# TC04788

**Appeal number: TC/2015/00572**

***INCOME TAX – Deduction in computing profits – Expenditure wholly and exclusively for purpose of trade – Travel expenses – Subsistence expenses – Orthopaedic surgeon – Taxpayer carrying on business providing medical reports for litigation purposes at home and at two private hospitals – Whether taxpayer entitled to deduct travel expenses for journeys between home and private hospitals- Section 34 Income Tax (Trading and Other Income) Act 2005 - Whether tax payer entitled to deduct subsistence expenses incurred during trips to private hospitals – Section 57A Income Tax (Trading and Other Income) Act 2005 - Whether taxpayer could account for income from medical reports business on a receipts basis – Section 25(1) Income Tax (Trading and Other Income) Act 2005***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Dr SHARAT JAIN** **Appellant**

**- and -**

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

**TRIBUNAL: Judge Rachel Mainwaring-Taylor**

**Mr Julian Stafford**

**Sitting in public at Fox Court on 13th August 2015**

**The Appellant appeared in person, assisted by Mr A Francis of Healthcare Financial Services**

**Mr Steven Goulding of HM Revenue and Customs, for the Respondent**

DECISION

1. In addition to being employed by the NHS and carrying out private medical work, the Appellant undertook work providing medical reports for litigation purposes for a number of agencies. The appeal concerned the taxation of his earnings for the reports and accounting practices relating to them. The Appellant deducted various travel and subsistence expenses in calculating his taxable earnings, which HMRC deemed not to be deductible. The Appellant also accounted for these earnings on a receipts basis, which HMRC contended was incorrect.

2. HMRC opened an enquiry into the Appellant's self assessment tax return for the year 2010/2011 under section 9A Taxes Management Act 1970 on 2nd October 2012, which resulted in an amendment and closure notice issued on 29th September 2014 under section 28A Taxes Management Act 1970. HMRC also issued an assessment dated 18th March 2014 in respect of the tax year 2009/2010 under section 29 of the Taxes Management Act 1970. The Appellant appealed against both the closure notice and the assessment.

**Background and matters not in dispute**

3. The Appellant, Dr Sharat Jain, is a consultant orthopaedic surgeon. He lives in Broadstairs, Kent. He is employed by East Kent Hospitals University NHS Trust. He is also in private practice, undertaking consultations and operations in the Spencer Wing of the Queen Elizabeth the Queen Mother Hospital in Margate. Neither his NHS salary nor his private medical practice earnings are the subject of the closure notice, assessment or this appeal.

4. Dr Jain also undertakes work providing medical reports for litigation purposes under contract for various agencies. Dr Jain sees clients for an initial consultation before preparing the reports. The consultations are carried out at two hospitals: The Spire in Washington, Tyne & Wear and the BMI Manor in Bedford. Dr Jain visits each hospital once a month, seeing clients during one day at the Spire and over two days at the BMI Manor on each visit. He stays overnight at local hotels in both cases. Dr Jain prepares the reports at his home. Each report takes approximately 2-3 hours to prepare. Additional administration in relation to this work is also carried out by Dr Jain at his home.

5. The agency contracts provide for set fees and stipulate payment dates ranging from 180 to 270 days after the work has been carried out. Payment may be withheld if the report is not prepared to the required standard, but does not depend on the outcome of the litigation.

6. Dr Jain uses two secretaries in connection with this work: Joan Johnson in Hebburn (near Washington) and Diana Wiser in Bedford. The secretaries schedule the consultations. They also issue invoices. A 'pro forma' invoice is issued in respect of each report when Dr Jain has prepared it. Payment is sent to the secretaries, who bank receipts and charge Dr Jain fees of 10% and 15% respectively for their work.

Payment is not generally received until the report has been accepted by the client, which is often many months after the provision of the report.

7. The accounting period in respect of this work is 31st March each year. The accounts for the year ending 31st March 2011 show opening and closing debtors estimated at £22,000. It was established during the enquiry that these figures were payments which had been received by the secretaries during March but not banked until after the year end.

8. On 2nd October 2012 HMRC opened an enquiry into the Appellant's self assessment tax return for the year 2010/2011 under section 9A Taxes Management Act 1970. On 18th March 2014 HMRC issued a Revenue assessment in respect of the tax year 2009/2010, which Dr Jain's advisers appealed on 16th May 2014. HMRC issued a closure notice in respect of the 2010/2011 tax return enquiry on 29th September 2014, which Dr Jain's advisers appealed on 26th October 2014. HMRC sent a current view of matter letter on 29th October 2014. Dr Jain's advisers requested a statutory review on 24th November 2014 and HMRC issued a conclusion of statutory review on 31st December 2014, upholding the closure notice but deeming the assessment too high.

***Adjustment to tax return for 2010/2011***

9. HMRC made a net adjustment of £91,397 to the 2010/2011 tax return on closure of the enquiry:

(1) increasing turnover and wages for the period to reflect when invoices were issued rather than when they were paid;

(2) applying the correct rate to calculate mileage claimed (this error and its correction being accepted by Dr Jain);

(3) disallowing deductions for accommodation, although Mr Goulding, on behalf of HMRC, informed Dr Jain and the Tribunal that these deductions would now be allowed;

(4) disallowing deductions for subsistence; and

(5) disallowing expenditure related to travel between Dr Jain's home and the hospitals in Washington and Bedford.

***Assessment in respect of tax year 2009/2010***

10. HMRC issued the Revenue assessment in respect of the tax year 2009/2010, in light of the enquiry into the 2010/2011 tax return, because the four year assessing time limit was about to expire. The assessment increased profits by £15,000. This was an estimate intended to include appropriate reductions to the amounts claimed for business travel and subsistence but not debtors or wages. The corresponding adjustments for 2010/2011 had already been quantified before the 2009/2010 assessment was issued, although correspondence about the treatment of debtors was ongoing.

11. HMRC's statutory review concluded that the figure of £15,000 was too high. The corresponding adjustments for 2010/2011 were £10,002 and deductions claimed for 2010/2011 were £4,594 higher than those claimed for 2009/2010. The 2010/2011 adjustments (excluding debtors and wages) amount to 22% of the total deductions claimed. A 22% reduction in the deductions claimed in 2009/2010 would be £10,694. HMRC therefore concluded that the 2009/2010 assessment should be varied to charge tax of £4,305 on additional profits estimated at £10,500 (as opposed to £15,000).

**Matters in dispute and evidence**

12. The following matters are in dispute:

(1) When Dr Jain's income from his medical report business should be accounted for (2010/2011 adjustment). Dr Jain has accounted on a receipts basis. HMRC contend the income should be accounted for when the invoice is issued.

(2) Whether the costs of travel from Dr Jain's home to Washington and Bedford should be allowable expenses (2010/2011 adjustment and 2009/2010 assessment).

(3) Whether Dr Jain's subsistence costs (incurred during his trips to Washington and Bedford) should be allowable expenses (2010/2011 adjustment and 2009/2010 assessment).

13. There is no suggestion that HMRC have not properly opened and conducted either the enquiry into the 2010/2011 tax return under sections 9A and 28A of the Taxes Management Act 1970 or the assessment under section 29 of the Taxes Management Act 1970.

14. The Appellant gave oral evidence. We found him to be a straightforward and honest witness.

15. HMRC produced no witness evidence. We heard submissions from Mr Goulding who appeared for HMRC.

**The law**

***Accounting for income***

16. Section 25(1) of the Income Tax (Trading and Other Income) Act 2005 states that:

> 'The profits of any trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes'.

17. Relevant parts of The Financial Reporting Standards for Smaller Entities (effective April 2008) are:

> ‘Reporting entities that apply the FRSSE are exempt from complying with other accounting standards (Statements of Standard Accounting Practice and Financial Reporting Standards)’ (Status of the FRSSE, General at para 2)

> ‘The financial statements shall state that they have been prepared in accordance with the Financial Reporting Standards for Smaller Entities (effective April 2008)’ (FRSSE, Accounting principles and policies at para 2.6)

18. Relevant parts of the Financial Reporting Standards are contained in Amendment to FRS5: Reporting the substance of transactions: Revenue recognition (November 2003):

> ‘G4 A seller recognises revenue under an exchange transaction with a customer when, and to the extent that, it obtains the right to consideration in exchange for its performance. At the same time, it typically recognises a new asset, usually a debtor.’

19. ‘Performance’ is defined as ‘the fulfilment of the seller’s contractual obligations to a customer through the supply of goods and services’.

20. ‘Right to consideration’ is defined as ‘A seller’s right to the amount received or receivable in exchange for its performance. This right does not necessarily correspond to amounts falling due in accordance with a schedule of stage payments which may be specified in a contractual arrangement. Whilst stage payments will often be timed to coincide with performance, they may not correspond exactly. Stage payments reflect only the agreed timing of payment, whereas a right to consideration arises through the seller’s performance.’

***Travel expenses***

21. Section 34 of the Income Tax (Trading and Other Income) Act 2005 states that:

> ‘(1) In calculating the profits of a trade, no deduction is allowed for
>
> (a) expenses not incurred wholly and exclusively for the purpose of the trade…’

22. There is no further legislation on the matter, but case law elaborates on the meaning of ‘wholly and exclusively for the purpose of trade’.

*Newsom v Robertson (H M Inspector of Taxes) 1952 33 TC 452*

23. A barrister claimed the costs of travel between home and chambers on the basis that his home was his place of business. The proper test is the statutory one: is the expenditure incurred wholly and exclusively for the purpose of the trade. The Court of Appeal found that travel between the barrister’s chambers and home had a dual

purpose: to carry out further work but also to 'eat, sleep and pursue domestic avocations'. As such, it could not be said to be wholly and exclusively for the purposes of carrying on his profession and these travel costs were not deductible.

*Horton v Young [1971] 3 All ER 412*

24. This is the only reported case in which travel to and from the taxpayer's home has been found to satisfy the statutory test and be deductible. In this case, the taxpayer, Mr Horton, was a bricklayer who worked on various building sites depending on the particular contracts he entered into from time to time. On the facts, his business base was found to be his home, there being no other place that could properly be called his place of business. His work was itinerant and it was found that all journeys he made from his home to various building sites were wholly and exclusively for the purpose of carrying on his trade. Accordingly, the statutory test was satisfied and the costs of this travel were deductible.

*Caillebotte v Quinn 1975 50 TC 222*

25. The taxpayer, a carpenter, sought to deduct costs he incurred in purchasing a hot lunch on days he worked, arguing that it was too far for him to travel home and he needed a hot lunch for warmth and energy (whereas had he not been working he would have had only a light meal). It was held that eating had a dual purpose and the cost was not incurred wholly and exclusively for the purpose of carrying on the carpentry trade. This duality of purpose was illustrated by the taxpayer's attempt to apportion the cost of the food between that which he would normally incur for a light lunch (10p) and the additional cost of the more substantial hot food he needed on working days (40p).

*Jackman v Powell 2004 76 TC 87*

26. A milkman operated under a franchise agreement with Unigate. He argued his business base was his home and sought to deduct the costs of travel to and from the depot where he kept his *milk* float. Lewison J, in the High Court, found that the expenses were not deductible. The Special Commissioner had erred in law. It was not necessary in all cases to identify a single base of operations (only Lord Denning suggested this in *Newsom*) and the only test to be applied was the statutory test: was the expenditure incurred wholly and exclusively for the purpose of carrying on the trade?

*Samadian v HMRC [2014] UKUT 13 (TCC)*

27. Dr Samadian was employed as a consultant for the NHS. He also had a substantial private practice. The points at issue were whether the costs of travel between (a) Dr Samadian's home and two private hospitals at which he saw private practice patients; (b) the NHS hospital and the two private hospitals; and (c) the NHS hospital and the homes of various private patients were deductible.

28. The First-tier Tribunal found that Dr Samadian had several places of business in his private practice, including his home and the two private hospitals. Travel between

his home and these hospitals was not therefore automatically disallowed under the commuting principle. However, there was inevitably a duality or purpose in making these journeys: to enable Dr Samadian to live away from the hospitals (as in *Newsom*) and so the statutory test was not satisfied and the costs of these journeys not deductible. The costs of travelling between the NHS hospital (not a place of business for the private practice) and the private hospitals were not allowable. The costs of travelling between the NHS hospital and individual patients' homes (neither of which were places of business) were deductible, being made solely for the purpose of carrying on the business.

29. The Upper Tribunal (Sales J) found that:

> (1) The FTT had not erred in concluding that the private hospitals were places of business, distinguishing *Horton* on the basis that there was a pattern of regular and predictable attendance, Dr Samadian had negotiated an entitlement to avail himself of facilities at the hospitals on a regular basis for the purpose of the business, he carried out significant performance of professional functions of his clinical work there, his attendance was generally fixed and predictable, although the pattern did vary over time, and these factors made him "more than just a visitor" at the hospitals, "negating any suggestion that his profession is itinerant (or entirely home-based) within the ratio of *Horton* as properly understood".
>
> (2) The Tribunals should take a pragmatic but reasonably robust approach in applying the statutory test and it was desirable, as an aspect of the rule of law, that in broad terms like cases should be treated alike.
>
> (3) Dr Samadian's journeys between home and the private hospitals had duality of purpose: to carry on the private practice and to enable him to live away from a place where he carried on the business in a fixed and predictable way.
>
> (4) Travel expenses are treated as deductible in relation to itinerant work (here, home visits to patients).
>
> (5) Expenses of travel between home and a place of business are not generally deductible even when the home is also a place of business. Exceptions may occur, for example, if Dr Samadian made a round trip to home and back from the private hospital to collect something he needed for his work there such as a patient's notes.
>
> (6) Travel expenses incurred for journeys between a place of business and some other location are not deductible.
>
> (7) Travel expenses for journeys between places of business undertaken for purely business reasons are deductible.

***Subsistence expenses***

30. The general rule set out in section 34 of the Income Tax (Trading and Other Income) Act 2005 (see above) applies, as does the above-mentioned case law illustrating its meaning. In addition, section 57A of the Income Tax (Trading and

Other Income) Act 2005 (putting a former Extra Statutory Concession on a statutory footing) provides as follows:

> '(1) In calculating the profits of a trade, a deduction is allowed for any reasonable expenses incurred on food or drink for consumption by the trader at a place to which the trader travels in the course of carrying on the trade, or while travelling to a place in the course of carrying on the trade, if conditions A and B are met.
>
> (2) Condition A is met if —
>
> (a) a deduction is allowed for the expenses incurred by the trader in travelling to the place, or
>
> (b) where the expenses of travelling to the place are not incurred by the trader, a deduction would be allowed for them if they were.
>
> (3) Condition B is met if —
>
> (a) at the time the expenses are incurred on the food or drink, the trade is by its nature itinerant, or
>
> (b) the trader does not travel to the place more than occasionally in the course of carrying on the trade and either —
>
> (i) the travel in connection with which the expenses are incurred on the food or drink is undertaken otherwise than as part of the trader's normal pattern of travel in the course of carrying on the trade, or
>
> (ii) the trader does not have such a normal pattern of travel.'

**Findings of fact and discussion**

***Invoices/earnings***

31. HMRC contended that earnings should be shown in Dr Jain's accounts by reference to the date on which an invoice was issued as opposed to the date on which payment was received and banked, because the payment was earned by Dr Jain at that point as he had completed his contractual obligations. HMRC determined that Dr Jain's turnover and debtors for 2010/2011 should be increased by £92,863 and the figure for wages by £13,167. These adjustments were based on consequent 'corrections' made by HMRC. In respect of the Bedford clients, HMRC used the secretary's records to reassess the income generated during year 2010/2011. No such records were available for the Washington clients, so HMRC took the percentage by which they had altered the Bedford figures and applied it to the Washington figures to adjust them similarly.

32. Dr Jain contended that he had not earned the remuneration at that stage and placed great emphasis on the fact that these were only 'proforma' invoices at this stage. Dr Jain explained that he submits a 'proforma' invoice with the first draft of his report, but that he has not at that stage completed his obligations. The reports are then sent by the agency to the solicitor and on to the client. Further questions are usually raised and he is required to undertake further work amending or expanding on his original report during the period of six to 12 months following the submission of the original report. Dr Jain said that he was only entitled to payment once the final version of the report was accepted by the client/solicitor. HMRC pointed out that Dr Jain issues further invoices for this supplementary work.

33. Unfortunately, we were not able to see one of Dr Jain's 'proforma' invoices. However, based on the evidence he gave, we find that the word 'proforma' is not relevant here: it is not a draft invoice, no final version is later submitted. The invoice submitted with the draft report is the invoice for the work undertaken preparing it. However, where further questions are raised, Dr Jain's duties are not completed until he has answered them, notwithstanding the fact that he will issue additional invoices in respect of this further work. If Dr Jain for some reason refused to answer the further questions, his original invoice would not be paid. Dr Jain told the Tribunal that in some cases he refused to make requested amendments and as a consequence was not paid for the original report. It is not straightforward to isolate the moment at which Dr Jain has fulfilled his contractual duties. There is some merit to the argument that this occurs when the report is accepted. However, that is dependent on third parties with whom Dr Jain may have no contact; he is not formally told when the report has been accepted, he knows it has been when his invoice is paid. It is necessary to take a pragmatic approach in determining the point at which Dr Jain has earned his remuneration. We therefore find that, in relation to reports where no questions are raised, Dr Jain has discharged his obligations in full at the point when he submits the draft report and invoice. In relation to reports where further questions are raised, Dr Jain discharges his obligations in full at the point when he submits the revised report and supplementary invoice.

***Travel expenses***

34. HMRC contended that the Spire and the BMI Manor were Dr Jain's 'places of business' and so, following *Samadian* and other cases mentioned above, his travel expenses from home to them were not deductible. HMRC disallowed expenditure related to travel between Dr Jain's home and the hospitals in Washington and Bedford on the basis that it had duality of purpose and so was not incurred wholly and exclusively for the purpose of the trade or profession. The result was a reduction to mileage (miles allowed) of £4,032 and to the cost of a driver of £4,035.

35. Dr Jain explained that his circumstances were different from those of Dr Samadian: he had never claimed expenses for travel in relation to his private medical practice, only in relation to his business providing medical reports for litigation purposes. He had to travel long distances to see clients in this context as they were based in the Bedford area and in the north east of England, whereas he lived in Kent. It would not be realistic for the clients to visit him at his home. To carry on this

business, Dr Jain said he had to travel to where the clients were. Dr Jain saw clients at a single location in each area for convenience. He could alternatively have visited them at their homes. At the hospitals, he used a room with a desk and chairs. He did not use any medical equipment. The consultations were not of a medical nature and did not have to take place in a hospital. Indeed, in the past Dr Jain had used a room in an estate agent's office in Bedford. He has no right or entitlement to use facilities at the two hospitals. He is not allocated the same room on each visit and if there were no availability when he wished to visit he would have to make alternative arrangements (though it did not seem this had occurred).

36. Dr Jain explained that he saw clients once a month on a Saturday between 9am and 5pm at the Spire, which meant he had to travel and stay overnight on the Friday. He saw clients over a weekend in Bedford: 9am to 5pm on Saturday and Sunday, again once a month. He left Margate around 5am on the Saturday morning and returned home around 9pm on the Sunday evening, but had to stay in a hotel on the Saturday night as it was too far to come home then. Dr Jain's secretaries scheduled the appointments for consultations and on each day he saw approximately 15 clients for 30 minutes each. During the consultations Dr Jain took notes of the client's medical history and current status. Later, at home, he reviewed medical records and prepared the reports, taking approximately two to three hours for each report.

37. Dr Jain further explained that he did not 'choose' to live in Kent; he was contractually obliged to live within a 10 mile radius of the NHS hospital at which he was employed. He was concerned that HMRC had said he chose to live in Margate and to travel for work for his own convenience.

38. We find that Dr Jain's home was a place of business for the purposes for the medical report business and that he carried out the bulk of the work there. However, that does not mean that the Spire and the BMI Manor could not also be places of business. Whether they are is a question of fact. There is no statutory definition of 'place of business'. Case law may assist to some extent. At one end of the scale, the two private hospitals at which Dr Samadian saw patients were found to be paces of business for him. He visited them almost daily although he had no permanent office there and did not keep his medical equipment there. At the other end of the scale, the building sites at which Mr Horton worked for around three weeks at a time were not places of business for him. In Dr Jain's case there is a degree of predictability and regularity in his visits to the Spire and the BMI Manor. We accept that he does not have to see patients in these (or any) hospitals, but it is not the nature of the facilities he uses but the regularity of his visits that indicate whether a particular location is a place of business.

39. Dr Jain's visits to these hospitals are for a different purpose and less frequent than those in the Samadian case. In addition, the work he does at home after the on-site visits seem to be more extensive than in the Samadian case. Notwithstanding this, we are mindful of the Upper Tribunal's comments on the desirability, in the interests of the rule of law, that like cases by treated alike. Here, we find sufficient similarity in the regularity and predictability of Dr Jain's visits to the Spire and the BMI Manor as to make them places of business.

### *Subsistence*

40. HMRC's view was that subsistence costs are not deductible because they have a dual purpose and so are not incurred wholly and exclusively for the purpose of the trade or profession. Accordingly they had disallowed Dr Jain's claim in the sum of £360 for 2010/11. We find, following the cases cited above, that expenditure on food does have duality of purpose (Caillebotte). Whether Dr Jain's subsistence expenditure may be deducted is dependent on the treatment of the related travel expenses, under section 57A of the Income Tax (Trading and Other Income) Act 2005.

## Conclusion

41. The questions before the Tribunal are of principle rather than quantum: how should income properly be accounted for and what expenditure is deductible rather than what is the correct figure for Dr Jain's taxable profits.

### *Accounting for income*

42. We have established that the point at which Dr Jain can reasonably be said to have completed his obligations in relation to the preparation of each medical report is:

> (1) For reports where no further questions are raised, the date that the invoice is submitted (with the report); and
>
> (2) For reports where further questions are raised, the date the supplementary invoice is submitted (with the supplementary answers/revised report).

43. It follows that, in line with the accounting principles set out above, these are the dates when Dr Jain's earnings should be accounted for.

### *Travel expenses*

44. Having established that the Spire and the BMI Manor are places of business for Dr Jain, it follows that costs of travel between them and his home (even though it is also a place of business) are not incurred wholly and exclusively for the purposes of the business and therefore are not deductible under section 34 of the Income Tax (Trading and Other Income) Act 2005.

45. As a result, the subsistence costs are not deductible either, since they cannot be said to be incurred wholly and exclusively for the purpose of the business, having the dual purpose of providing nourishment.

46. We leave it to HMRC and the Appellant to make the necessary adjustments to the accounts and consequently the self assessment tax returns for the year 2010/2011 and later years. HMRC will also, as a consequence, need to review the amount of the assessment raised in relation to the year 2009/2010. Mr Goulding expressed some

concern at the unavailability of records, in particular in relation to the Washington cases, but Dr Jain said the necessary information could be found.

47. 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.

**RACHEL MAINWARING-TAYLOR**

**TRIBUNAL JUDGE**
**RELEASE DATE: 10 DECEMBER 2015**