AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

67TACD2022

Between

[redacted]

Appellant

-and-

REVENUE COMMISSIONERS

Respondent

Determination

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") of an amended assessment of the Revenue Commissioners ("the Respondent") of 17 August 2017 regarding the Appellant's charge to income tax for the year 2013. At issue is whether the expense incurred by the Appellant in bringing legal proceedings [redacted]) is deductible from his Schedule E emoluments under section 114 of the Taxes Consolidation Act 1997 ("the TCA 1997").

Background

2. [redacted]

3. On 17 August 2016, the Respondent wrote to the Appellant to inform [redacted] that in its view the expenditure on legal costs was not an allowable expense under section 114 of the TCA 1997. A meeting occurred between the Appellant and the Respondent on 13 September 2016, which did not result in either party altering their respective views on the matter. On 17 August 2017, the Respondent issued its amended notice of assessment, which disallowed the Appellant's deduction. The Appellant filed [redacted] appeal on 6 September 2017.

The [redacted] Proceedings

4. The Appellant issued [redacted] proceedings against [redacted]. [redacted]

5. [redacted] While the Commissioner was not provided with the Appellant's pleadings, the opening paragraph of the judgment states that he sought:-

6. [redacted]

[1] [redacted]

[redacted]

7. The Commissioner heard that prior to issuing the proceedings the Appellant sought independent legal advice, which [redacted] gave a positive opinion of the merits of his proposed action [redacted]. This advice was not included as part of the documentation accompanying the Appellant's appeal.

8. [redacted]

9. [redacted]

10. [redacted]

11. [redacted]

12. [redacted]

[redacted]

13. [redacted]

Legislation and applicable legal principles

14. Section 114 TCA 1997 sets out the "*general rule*" as to deductions in respect of Schedule E emoluments:-

> *"Where the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments of the office or employment of profit expenses of travelling in the performance of the duties of that office or employment, or otherwise to expend money wholly, exclusively and necessarily in the performance of those duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."*

15. The general rule is longstanding, being in all material respects identical to that prescribed in the Income Tax Act 1918 and, before that, the Income Tax Act 1853. Its scope has been explained in a variety of English judgments that have been approved in this jurisdiction (see ***SP Ó Broin v Mac Giolla Meidhre,* [1959] IR 98**). In ***Lomax (HM Inspector of Taxes) v Newton,* [1953] All ER 801,** a captain in the army sought a deduction in respect of mess hall charges that went towards the entertainment of regimental guests. It was accepted by both sides in the appeal that had the captain refused to pay these charges, he would have been asked to resign his commission. In refusing the deduction, Vaisey J. held:-

> "*…I would observe that the provisions of* [the general rule] *are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of* [the general rule] *it must be shown that the expenditure incurred was not only necessarily but wholly and exclusively incurred in the performance of the relevant official duties. And it is certainly not enough merely to assert that a particular payment satisfies the requirements* of [the general rule] *without specifying the detailed facts on which the finding is based. An*

expenditure may be "necessary" for the holder of an office without being necessary to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are, indeed, stringent and exacting. Compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that, when examined, they are found to come to nearly nothing at all."

16. In the aforementioned case of ***SP Ó Broin v Mac Giolla Meidhre,*** **[1959] IR 98**, Teevan J., quoted the following words of Lord Blanesburgh in relation to the operation of the general rule in ***Ricketts v Colquhoun,*** **[1926] AC 1**:-

"It says: 'if the holder of an office' – the words be it observed are not 'if any holder of an office' – 'is obliged to incur expenses in the performance of the duties of the office' – the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective. The deductible expenses do not extend to those which the holder has to incur mainly, and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition."

17. Later, in ***McKie v Warner,*** **[1961] 1 WLR 1230** Plowman J. held :-

"It has been pointed out many times, and it is unnecessary for me to refer to any of the occasions because it is notorious, that it is very difficult for a taxpayer under Schedule E to bring his expenses within [the statutory predecessor of section 198(1) in rule 7 of Schedule 9 to the Income Tax Act 1952]. In order to succeed in a claim under the rule the taxpayer has to prove, first of all, that the expense is one which he was necessarily obliged to incur and, secondly, that it was incurred wholly, exclusively and necessarily in the performance of his duties.

As regards the first of those two requirements, the authorities show that the word "necessarily" in the expression "necessarily obliged to incur" refers to the necessities of the office or the employment. In order to qualify, the expense must have been necessitated by the duties of the employment. The fact that it was required by the employer is not sufficient, nor is the facts that it was thought to be necessary by the employee.

As regards the second requirement, the authorities show that the expression "in the performance of the said duties" is a very stringent one: it has quite a different connotation from what I might call the corresponding provision in section 137 of the

Act relating to expenses for purposes of Schedule D, where the relevant words are 'for the purposes of'. In rule 7, the necessity for expenditure "in the performance of the said duties" means that the sum in question must be defrayed in the actual discharge of duties – "in doing the work of the office" is the expression which Rowlatt J used in Nolder v Walters, [(1930) 15 TC 380, at page 387]. But, even if the expenditure was necessarily incurred in doing the work of the office, it must also have been defrayed wholly in discharge of the duties and exclusively in the discharge of the duties."

18. Given the above words of Plowman J. concerning the general rule then in being in England and Wales regarding the deduction of Schedule D income under section 137 of the Income Tax Act 1952, it is worth noting that the equivalent general rule in this jurisdiction in respect income arising from trades or professions is prescribed in section 81 of the TCA 1997. Like the Income Tax Act 1952, this provides that no sum shall be deducted unless it is wholly and exclusively laid out or expended *"…for the purposes of the trade or profession."*

19. More recently, in ***HMRC v Banarjee [2009] EWHC 62 (CH)***, an authority relied on by the Appellant, Henderson J. held in the Court of Appeal of England and Wales that:-

    "The critical requirements […] are two in number. First, the obligation to incur the expenditure must be an objective necessity imposed by the duties of the employment itself, in the sense that (as Donovan LJ said in Brown v Bullock, loc. cit.) 'irrespective of what the employer may prescribe, the duties themselves involve the particular outlay'. Secondly, the expenditure must be incurred in the actual performance of the duties of the employment, and it must be wholly and exclusively so incurred.

    Wrapped up in this second requirement are a number of important distinctions. Expenditure which is not incurred in the actual performance of the taxpayers duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible. Again, any duality of purpose is fatal: that is the force of the word 'exclusively'."

20. The case to which Henderson J. referred, ***Brown v Bullock,*** **[1961] 1 WLR 1095**, concerned a claim made by a bank manager who was required by his employer to join a London club at his own expense for the purpose of entertaining customers. In dismissing the bank manager's appeal against refusal, Donovan L.J. held:-

    "The test is not whether the employer imposes the expense, but whether the duties do, in the sense that irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay.

… Mr Monroe has conceded that even If the Midland Bank did not request and expect the appellant to join a club like the Devonshire Club, he could still perform his duties as bank manager; and that if the test is the strictly objective one which I have stated, he must fail."

21. [redacted]

22. [redacted]

[redacted]

Submissions

Appellant

24. [redacted]

25. [redacted]

[redacted]

26. In this regard, [redacted] compared [redacted] position with that of the taxpayer in ***HMRC v Banarjee***. There it was found by the Court of Appeal of England and Wales that it was an "intrinsic" part of the performance of the role of a specialist registrar in dermatology to attend training courses. This finding, which the HMRC argued was in ostensible conflict with pre-existing authorities disallowing expenses claimed by trainee solicitors and doctors in respect of the sitting of exams, was justified on the grounds that the role in question was *"essentially a training post"* . The overriding duty of the registrar, it found, was to improve her expertise and skills for the benefit of her employer and the expenses deducted were used entirely for this purpose.

27. [redacted]

28. [redacted]

29. [redacted]

30. [redacted]

Respondent

31. The Respondent submitted that the Appellant's [redacted] did not necessitate the bringing of proceedings. Secondly, it submitted that the proceedings were not "*wholly and exclusively and necessarily incurred*" in the performance of the duties of [redacted]. In so doing it pointed to most of the authorities enumerated in the earlier part of this determination.

32. [redacted]

33. [redacted]

[redacted]

Material Facts

34. The facts material to this appeal that are not in contest are as follows:-

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Analysis

35. In determining this appeal the questions to answer are whether the Appellant was "*necessarily obliged*" [redacted] to incur the expense of bringing the [redacted] proceedings and whether the expense was "*wholly, necessarily and exclusively incurred in the performance of those duties*". In this regard, the Commissioner views the various authorities referred to above as accurately reflecting the scope of the general rule under section 114 of the TCA 1997.

36. In ***Brown v Bullock*** the Court of Appeal of England and Wales stated that a court must ask whether a taxpayer was necessarily obliged to incur *"…the particular outlay"*. [redacted]

37. It is not in dispute that the Appellant's decision to bring the [redacted] proceedings was precipitated by the subjective belief that [redacted]

38. [redacted]

39. As is clear from the passage in ***Ricketts v Colquhoun*** quoted above, it is a strict requirement for the allowance of a deduction under section 114 of the TCA 1997 that there be an objective obligation arising from a duty that necessitates a taxpayer to incur an expense. This rules out expenses that arise from decisions that are *"personal*" to a taxpayer. The statement of Donovan L.J. in ***Brown v Bullock*** that a taxpayer must show

that "…*the duties cannot be performed without incurring the particular outlay"* is to the same effect.

40. [redacted]

41. [redacted] the Commissioner finds that there was no [redacted] duty on the part of the Appellant necessarily obliging [redacted] to issue proceedings [redacted] Rather, the Commissioner finds that the issuing of proceedings was a voluntary act on the Appellant's part [redacted]

    [redacted]

42. Given the strictures of the test under section 114 of the TCA 1997, the finding that the Appellant was not "necessarily obliged" by [redacted] duties [redacted] to bring the [redacted] proceedings means that this appeal must fail.

43. Lest this finding be in error however, the Commissioner also finds that the appeal cannot succeed because the expense of bringing the [redacted] Court proceedings was not incurred

"*wholly, exclusively and necessarily in the performance of the duties* [redacted]

In ***HMRC v Banerjee****,* Henderson J. stated:-

> *"Expenditure which is not incurred in the actual performance of the taxpayer's duties, but merely in order to put the taxpayer in a position to perform his or her duties, is not deductible:* ***any duality of purpose is fatal: that is the meaning of the word "exclusively".***

44. [redacted] it was a relief sought on the incorrect presumption that it was necessary to put [redacted] in the position to perform [redacted] duties. As Henderson J. found in ***HMRC v Banerjee****,* the use of the word "exclusively" in this context demands that there be just one purpose, namely the actual performance of the duties in question. This is a stricter requirement than that imposed in relation to Case I and II income under Schedule D, which refers to the need for the expenditure to be "*for the purpose"* of the relevant trade or profession. The Commissioner finds that this additional purpose in bringing the [redacted] proceedings, which is distinct from the actual performance of the duties of [redacted] means that the expense incurred is outside the ambit of what is deductible under section 114 of the TCA 1997. For this reason also, the Appellant's appeal must be refused.

Determination

45. For the foregoing reasons, the Commissioner finds that the amended assessment of 17 August 2017, pursuant to which the Respondent refused a deduction of €46,883.67 against the Appellant's emoluments under Schedule E of the TCA 1997 must stand.

46. This appeal has been determined in accordance with section 949AL TCA 1997. The determination contains full findings of fact and reasons. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the TCA 1997.

Conor O'Higgins
Appeal Commissioner
27th April 2022