in the performance of that councillor's duties. For the 2003 year HMRC had initially allowed a "standard"
20 deduction of £135. This had been the amount included in an agreement between HMRC and the Association of Local Councillors which is set out in the Manual at paragraph EIM 65955. We now quote from our earlier decision relating to household expenses:

25 "10. Mr Lorber, at an early stage of the correspondence, was asked by HMRC to provide information about his home expenses claim and he replied in a letter of 24 February 2005 as follows:

30 I use my home on a daily basis to perform my functions. My home has an allocated room which I use as a study for my council work. It has desks, computer, phone etc: in addition I use other parts of my house for meetings with my colleagues and constituents. I do not accept the ludicrous £125 "home use" allowance. My Council Tax is around £1,500, Home Insurance is around £300, Gas and Electricity around £500. Water Rates around £200 plus wear and tear etc. Your predecessors have accepted my claims for the past 20 years. I
35 fail to see what has changed.

40 11. While the actual figures provided by Mr Lorber may be correct, neither HMRC nor this Tribunal have been provided with any information about how many rooms have been occupied for meetings etc, and for how much time they have been used for those purposes. There is therefore no way by which we (and HMRC) can determine how much more Mr Lorber incurred each year, over and above what it would otherwise have cost him to run his house for his private use, to

5 provide space for meetings. Bearing in mind that HMRC have offered to provide one-sixth of his total costs of £2006.80 (i.e. £334.40) for the twelve months to 5 April 2005, as presumably representing the costs associated with the one room which Mr Lorber had dedicated to council business, that amount seems to us to be perfectly reasonable in the absence of any better explanation. We therefore direct that the home expenses claim be restricted to £334.40 for the year.”

10 10. With our earlier experience of Mr Lorber’s failure to provide adequate evidence, the words of the Direction issued on 28 July 2011 (set out above) were carefully chosen.

15 11. What Mr Lorber says in the 22 January 2012 e-mail sounds rational. HMRC are in principle prepared to accept, as deductible expenditure of local councillors, an appropriate part of their expenditure on keeping a room for council business. The question for the Tribunal is precisely what expenditure is appropriate. To sustain his case, Mr Lorber, in common with any other taxpayer in similar circumstances, must satisfy us:

- 20 (i) That a room is dedicated for use when working as a councillor and
(ii) That, by maintaining the particular room in his house, the water rates and insurance premiums for the years 2003 and 2004 have been increased to a greater amount than they would have cost him had he
25 not maintained such a room.

30 There is no dispute about point (i). As already observed HMRC accept Mr Lorber has one room dedicated for use for council work. Satisfying us on point (ii) is the problem. Mr Lorber has to prove positively that his water rates in 2003 and 2004 were actually greater, on account of the size and the Council Tax band of his house, than would have been the case if he had occupied a smaller house. But he has produced no evidence to us that his water rate expenditure has been so increased. The same goes for his insurance premiums. We are left with the bare assertions in the e-mail; and although Mr Lorber repeated these at the hearing, he produced no data in
35 support of them. We assume that HMRC’s offer to allow one sixth of Mr Lorber’s total costs of £2,006.80 (i.e. £334.40) still stands. Subject to Mr Lorber’s acceptance of that offer, we are driven to reject the rest of his claim as regards household expenses for those two years.

40 **Child Care**

45 12. Mr Lorber had explained in a letter of 1 December 2004 that a small part of his councillor’s allowance is “used to pay the occasional child minding costs (eight times in 2002/03) when I could not get friends or family to look after my young children.” In a later letter of 24 February 2004 Mr Lorber says, in connection with child care costs, that the basic allowance had been “set at a level that meets these out of pocket expenses and ensures that Councillors are not out of pocket”. He states in

that letter that the cost of child care is covered in a number of documents (which he had apparently enclosed with his letter to HMRC of 24 February 2004 but which had not been produced in evidence).

5 13. Our attention was drawn to a message in a statement issued by the Office of
the Deputy Prime Minister in August 2003 that the representatives on a council
should reflect the whole range of people they serve. There should therefore, said Mr
Lorber, be young parents on councils whose child caring needs were covered. When
10 we read the Independent Panel's "Review of Councils in London: 2003 Review"
produced in the summer of 2003, we noted that they expressed the view that
allowances should be paid to the councillor, at a rate to reflect local costs, to cover
expenses of arranging the care of children while the councillor is attending, among
other things, council and committee meetings. That allowance no doubt reflects the
15 fact that, for tax purposes, child care expenditure is not allowable as a deduction in
computing taxable earnings. This is because child care expenses are not dictated by
the requirements of the job of being a councillor; instead they have to be incurred to
meet the personal circumstances of the councillor (and see *Halstead v Condon* (1970)
46 TC 289). And that is the reason why, we think, HMRC were correct in
20 disallowing Mr Lorber's claim for £80 for child minding expenses.

14. Nothing that has arisen in the course of the present hearing has changed our
conclusion on the point that Mr Lorber's child care expenditure for 2003 and 2004
was not deductible.

25 **Subscriptions and Publications expenditure**

15. Mr Lorber has claimed an unspecified amount for subscriptions and
publications. In the e-mail of 22 January Mr Lorber required the hearing to deal with
his subscription to his "Councillor Support Association to obtain legal cover,
30 publications and relevant topics and access to advice." We were not provided with
any evidence as to the material provided by the "Councillor Support Association".
Mr Lorber explained to us at the present hearing that the Support Association related
to Liberal Democrat councillors. Apparently the material provided included advice
on current Bills and changes in topics of general interest such as housing benefits. He
35 mentioned also that the Support Association funded proceedings where challenges
had been made to outcomes of local elections. Mr Lorber explained to us that
membership of the Association was not "compulsory". He did say, however, that it
was highly recommended. The service provided by the Association was made, he
explained, in return for an annual subscription of around £60 in the years in question.

40 16. HMRC have refused relief for that expenditure on the grounds that the costs of
subscriptions and publications are not incurred in the performance of the Councillors'
duties; "they merely put you in a better position to perform those duties".

45 17. The decision in 1925 of *Simpson v Tate* 9 TC 314 established that a
subscription to a professional body paid by an employed county medical officer of
health was to be disallowed as a deduction; this was based on reasoning that the

subscription was not “necessary”, in that other individuals could have performed the duties of the particular office without being members of the professional body. By parity of reasoning, a subscription by a councillor to the present Association is not “necessary”; other councillors can carry out the duties without receiving the benefits provided by the association. In response to our Direction of 28 July 2011 Mr Lorber provided no proper details of the publications obtained in return for his subscription. We have to infer that there is nothing exceptional about them that takes them outside the general rules set out above. Moreover, it appears to us that the material obtained by Mr Lorber is not “job specific” (i.e. to deal with the immediate problems before him) but more generally qualifies him the better to carry out the duties of his office. For those reasons we are bound by authority to dismiss Mr Lorber’s appeal so far as it relates to this expenditure.

Conclusion

18. We had hoped when we embarked on this second hearing of this part of Mr Lorber’s appeal, that we would have been provided with clear evidence and clear propositions of law in support of his case. Mr Lorber is not inexperienced in the field of taxation. All we can say is that he has failed to sustain the points advanced in support of his case. We therefore dismiss the appeal so far as it relates to the three topics dealt with above.

19. 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.

**SIR STEPHEN OLIVER, QC
TRIBUNAL JUDGE**

RELEASE DATE: 24 July 2012