[2018] UKFTT 0462 (TC)

TC06640

Appeal number: TC/2016/05600

INCOME TAX – deductibility of expenses by exotic dancer – travelling expenses – Horton v Young considered - deductibility of clothing and underwear – Mallalieu v Drummond considered – deductibility of other items including cosmetics and hair extensions

FIRST-TIER TRIBUNAL
TAX CHAMBER

GEMMA DANIELS **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MICHAEL BELL ACA CTA

Sitting in public at Taylor House, London on 8 May 2018

Jack Maunders, Dinsdale Young Consultants Limited, for the Appellant

Christine Cowan, Presenting Officer, for the Respondents

DECISION

Introduction

1. The appellant in this case, Ms Daniels, was a self-employed exotic dancer who was engaged, at all times material to this appeal, to perform at a nightclub called Stringfellows ("Stringfellows") in Central London. Ms Daniels appeals against an amendment (by a closure notice) to her self-assessment tax return for the year ended 5 April 2014 (in the sum of £5881.18, an increase of £2318.26) issued under section 28A Taxes Management Act 1970 ("TMA") and against assessments to additional income tax, issued under section 29 TMA, for the years ended 5 April 2011 (in the sum of £2049.04), 2012 (in the sum of £1987.66) and 2013 (in the sum of £2258.81).

2. Essentially, the issues in dispute concern the deductibility of travelling expenses incurred by Ms Daniels to and from her home to Stringfellows and the deductibility of certain items including clothing, lingerie, dry-cleaning, make-up, beauty treatments and hairdressing (including hair extensions) – all of which were claimed as allowable in Ms Daniels' tax returns for the years in dispute.

3. Secondly, Ms Daniels challenges the validity of the assessments made under section 29 TMA on the basis that her returns for the relevant periods were made in accordance with the practice generally prevailing at the time and, in respect of the assessments for the years ended 5 April 2011 and 2012, on the basis that her returns were not made carelessly.

4. In addition, HMRC have issued a penalty assessment under Schedule 24 Finance Act 2007 ("FA 2007") for the period from 6 April 2010 to 5 April 2014 in the sum of £1,938.09. The basis of the penalty assessment was that Ms Daniels was alleged to have been careless in respect of the submission of her self-assessment tax returns for the years ended 5 April 2011, 2012, 2013 and 2014. The penalties have been suspended, as the result of an alternative dispute resolution process, under provisions contained in paragraph 14 Schedule 24 FA 2007. Ms Daniels appeals against these suspended penalties.

The evidence

5. Ms Daniels and Mr Patrick McGivern (the HMRC officer who issued the above closure notices and discovery and penalty assessments) produced witness statements, gave oral evidence and were cross-examined. In addition, we were furnished with a bundle of documents, correspondence and witness statements.

The facts

6. Ms Daniels worked as a self-employed exotic dancer at Stringfellows, a nightclub in Central London between July 2005 and September 2014. At all times material to this appeal, Ms Daniels performed only at the same Stringfellows nightclub. Ms Daniels lived in a suburb located in South West London.

7. She travelled in her car from her home to Stringfellows, leaving home at 6:30 pm and returning at approximately 4:30-5:00 am the following morning. Sometimes she used her car to travel to markets and a fancy dress shop in Camden to buy cosmetics and other items for her performances (e.g. glitter and sequins for her costumes).

8. At all material times, Ms Daniels shared her home with her mother who has been in ill health. Ms Daniels had a separate room at her home which was set up as a study and an office.

9. From her home Ms Daniels carried out the following activities:

(1) telephone calls to organise sessions with Stringfellows;

(2) contacted actual and potential customers of Stringfellows to encourage them to attend her performances;

(3) organised web-cam sessions as a marketing tool for potential customers of Stringfellows;

(4) ordered costumes and materials;

(5) arranged hairdressing, facial and tanning appointments;

(6) arranged dancing lessons;

(7) designed and made costumes;

(8) practised choreography;

(9) wrote up her diary and the cashbook in which she kept a record of her expenses incurred in connection with her self-employment ("the cashbook"); and

(10) dealt with necessary correspondence and telephone calls.

10. From home she would also travel to visit the bank and her accountant and would also travel to shop for costumes, jewellery, cosmetics for the purposes of her self-employment.

11. The cashbook was written up daily or weekly from her diary notes which were kept contemporaneously. For most items of expenditure, there were no receipts or other primary records. Ms Daniels said that she obtained receipts where possible but in many cases it was not possible. For example, she bought some items from market stalls and she also bought some costumes from a lady who sold costumes at Stringfellows but who did not provide receipts. Ms Daniels kept a separate cashbook for each year.

12. Ms Daniels' evidence, which we saw no reason to doubt, was that her appearance was a very important part of her role at Stringfellows. The costumes and dresses that she wore were not the type of clothing that would be suitable to be worn outside Stringfellows and she would not have wished to do so. Her dresses were long, see-through and skimpy. They were frequently decorated with sequins so that they dazzled under the lights. Her shoes had 6 to 10 inch stiletto heels. They were cleverly

made so that it was possible to hang upside down from a pole when her performance included pole dancing. Her high-heeled shoes tended to wear out quickly. In addition, her costumes would include nurses and schoolgirls uniforms when Stringfellows put on a "fancy dress" evening.

13. As mentioned, she bought some of her costumes from a lady trading at Stringfellows. Sometimes she made her own costumes from material which she had bought in shops.

14. The cashbook also recorded expenditure in respect of lingerie and underwear. The cashbook for the year to 31 March 2014[1] recorded, for example, the purchase of thongs, "black lingerie – Stringfellows", "Body Kiss lingerie" and corsets etc.

15. As regards cosmetics, these had to be heavily applied in a theatrical manner (which Ms Daniels described as "over the top") in order to last the whole evening of her performances. She sometimes applied the make up at home and sometimes at Stringfellows (where there was a changing room for the dancers) and she removed the make up at Stringfellows. She did not wear that make-up outside her work at Stringfellows.

16. In addition, the cashbook recorded expenditure in respect of perfume. Ms Daniels said that she did not wear perfume other than for her performances. Her performances involved, as she candidly put it, "getting naked in front of drunken men" and she did not want perfume to feature in her everyday life to remind her of her dancing job. We should note that, although Ms Daniels was referred to in the papers as an exotic dancer, it was clear from her evidence that she danced naked at Stringfellows and that her dresses (and other costumes) and lingerie (and her make up and the various beauty treatments described below) were intended to be alluring and, to a large extent, arousing and erotic for Stringfellows customers.

17. Furthermore, the cashbook disclosed expenditure on fake tanning spray, arm and leg waxing, "eyelure lashes" (i.e. false eyelashes), eyelash and eyebrow tints, various hair treatments (including hair extensions and hair extension maintenance). The amounts in respect of hair extensions and hair extension maintenance were considerable. For example over a nine-month period in 2013, the cashbook recorded Ms Daniels as spending £2,240 on hair extensions in Camden. There were also items of expenditure in respect of treatments for fingernails and pedicures. Ms Daniels said, and we accept, that she no longer had these various beauty treatments once she gave up her career as a dancer.

18. The cashbook also contained expenditure on dry-cleaning which related to the dry-cleaning of Ms Daniels' costumes and garments used for her performances.

[1] It was said by Mr Maunders that this cashbook was typical of all the years in dispute and this was not disputed by HMRC.

19. Ms Daniels said that her previous accountant had advised her that keeping a contemporaneous cashbook recording her business expenditure was sufficient for tax purposes.

20. It was evident from Ms Daniels' evidence that she was relieved when she gave up dancing at Stringfellows in September 2014 and that it seemed to us that she had developed a distaste for her exotic dancing career. Ms Daniels now lived in straightened circumstances with an income of approximately £6000 per annum.

21. Ms Daniels' self-assessment tax return for the year ended 5 April 2014 was received by HMRC on 5 December 2014. HMRC opened an enquiry into that return under section 9A TMA on 18 February 2015. HMRC requested statutory records and other information used to complete Ms Daniels' return. Information was provided about her income from Stringfellows and, we understand, the amount of gross income is not in dispute.

22. Although the cashbook was provided, showing expenses totalling £8629.48 and which were claimed as an allowable deduction, receipts and invoices were provided which substantiated less than 10% of the amount claimed.

23. Ms Daniels had claimed a mileage allowance to cover travel between her home and Stringfellows, although no receipts or invoices were provided in respect of the travel costs thus claimed.

24. HMRC proposed a meeting to discuss the progress of the enquiry but Ms Daniels' then agent, Mr Carter, declined a meeting.

25. After the provision of additional information by Ms Daniels and Mr Carter, HMRC disallowed the cost of travel between Ms Daniels' home and Stringfellows on the basis that it constituted "home to work" travel. HMRC also concluded that expenditure on clothing, footwear, make up, beauty treatments et cetera should be disallowed. However, in order to conclude the enquiry, HMRC proposed a 20% allowance of the expenses claimed.

26. Mr Carter emailed HMRC on 29 September 2015 indicating that his client agreed to the proposed adjustments made by HMRC.

27. On 14 October 2015, however, Ms Daniels wrote to HMRC stating that she did not agree with the settlement proposals. She did not understand why her accounts should be questioned, as all the relevant information was provided to her accountants in all the years and she believed that they showed the correct figure, including the expenditure which was correctly claimed. She said that she felt under duress to settle. She said that she was unhappy with the work carried out by her previous accountants and had appointed a new accountant to review the correspondence. She noted that her accountant would be going abroad for one month from 19 October and therefore indicated that a further two months would be needed to deal with HMRC's most recent letter.

28. On 15 October 2015, Mr Maunders of Dinsdale Young Consultants Limited, Ms Daniels' new accountant, contacted HMRC requesting copies of various documents and correspondence. He noted that he would be abroad until 20 November and, would not therefore be in a position to take the matter further before 31 December 2015.

29. Notwithstanding the change of accountants and the knowledge that Mr Maunders was abroad, Mr McGivern decided to issue an information notice under paragraph 1 of Schedule 36 Finance Act 2008 on 5 November 2015. We thought that this was an unusual course of action to take. Mr McGivern, when questioned about this by Mr Maunders, laconically replied that there was no exemption for changing accountants and Ms Daniels should have "got another agent". That may be true (at least as regards the exemption point), but we thought that Mr McGivern's action in issuing the information notice was, in our experience, unreasonable in the circumstances and we infer that his hard-nosed attitude soured his relationship with Mr Maunders from the outset. We agree with Mr Maunders' assessment that Mr McGivern's behaviour was "heavy-handed".

30. In the event, no agreement between the parties was reached and HMRC concluded their enquiry by issuing a closure notice under section 28A TMA on 20 April 2016 in respect of the tax year ended 5 April 2014. In addition HMRC issued "discovery" assessments under section 29 TMA for the tax years ended 5 April 2009, 2010, 2011, 2012 and 2013. Furthermore, HMRC also informed Ms Daniels that penalties would be charged under Schedule 24 FA 2007.

31. Mr Maunders' letter of 25 April 2016 complained about HMRC's conduct, claiming that HMRC's conduct constituted "over-zealousness" which amounted to "harassment" of Ms Daniels. This letter of complaint was also treated by HMRC as an appeal against the closure notice and assessments and as a request for a statutory review.

32. In the event, by a letter of 14 June 2016, the statutory review concluded that HMRC's decision should be varied. The discovery assessments for the years ended 5 April 2009 and 2010 were out of time when they were issued on 20 April 2016 and, accordingly, were cancelled (as were the associated penalties for those years). The review concluded that the decision to disallow travelling costs in full should be upheld as should the 80% disallowance of the clothing, make up and other items. Although the reviewer could see an argument for distinguishing Ms Daniels' case from *Mallalieu v Drummond*, the result would have been to allow a deduction for expenses with no evidence that the money was spent on the items claimed, or spent at all.

33. The review letter contained the following paragraphs which we quote in full because Mr Maunders placed considerable emphasis upon them and, indeed, reflected a somewhat different approach from the submissions put forward by Ms Curran before us:

> "**My Conclusion**

I cannot see why HMRC should allow a deduction for home to work travel. As in *Newsome v Robertson* there is in here a duality of purpose in that the journey is made in order to allow you to carry on your trade at Stringfellows, but it is also made in order to allow you to live elsewhere, in your case [South West London]. In *Horton v Young*, where the appellant was successful, his home was to an extent also a workplace. Your agent claims that your business was "clearly based at her home, but she [sic] did not dance commercially at her home in [South West London], nor would it be practicably possible for her to do so.

It is true that you had to get home in the early hours of the morning, thus exposing herself [sic] to danger. There is no provision for this in the law, and the inspector had no option other than to disallow it.

There certainly was a discovery during the enquiry that some of the contested items were ineligible for a deduction. I have considered the use of presumption of continuity based on the enquiry year. I think this is a reasonable approach, as the expenses claimed have been broadly similar, and the evidence suggests that you have always claimed to have your travel, costume, make-up, beauty treatments and so on.

As regards the make-up and clothing the position is less clear. It is something of a grey area. Normal everyday clothing is not allowable, as established in *Mallalieu v Drummond*. Uniforms, theatrical costumes and so on are allowable, not being deemed to be normal everyday clothing [BIM 37910]. You are an exotic dancer in a famous nightclub. Your [sic] appearance is critical to her earnings and indeed those of her engager. She is required to wear arousing underwear, very high heeled shoes (which dancers wear out quickly), other 'costumes' and little else. During *Mallalieu v Drummond* HMRC pointed out that the items she had claimed for were normal female attire, her white shirt, black jacket, skirt, and tights capable of being worn in public by any woman. Indeed it is standard dress among much of the female workforce. Underwear would not normally be allowable, (mentioned in *Mallalieu*), being a matter of personal choice and not being visible, therefore not relevant to any trade; but in your case it is part and parcel of your theatrical costume and trade. That said it can be worn outside your performances.

The whole point of wholly and exclusively is that the duality has to be simultaneous, otherwise no apportionment as possible. Not only was Miss Mallalieu's black wardrobe allowing her to enter the Court, it was *simultaneously* "protecting her warmth and decency". Therefore no apportionment was possible. This is not the case with your costumes, they are doing nothing else simultaneously.

Make-up is similar. Most women, irrespective of what work they do, or whether they work at all, wear make-up of some sort. However a stage performer has to wear a different level of make-up, and stage make up is allowable as part of a performer's costume. An exotic dancer's function is to be look [sic] as alluring as possible, and she has to be made up beyond what is appropriate in everyday use. All professional actors and TV presenters wear make up, irrespective of sex. You have

> pointed out that the make-up in question is heavy theatrical make up. If so, it is unlikely to be appropriate outside the nightclub where you work.
>
> Where however I consider your position to be weak is that you have not supplied adequate evidence of your expenditure. Of the £8600 listed as clothing, beauty, dry cleaning, make-up and so on, you have reduced invoices only for around £800 (more than covered by the 20% allowance the inspector has given).
>
> My conclusion is that the decision to disallow the travelling costs in full should be upheld, as should the 80% disallowance of the clothing, make-up and so on. I can see an argument for distinguishing your case from *Mallalieu v Drummond*, but the result would be allowing a deduction for expenses with no evidence that money was spent on the items claimed, or spent at all. I am therefore varying the assessments by cancelling the out of time 2009 and 2010 assessments…. [and the associated penalties].
>
> As regards the later penalties I consider they are fairly stated considering that the returns were incorrect, and this was a result of carelessness on your part."

34. Thus, with the exception of travelling expenses and underwear (both of which were fully disallowable), the statutory review letter concluded that expenditure of the kind incurred by Ms Daniels could be allowable but that because there was insufficient evidence of the expenditure 80% of the expenditure should be disallowed.

35. By contrast, as we shall see, Ms Curran's submissions, broadly speaking, assumed that the claimed expenditure had indeed been incurred by Ms Daniels (whilst criticising her poor record-keeping) but argued that the expenditure was disallowable.

36. Revised assessments for the years ended 5 April 2009 and 2011 were raised on 1 September 2016 and a notice of amended penalty assessment was raised on 29 September 2016 to reflect the outcome of the review.

37. A notice of appeal was lodged with this Tribunal on 18 October 2016.

38. Next, Ms Daniels applied for Alternative Dispute Resolution ("ADR") with HMRC and a facilitated meeting took place on 16 February 2017. None of the substantive issues were agreed by the ADR process but it was agreed that the penalty charged on Ms Daniels should be suspended.

39. Finally, we should give some detail about how the penalties were calculated. First ("Stage 1"), the penalty notice explained the reasoning behind the penalty range and dealt with two topics: "Behaviour" (i.e. the behaviour which led to the inaccuracy) and "Disclosure" (whether the disclosure was prompted or unprompted). As regards the former the penalty notice stated:

> "[**Behaviour**] We consider that the behaviour was 'careless'. This is explained below.

> I believe the behaviour that led to these inaccuracies to be careless. It is not [sic] unrealistic to think that a customer could believe clothing etc used the dancing should be an allowable expense. I have been back and forth with the agent quoting case law to support my arguments e.g. Mallalieu v Drummond, Horton v Young ."

40. As regards the second heading "Disclosure" the penalty notice stated:

> "The disclosure was prompted because you did not tell us about the inaccuracy before you had reason to believe we had discovered it, or were about to discover it."

41. The penalty notice continued:

> "For this 'careless' inaccuracy, with a prompted disclosure, the minimum penalty percentage is 15% and the maximum penalty percentage is 30%.
>
> This means that the penalty range is from 15% to 30%."

42. Secondly ("Stage 2"), considered the amount by which the percentage could be reduced depending on HMRC's view of how much assistance the taxpayer rendered during the enquiry. HMRC refer to this assistance as "quality of disclosure" (or as "telling, helping and giving"). In relation to this Stage 2, the penalty notice stated:

> "**Telling**: No disclosure of the error. No acceptance of certain very clear-cut errors. Did however explain reasoning behind why the expenses were claimed.
>
> **Helping**: No help provided in calculating the correct figures. Obstreperous approach from the agent. No information provided voluntarily. The agent did however actively engage in discussions to resolve the enquiry.
>
> **Giving**: All information provided within the time limits. No need to use information powers (I did use sch 36 powers on one occasion but did so in error as there had been no failure on the customer's side).
>
> Because of this, the total reduction we have allowed is shown below:
>
> | | |
> |---|---|
> | Telling us about it | 10%[2] |
> | Helping us understand it | 10% |
> | Giving us access to records | 30% |
> | **Total reduction** | **50%**" |

43. Thirdly ("Stage 3"), the penalty notice explained that the penalty percentage was calculated by working out the difference between the minimum and maximum penalty percentages (Stage 1) and then multiplying that figure by the total reduction (Stage 2) to get to the percentage reduction. The percentage reduction was then deducted from the maximum penalty percentage that was chargeable. The penalty notice stated:

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[2] The maximum percentages were 30% as regards "telling", 40% as regards "helping" and 30% as regards "giving".

"The difference between the minimum and maximum is 15%

(difference)	15.00 %
multiply by (total reduction)	50.00%
Equals (percentage reduction)	7.50%
(maximum penalty)	30.00%
Minus (percentage reduction)	7.50%
Equals **(penalty percentage)**	**22.50%.**"

44. As regards potential reductions for "special circumstances" the penalty notice stated:

> "Based on the information we have, we do not consider there are any special circumstances which would lead us to further reduce the penalty. Any reductions or adjustments are shown in the penalty table at the end of this schedule."

45. At first, Mr McGivern indicated in his oral evidence that he considered that there were no "special circumstances" justifying a reduction of the penalty for the purposes of paragraph 11 Schedule 24 FA 2007. Later, when questioned by the Tribunal, he noted that he had not in fact taken this decision himself. He had referred it to his line manager who, in turn, had referred it to his manager who has said that there were no "special circumstances". Mr McGivern said that he had "no clue" as to the basis on which this decision had been reached.

Submissions and discussion

46. As we have indicated, HMRC's review decision proceeded on the basis that some of Ms Daniels' expenses, e.g. clothing, could be deductible but that there was insufficient documentary evidence that Ms Daniels had incurred the expenditure claimed. Ms Curran, for HMRC, put matters rather differently in her submissions before us. Ms Curran said (in response to a specific question from the Tribunal) that HMRC had no reason to believe that the expenditure claimed by Ms Daniels had not in fact been incurred but, rather, HMRC's case was that in any event the expenditure was not deductible under section 34 Income Tax Trading and Other Income Act 2005 ("ITTOIA"). In cross-examination, Ms Curran did not clearly challenge Ms Daniels on the question whether the expenditure had actually been incurred, but instead pointed out to Ms Daniels on several occasions that there was usually no contemporaneous record of the expenditure (other than the cashbook).

47. Against this background, we consider that it is not open to HMRC to argue that the expenditure was not actually incurred by Ms Daniels. To do so would be tantamount to an allegation of dishonesty and the failure to put that allegation plainly to the witness in our view precludes that argument being advanced by HMRC.

48. Accordingly, we approach this appeal on the basis that the expenditure claimed by Ms Daniels in the relevant years was incurred as described, as HMRC were prepared to accept. The real issue in this appeal, therefore, is whether that expenditure

satisfies the test in section 34 ITTOIA of having been incurred "wholly and exclusively for the purposes of the trade."

49. Finally, we should add that it appeared to be common ground that the disputed expenditure was revenue rather than capital expenditure. That was particularly relevant in the case of Ms Daniel's shoes, dresses, lingerie and other garments. We proceed on the basis that the expenditure was of a revenue nature because, as appeared to be the case from the evidence, these items were purchased as renewals.

Travelling expenses: submissions and discussion

50. In short, Mr Maunders, appearing for Ms Daniels, argued that she carried on her business from her home, which she used as a base. Her travelling expenses were, therefore, deductible in accordance with the principle established in the decision of the Court of Appeal in *Horton v Young* 47 TC 60 and [1971] 2 All ER 351.

51. Ms Curran, however, argued that the principle established in *Horton v Young* was inapplicable in the present case. In that case the taxpayer worked on various building sites on a short-term basis and wrote up his books and kept his tools at home. In the present case, Ms Daniels worked only at Stringfellows and did not have, as in *Horton v Young*, a peripatetic trade. Instead, the present appeal was more akin to the facts in the earlier case of *Newsom v Robertson* 33 TC 452 and [1952] 1 All ER 1290.

52. *Newsom v Robertson* was a decision of the Court of Appeal concerning a barrister in private practice. The taxpayer claimed a deduction for his travelling expenses between his chambers in London and his home in Whipsnade. He carried out a significant amount of his professional work in his study at home (especially during vacations, when he only rarely visited his chambers).

53. Somervell LJ considered that the taxpayer's chambers in London remained his "professional base" throughout the year. His house had nothing to do with his practice and was simply his home – the fact that he did a significant amount of professional work there did not change that fact.

54. Denning LJ (at page 464) held that it was necessary to ascertain the base from which the individual's trade, profession or vocation was carried on. Travelling expenses incurred between his home and his chambers was incurred for the purpose of the barrister living at his home and not for the purposes of his profession (or at any rate not wholly or exclusively). The barrister's professional base was, throughout, at his chambers.

55. In his concurring judgment, Romer LJ (at page 465) commented that the object of the taxpayer's journeys from his home to his chambers (or to court) "both morning and evening, is not to enable [the taxpayer] to do his work but to live away from it." The position was not altered by the fact that the barrister worked at his home as well as his chambers. The taxpayer could carry on his profession by remaining the whole time at his chambers in London.

56. In our view, Ms Daniels' travelling expenses are non-deductible – they were not incurred wholly and exclusively for the purposes of her trade but were, instead, partly incurred because of where she chose to live and partly in order for her to get from her home to her place of work (Stringfellows). This duality of purpose is, in our view, fatal to her claim.

57. Mr Maunders relied on the decision of the Court of Appeal in *Horton v Young*. In that case, a bricklayer contracted for work, wrote up his books and kept his tools at home. He worked at various building sites, working on each side for approximately three weeks. There was no office on the sites. The Court of Appeal held that the taxpayer's home was his "business base". Lord Denning MR said at page 71:

> "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."

58. Salmon LJ agreed that the taxpayer's home was his business base, recording that the taxpayer agreed his contracts at home, kept his tools and business books there and did all his office work at home. At page 72 Salmon LJ rejected the Inland Revenue's argument that the taxpayer should be regarded as having a shifting business base i.e. that every time he went to a new site that site became his business base.

59. Stamp LJ, delivering a short concurring judgment, found (at page 73) that the taxpayer had no place which could be called his place of business except his home. Stamp LJ also (at page 72) implicitly referred to the taxpayer as being an "itinerant" trader.

60. The Court of Appeal in *Horton v Young* distinguished the decision in *Newsom v Robertson*. Lord Denning said at page 71:

> "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."

61. Salmon LJ said at page 72:

> "In that case [*Newsom*] the court rejected the view that Mr. Newsom's base at which he carried on his profession was anywhere except Lincoln's Inn. It is possible also to regard *Newsom's case* as depending to some extent upon a view that Mr. Newsom chose to live in Whipsnade and chose not to live, as he might have done, in Lincoln's Inn or perhaps the Temple."

62. Stamp LJ said at page 72:

> "I find the greatest difficulty in drawing a line or indicating theoretical distinctions between expenses of travelling to and from home in cases such as those of itinerant traders, itinerant professional consultants or itinerant bricklayers, or persons whose business involves travelling, on

> the one hand, and, on the other, the travelling expenses of persons such as Mr. Newsom in *Newsom's case* [1953] Ch. 7. The facts of such cases are infinitely variable, and one must, in my judgment, look at the facts of each case and decide whether the expenses are money wholly and exclusively laid out or expended for the purpose of the trade or the profession."

63. We referred the parties to the decision of the Upper Tribunal in *Samadian v HMRC* [2014] STC 763 (Sales J), in which the relevant authorities were recently reviewed, but which was not mentioned in the skeleton arguments of either party. In *Samadian*, so far as relevant for the purposes of this appeal, the taxpayer carried on a self-employed medical practice at his home and at two private hospitals. The question before Sales J was, *inter alia*, whether the taxpayer was entitled to deduct expense of journeys between his home and the private hospitals. Sales J held that the taxpayer was not entitled to a deduction and upheld the decision of the First-tier Tribunal ("FTT"). At [23] Sales J addressed the question of whether the private hospitals were places of business in the following terms:

> "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."

64. With respect, we specifically agree that the "business base" or "place of business" test should be used sparingly. It is a test that has no statutory basis and seems to us one which is liable to create artificial and unsustainable distinctions. It may well be that the day will come when the "business base" test will require reconsideration by the higher courts. In the meantime, its use in cases such as *Newsom v Robertson* and *Horton v Young* is best understood as confined to the particular facts of those cases.

65. Next, in *Samadian*, Sales J considered whether the taxpayer had a mixed private and business purpose in his general pattern of travelling between his home and the private hospitals. Sales J, in a passage which we consider worth quoting in full, said:

> "**[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…. 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 [counsel for the taxpayer] and Mr Stone [counsel for HMRC] 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] STC 665 at 668, [1983] 2 AC at 870.

[31] As Romer LJ said in *Newsom* ((1952) 33 TC 452 at 465, [1953] Ch 7 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' ((1952) 33 TC 452 at 465, [1953] Ch 7 at 18). Danckwerts J was of the same view at first instance in *Newsom* (see the summary of his decision at [1953] Ch 7 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 ((1952) 33 TC 452 at 463, [1953] Ch 7 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 ((1952) 33 TC 452 at 465, [1953] Ch 7 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' ((1952) 33 TC 452 at 465, [1953] Ch 7 at 17). This is the core of Romer LJ's reasoning in the case. He explained ((1952) 33 TC 452 at 465–466, [1953] Ch 7 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 ((1952) 33 TC 452 at 465–466, [1953] Ch 7 at 18). 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 ((1952) 33 TC 452 at 462 and 465–466, [1953] Ch 7 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."

66. The decision in *Samadian* is, of course, binding upon us but we follow it not solely because of the doctrine of precedent but because, with respect, we consider that it is a clear and correct statement of principle.

67. Therefore in the present case, correctly analysed in accordance with *Samadian*, Ms Daniels' journeys from her home to Stringfellows and back again were carried out because she maintained her home in a different place from the place where she carried out her performances i.e. Stringfellows. It is true that Ms Daniels also carried out business-related activities at her home but we do not think that this changes the position. Her travelling expenses were incurred for a dual purpose i.e. that of travelling from home to work and back again as well as travelling from her home business location to her place of work at Stringfellows. It is clear that the facts in this case are entirely different from those in *Horton v Young* where the taxpayer was an "itinerant" trader whose place of work varied from week to week and month to month. By contrast, Ms Daniels was retained to work throughout all the periods under appeal only at Stringfellows in Central London. Her travelling expenses are, therefore, non-deductible.

Clothing, garments and shoes

68. Mr Maunders argued that all clothing expenses claimed by Ms Daniels were for costumes used only for her work as a dancer. They could not be used as normal day-to-day wear. There was, therefore, no duality of purpose and the decision of the House of Lords in *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 A.C. 861 ("*Mallalieu*") was therefore inapplicable. The review decision, he said, accepted this analysis in principle.

69. Ms Curran submitted that if there was a non-business purpose in the acquisition of clothing and other garments it was not an allowable business expense. This was so even where particular standards of dress might be required in relation to a given trade or profession. In accordance with *Mallalieu*, it was irrelevant whether Ms Daniels chose to wear the clothing outside of work – the point was that the clothing could be worn or used outside work (i.e. outside Stringfellows).

70. Ms Curran accepted that the cost of clothing was not always disallowed and, for example, HMRC accepted that deductibility was permissible in cases of protective clothing and uniforms. In addition, HMRC accepted that the cost of clothing acquired for a role in the film, TV production or stage play might not be regarded as a person's "everyday wardrobe" and therefore may be deductible.

71. In the present case, Ms Curran submitted that underwear, dance dresses, stockings and shoes were capable of being used for ordinary everyday wear. Nonetheless, HMRC accepted that certain items of clothing could be classed as stage costumes and may not be appropriate for wearing outside Stringfellows. For this reason, HMRC were prepared to accept a figure of 20% of the expenses claimed as being allowable. This offer remained "on the table" notwithstanding the present appeal.

72. The leading authority in relation to the deductibility of clothing and other garments is, of course, the decision of the House of Lords in *Mallalieu*. That case concerned a claim for expenses of maintaining suitable clothing to be worn in court by a barrister, Ms Mallalieu. Her evidence (which was accepted by the General Commissioners) was that her usual choice of clothes would be unsuitable for use in court and her sole conscious motive in incurring the expenditure was to ensure that she could satisfy the relevant professional rules for appropriate court attire. The relevant finding of fact by the General Commissioners was:

> "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."

73. Lord Brightman (with whom Lords Diplock, Keith and Roskill agreed, Lord Elwyn-Jones dissenting) explained that:

> "To 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 [sic] 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."

74. Lord Brightman concluded (at page 875) that even though Ms Mallalieu's sole conscious motive was to comply with the professional rules, that was not the relevant test:

"… 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."

75. Therefore, Ms Mallalieu's deductibility claim failed.

76. Lord Brightman indicated in *Mallalieu* that the absence of a conscious motive on the part of the taxpayer did 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.

77. As Sales J held at [16] in *Samadian*:

> "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 (Inspector of Taxes)* [1995] STC 353 at 395, 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."

78. There is one further passage from Lord Brightman's speech *Mallalieu* which we should cite – a passage which is often overlooked. Lord Brightman at the conclusion of his speech (at page 875) approved a the decision of Goulding J in *Hillyer v. Leeke* (1976) 51 T.C. 90 (a decision relating to employment income):

> "It was inevitable in this sort of case that analogies would be canvassed; for example, the self-employed nurse who equips herself with what is conveniently called a nurse's uniform. Such cases are matters of fact and degree. In the case of the nurse, I am disposed to think, without inviting your Lordships to decide, that the material and design of the uniform may be dictated by the practical requirements of the art of nursing and the maintenance of hygiene. There may be other cases where it is essential that the self-employed person should provide himself with and maintain a particular design of clothing in order to obtain any engagements at all in the business that he conducts. An example is the self-employed waiter, mentioned by Kerr L.J., who needs to wear "tails." In his case the "tails" are an essential part of the equipment of his trade, and it clearly would be open to the commissioners to allow the expense of their upkeep on the basis that that money was spent exclusively to serve the purposes of the business. I do not think that the decision which I urge upon your Lordships should raise any problems in the "uniform" type of case that was so much discussed in argument. As I have said, it is a matter of degree.
>
> The case before your Lordships is indistinguishable in principle from *Hillyer v. Leeke* (1976) 51 T.C. 90. That case arose under Schedule E, but the *ratio* of the first ground of decision is equally applicable to Schedule D. The taxpayer was a computer engineer. His work involved travelling to the establishments of his firm's customers. His employers required him to wear a suit. When present on a customer's premises he might be called upon to assist the customer's engineer at short notice without an opportunity to change into overalls or a boiler suit. The taxpayer therefore maintained two working suits which he wore only

> for the purposes of his work. He claimed a deduction of £50 for their upkeep. This was disallowed by the inspector. The commissioners confirmed the assessment. I read the following passages from the judgment of Goulding J. at p. 93 which seem to me to be correct and in point:
>
> "The truth is that the employee has to wear something, and the nature of his job dictates what that something will be. It cannot be said that the expense of his clothing is wholly or exclusively incurred in the performance of the duties of the employment**. . . .** In the case of clothing the individual is wearing clothing for his own purposes of cover and comfort concurrently with wearing it in order to have the appearance which the job requires**. . . .** Does it make any difference if the taxpayer chooses, as apparently Mr. Hillyer did, to keep a suit or suits exclusively for wear when he is at work? Is it possible to say, as Templeman J. said about protective clothing in the case of *Caillebotte v. Quinn* [1975] 1 W.L.R. 731, that the cost of the clothing is deductible because warmth and decency are merely incidental to what is necessary for the carrying on of the occupation? That, of course, was a Schedule D and not a Schedule E case, but the problem arises in a similar way. The answer that the Crown makes is that where the clothing worn is not of a special character dictated by the occupation as a matter of physical necessity but is ordinary civilian clothing of a standard required for the occupation, you cannot say that the one purpose is merely incidental to the other. Reference is made to what Lord Greene M.R. said in *Norman v. Golder* (1944) 26 T.C. 293, 299. That was another case under Schedule D, but again, in my judgment, applicable to Schedule E cases, where the learned Master of the Rolls said, referring to the food you eat and the clothes that you wear: 'But expenses of that kind are not wholly and exclusively laid out for the purposes of the trade, profession or vocation. They are laid out in part for the advantage and benefit of the taxpayer as a living human being.' In my judgment, that argument is conclusive of the present case, and the expenditure in question, although on suits that were only worn while at work, had two purposes inextricably intermingled and not severable by any apportionment that the court could undertake."
>
> The learned judge then founded on a second argument turning on the word "necessarily," to which I need not refer as that requirement only exists in the case of a Schedule E computation.
>
> I find myself in complete agreement with Goulding J. and I regard his observations as appropriate in their entirety to the case before your Lordships."

79. In the present case, we accept Ms Daniels' evidence that the dresses that she acquired in order to perform at Stringfellows were not appropriate to be worn outside that club and that she purchased them only for the purposes of her performances. She described them as "see-through" and "skimpy" – they were often decorated with sequins in order to catch the lights under which she performed. The dresses worn by Ms Daniels could not be described as providing "warmth and decency", the mantra used in *Mallalieu*. Indeed, we are satisfied that the objective of Ms Daniels in acquiring the dresses was the reverse of the objective of the provision of "warmth and

decency". Accordingly, we have concluded that the expenditure incurred by Ms Daniels on these dresses is deductible for the purposes of section 34 ITTOIA.

80. In the same vein, we consider that Ms Daniels' claims in respect of expenditure on lingerie and shoes are similarly allowable. HMRC contended that underwear was never allowable. Nonetheless, in this case, it is clear that the type of underwear and lingerie (stockings) bought by Ms Daniels was of a suggestive nature and we accept her evidence that they were not suitable for use outside Stringfellows and was purchased solely for her performances. Similarly, her shoes had very pronounced heels which were used to grip on the pole which she used in her performance and, therefore, we conclude that expenditure on these items was also allowable.

81. It follows that for the same reasons the incidental expenditure incurred on the dry cleaning of these items should also be allowable.

82. In short, we consider that Ms Daniels' expenditure on dresses, lingerie, stockings and shoes etc was akin to the acquisition of a costume by a self-employed actor for use in a performance – expenditure which in accordance with HMRC's established practice is deductible.

Cosmetics and perfume

83. Ms Daniels' evidence was that she applied very much heavier make-up for the purposes of a performance at Stringfellows than would be normal in an everyday context. She did not use that make-up outside her work. Similarly, she used those brands of perfume only for her performances, noting that she would not use those brands of perfume in her everyday life because she did not want to be reminded of her working life as an exotic dancer.

84. Again, in our view, the fact that Ms Daniels *could* have worn make-up and the perfume outside her work is not the correct test. Her evidence was that she did not do so and that she bought those items solely for her performances. We consider that she incurred the expenditure wholly and exclusively for the purposes of her performances and that it was therefore deductible.

Hair and beauty treatment

85. Under this heading, Ms Daniels deducted the cost of hairdressing and, in particular, hair extensions as well as various beauty treatments (e.g. manicures, fake tanning and waxing).

86. We accept that it would not, obviously enough, have been possible to remove her hair extensions or the effect of her manicure treatments when she had finished her performance. Nonetheless, her evidence was that her appearance was of great importance in her role as a Stringfellows dancer. We have no hesitation in accepting this self-evident proposition. It seems to us that, as Lord Brightman observed in *Mallalieu*, that it is necessary to distinguish between the purpose and the effect of expenditure. We are in no doubt that the purpose of Ms Daniel's expenditure on these

items was to enhance her appearance for the purposes of her performances. The effect may have been that her appearance in her everyday life was also enhanced, but that is not the same as her purpose in incurring expenditure. For this reason we consider that the expenditure under this heading is deductible. We consider that this conclusion is consistent, by analogy, with HMRC's own practice as outlined in its own Manuals (BIM50160) in relation to medical expenses:

> "Where a performer claims a deduction for the cost of cosmetic surgery to correct some perceived inadequacy in their appearance then you need to examine whether one of the purposes in incurring those costs was to gratify their private wish to improve/change their appearance. If it was, no deduction will be due. Some performers may, however, be able to show that expenditure on cosmetic surgery has been incurred solely for professional purposes. Such expenditure may be allowed.
>
> Example
>
> A radio performer of many years experience starts to do TV work. She is advised that her irregular teeth are holding back her TV work. She has cosmetic dentistry to give her a perfect smile. It is established as fact that she had been content with her appearance and the TV work was the sole reason for the dentistry. The cost is allowable."

87. In the present case there was no evidence to suggest that Ms Daniel's expenditure on beauty treatments was anything other than for the purposes of her business – on the contrary her evidence was the expenditure for solely for the purposes of her performances. This was supported by her evidence that she had ceased to have these beauty treatments once she stopped dancing.

88. **Presumption of continuity and time limits**

89. In relation to the tax year ended 5 April 2014 (i.e. the year under enquiry), the assessment was validly raised under section 28A TMA.

90. We are also satisfied that the assessments for the tax years ended 5 April 2013 and 2014 fell within the usual four year time limit contained in section 34 TMA.

91. The assessments for the tax years ended 5 April 2011 and 2012, however, fall outside this four year period and, therefore, HMRC must show that a loss of tax has been brought about carelessly or deliberately for the purposes of section 29(4) and section 36 TMA.

92. Furthermore, Ms Curran submitted that where errors were discovered in an enquiry year HMRC had to consider whether those errors would also have occurred in other years. In cases where there had been no material changes in the nature and conduct of the business, the level of turnover or level of expenses Ms Curran argued that HMRC were entitled to apply the "presumption of continuity" (see *Jonas v Bamford* [1973] STC 519).

93. In relation to travelling expenses, Mr Maunders cited various sections of HMRC's Business Income Manual ("BIM"). In particular, Mr Maunders cited BIM 37675. Mr Maunders relied on the final paragraph of BIM 37675 in arguing that Ms Daniels had submitted her returns for the years under appeal in accordance with prevailing law and practice. Section 29(2) TMA provides that a taxpayer shall not be assessed under section 29(1) TMA if the return "was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made." Mr Maunders argued that, on the basis of BIM 37675, Ms Daniels tax returns had been made in accordance with generally prevailing practice.

94. The relevant passages of BIM 37675 stated:

> **"What to do in practice**
>
> In order to determine what travelling and subsistence expenses are allowable it can be useful in some cases to establish where the business is carried on (see Horton v Young….).
>
> Normally, the cost of travel between the business base and other places where work is carried out is an allowable expense while the cost of travel between the taxpayer's home and the business space is not allowable. Carrying on significant business activities at home does not mean that travel between home and another place where the business is conducted is thereby allowable (see Newsom v Robertson….).
>
> What is a business base as a matter of fact to be established in the individual case.
>
> **Separate business premises**
>
> Where the taxpayer owns or rents separate business premises away from their residents there is normally little doubt that these are the base of the business.
>
> **No separate business premises**
>
> There are some types of business where the taxpayer has no separate business premises away from home. For example, a doctor whose only office is a surgery attached to his home or an accountant whose office is at his residence. In these cases, the doctor's costs and travelling to visit patients and the accountant's costs incurred in visiting clients are both clearly allowable. Similarly an insurance agent who has no office away from their residents but who visits clients would also incur allowable coupling expenditure.
>
> In the cases above, the taxpayer would normally visit a large number of different premises to carry on the business. The position is rather different where a subcontractor works at one or a very small number of different sites during the year. In such a case it may be that the premises where the taxpayer carries on the business are, in fact, the business base. If this is so, the cost of travelling between the taxpayer's home and the business space should be disallowed.
>
> Following the decision in Horton v Young…, where a subcontractor works at two or more different sites during a year travelling expenses

between the taxpayer's home and those sites should normally be allowed.

However, where the subcontractor works at a single site in the year and this is the normal pattern for the business, travelling expenditure between the subcontractor's home and the single site should only be allowed if the home is, in some real sense, the centre or base of the business. That will depend on the facts of the case and specifically what business activities are carried out at home.

…" (Emphasis added)

95. Mr Maunders argued that, on the basis of this final paragraph BIM 37675, Ms Daniels' tax returns had been made in accordance with generally prevailing practice.

96. In our view, however, BIM 37675 provides no support for Mr Maunders' submission. It is clear that when this paragraph is read in context it indicates that travel expenses between home and a single site is only exceptionally allowable i.e. in the case where the home was the centre or base of the business in a real sense. In the present case, the activities carried out by Ms Daniels at home were relatively minimal. She consistently performed, over many years, as a dancer only at Stringfellows. It therefore seems to us that that was the real place at which her business was carried out and that her business-related activities carried out at her home were largely incidental.

97. This brings us to the next question, viz the validity of the assessments for the tax years ended 5 April 2011 and 2012 and 2013.

98. As regards the tax year ended 5 April 2013, the assessment was within the four year time period prescribed by section 34 TMA. The tax years ended 5 April 2011 and 2012 were outside this four year time period and can only be assessed, in accordance with section 36 TMA, if the loss of tax was brought about carelessly by the taxpayer (in which case a six year time period from the end of the year of assessment applies). The tax years ended 5 April 2011 and 2012 lie within this six-year time period and it was not contended that the loss of tax was brought about by deliberate behaviour (in which case a 20 year time period would apply).

99. As we have mentioned, in order to assess Ms Daniels under section 29 TMA for the tax years ended 5 April 2011, 2012 and 2013, HMRC must show, first, that an officer of the Board has discovered that income had not been assessed or that relief which has been given was excessive ("the tax shortfall"). Secondly HMRC must show, in accordance with section 29 (4) TMA, that the tax shortfall was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. Thirdly, HMRC must show that the officer could not reasonably have been expected, on the basis of the information made available to him to be aware of the tax shortfall (section 29(5) TMA). It was not, as we understood in dispute that this third requirement was satisfied.

100. In relation to the first two of those three conditions, it seems to us clear that the first condition i.e. that Mr McGivern (or his predecessor) made a "discovery" is satisfied. A discovery in this context is simply that the officer concluded on the

information available to him that insufficient tax had been paid. In *Charlton v HMRC* [2013] STC 1033 the Upper Tribunal stated at [37]:

> "All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment."

101. Mr McGivern, on the facts which emerged in the course of the enquiry into the return for the year ended 5 April 2014, came to the conclusion that tax had been underpaid or that excessive relief had been given for the years ended 5 April 2011, 2012 and 2013. He formed this view on the basis of the presumption of continuity which is nothing more than a common-sense inference that the facts pertaining in one tax year are likely to be the same in earlier years, absent a material change of circumstances. In our view, this plainly constitutes a "discovery" for the purposes of section 29(1) TMA.

102. The real question as regards the validity of the assessments in relation to the tax years ended 5 April 2011, 2012 and 2013 is whether the tax shortfall was "brought about carelessly or deliberately by the taxpayer or a person acting on his behalf" for the purposes of section 29(4) TMA. This carelessness issue is also relevant to the extended six year time limit under section 36 TMA.

103. As we have said, there was no suggestion before us that the alleged tax shortfall was brought about deliberately by Ms Daniels or by her previous tax adviser. The question, therefore, is whether the tax shortfall was brought about carelessly, noting that the carelessness (for the purposes of section 29(4) TMA) can be either that of the taxpayer "or a person acting on [her] behalf."

104. In our view, Ms Daniels and the tax adviser who advised in relation to those two tax returns, acted carelessly in submitting claims for expenses which were in excess of what was properly allowable. It must have been perfectly clear that the facts in Ms Daniels' case were very different from those of *Horton v Young* – the authority upon which Mr Maunders based his case in relation to travelling expenses. Ms Daniels was not carrying on an itinerant business and it should have been clear to her accountant that this was the case.

105. Accordingly, as regards the assessments for the tax years ended 5 April 2011, 2012 and 2013 in relation to travelling expenses the assessments were validly made.

Penalties

106. It must follow from the views expressed above in relation to all matters other than travelling expenses that the suspended penalties charged on Ms Daniels must be discharged. However, as we have indicated, we consider that her excessive claim for travelling expenses was careless. Accordingly, HMRC were justified in charging penalties in relation to these matters.

107. Mr Maunders argued that Ms Daniels could not have been careless because she relied on her accountant to prepare and submit her self-assessment tax returns. We do

not accept that argument. There may be cases, for example those involving the technical construction of a complex piece of tax legislation, where a taxpayer who relies on the advice of a tax adviser may be protected from a penalty on the grounds of carelessness by relying on professional advice. But this is a simpler situation where Ms Daniels consistently claimed travelling expenses from her home to her place of work, without apparently questioning why such expenses could be deductible. On that basis we consider Ms Daniels to have been careless.

108. However, we consider that the amount of the suspended penalties assessed on Ms Daniels was excessive. Pursuant to paragraph 15(2) Schedule 24 FA 2007, we consider that the penalty percentages levied should be reduced for the following reasons.

109. As regards "helping" (i.e. "giving HMRC reasonable help in quantifying the inaccuracy": paragraph 9 (1) (b) Schedule 24 FA 2007), Mr McGivern said:

> "No help provided in calculating the correct figures. Obstreperous approach from the agent. No information provided voluntarily. The agent did however actively engage in discussions to resolve the enquiry."

110. Mr McGivern appears to have underestimated the effect that his rather unreasonable approach referred to in [29] above had upon Mr Maunders – an approach which, in our view, soured the relationship from the beginning. We consider that Mr McGivern (and consequently HMRC) should accept some responsibility for the alleged "obstreperous" behaviour to which Mr McGivern refers. Moreover, we consider that Mr Maunders' robust advocacy and support of his client's case should not be held against him. For these reasons, we would increase the reduction under this heading to 30%.

111. We have also considered whether there should be a reduction in the suspended penalty because of "special circumstances" (paragraph 11 (1) Schedule 24 FA 2007). It is clear that, in effect, we can only reach a different conclusion in relation to a "special circumstances" reduction if we reach the conclusion that HMRC's decision was flawed in the light of principles applicable in proceedings for judicial review (paragraph 17 (3) and (6) Schedule 24 FA 2007).

112. We consider that Mr McGivern's decision was flawed because, as he explained, although he was the decision-maker he had "no clue" as the basis on which the decision in respect of the reduction for "special circumstances" had been taken by those to whom he had referred the issue.

113. Be that as it may, we have nonetheless concluded that there were no "special circumstances" in this case and that, accordingly, no reduction should be made under paragraph 11 Schedule 24 FA 2007.

Disposition

114. Ms Daniels' appeals are allowed in part in relation to the assessments for the four years under appeal as regards her claims for clothing, garments (including lingerie), dry cleaning, shoes, cosmetics, perfume and beauty treatments. In respect of her claim for travelling expenses her appeals against the assessments are dismissed.

115. Similarly, Ms Daniels' appeals against penalties are correspondingly allowed in part in relation to the penalty determinations for the four years under appeal in so far as the penalties relate to her claims for clothing, garments (including lingerie), dry cleaning, shoes, cosmetics, perfume and beauty treatments. In respect of her claim for travelling expenses, her appeals against the suspended penalty assessments are dismissed. Accordingly, HMRC must now recalculate the assessments and penalty determinations on the basis of this decision.

116. Finally, we should observe that Ms Daniels' failure to keep primary records (invoices, receipts etc) fell short of the standards normally expected in respect of a taxpayer seeking to claim a deduction for income tax purposes. In future, we recommend that she should keep such records in respect of any future self-employment she may undertake.

117. 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.

GUY BRANNAN

TRIBUNAL JUDGE
RELEASE DATE: 11 July 2018