



INCOME TAX – travel and subsistence payments – whether taxable as employment income – was there a "substantial effect" on journey when job location changed within Greater London - s338 Income Tax (Earnings and Pensions) Act 2003

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03508

BETWEEN

NARINDER SAMBHI

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
HELEN MYERSCOUGH ACA**

Sitting in public at Taylor House, London EC1 on 15 October 2019

Sarah Black, counsel for the Appellant

Kenniesha Stephens, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a review decision dated 4 May 2018. The review upheld closure notices eliminating claims made by Mr Sambhi in his self-assessment tax returns for relief in respect of payments for travel and subsistence paid by his employer as follows:

Date	Tax year		Tax
27/10/2017	2015/16	Closure Notice	£10,030.40
22/01/2018	2016/17	Closure Notice	£9963.20

2. At the hearing, Ms Black represented Mr Sambhi and Ms Stephens represented HMRC. We heard evidence from Mr Sambhi, and a bundle of documentary evidence was produced.

THE LAW

3. The issue in this appeal is whether Mr Sambhi is entitled to claim relief under ss338 and 339 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") in respect of travel and subsistence allowances paid by his employer, in particular, whether the various construction sites where he worked constituted "temporary workplaces" for the purposes of the legislation.

4. As a matter of general law, the cost of commuting from home to work is not deductible as an expense against employment income. This is on the basis that (in broad terms) it is not a cost wholly, exclusively, and necessarily incurred in the performance of the duties of his employment, but rather a cost incurred to put the taxpayer in the position of being able to perform the duties of his employment.

5. There is an exception for travel and subsistence costs incurred in travel to a location which is not a "permanent workplace". Provision for relief for such expenses is made in ss338 and 339 ITEPA. The legislation is as follows:

338 Travel for necessary attendance

- (1) A deduction from earnings is allowed for travel expenses if—
 - (a) the employee is obliged to incur and pay them as holder of the employment, and
 - (b) the expenses are attributable to the employee's necessary attendance at any place in the performance of the duties of the employment.
- (2) Subsection (1) does not apply to the expenses of ordinary commuting or travel between any two places that is for practical purposes substantially ordinary commuting.
- (3) In this section "ordinary commuting" means travel between—
 - (a) the employee's home and a permanent workplace, or
 - (b) a place that is not a workplace and a permanent workplace.
- (4) Subsection (1) does not apply to the expenses of private travel or travel between any two places that is for practical purposes substantially private travel.
- (5) In subsection (4) "private travel" means travel between—
 - (a) the employee's home and a place that is not a workplace, or
 - (b) two places neither of which is a workplace.

(6) This section needs to be read with section 359 (disallowance of travel expenses: mileage allowances and reliefs).

339 Meaning of “workplace” and “permanent workplace”

(1) In this Part “workplace”, in relation to an employment, means a place at which the employee's attendance is necessary in the performance of the duties of the employment.

(2) In this Part “permanent workplace”, in relation to an employment, means a place which—

(a) the employee regularly attends in the performance of the duties of the employment, and

(b) is not a temporary workplace.

This is subject to subsections (4) and (8).

(3) In subsection (2) “temporary workplace”, in relation to an employment, means a place which the employee attends in the performance of the duties of the employment—

(a) for the purpose of performing a task of limited duration, or

(b) for some other temporary purpose.

This is subject to subsections (4) and (5).

(4) A place which the employee regularly attends in the performance of the duties of the employment is treated as a permanent workplace and not a temporary workplace if—

(a) it forms the base from which those duties are performed, or

(b) the tasks to be carried out in the performance of those duties are allocated there.

(5) A place is not regarded as a temporary workplace if the employee's attendance is—

(a) in the course of a period of continuous work at that place—

(i) lasting more than 24 months, or

(ii) comprising all or almost all of the period for which the employee is likely to hold the employment, or

(b) at a time when it is reasonable to assume that it will be in the course of such a period.

(6) For the purposes of subsection (5), a period is a period of continuous work at a place if over the period the duties of the employment are performed to a significant extent at the place.

(7) An actual or contemplated modification of the place at which duties are performed is to be disregarded for the purposes of subsections (5) and (6) if it does not, or would not, have any substantial effect on the employee's journey, or expenses of travelling, to and from the place where they are performed.

(8) An employee is treated as having a permanent workplace consisting of an area if—

(a) the duties of the employment are defined by reference to an area (whether or not they also require attendance at places outside it),

- (b) in the performance of those duties the employee attends different places within the area,
- (c) none of the places the employee attends in the performance of those duties is a permanent workplace, and
- (d) the area would be a permanent workplace if subsections (2), (3), (5), (6) and (7) referred to the area where they refer to a place.

6. If a workplace is a "temporary workplace", then relief can be claimed in respect of all travel costs, which for this purpose include subsistence costs (see *Nolder v Walters* (1930) 15 TC 380).

BACKGROUND FACTS

7. The background facts were not disputed to any material extent, and on the basis of the evidence before us, we find them to be as follows.

8. Mr Sambhi has worked for Lend Lease EMEA Limited and other companies in the Lend Lease group (collectively, "Lend Lease") since June 2007. Mr Sambhi's home is (and has always been) in Birmingham.

9. As Lend Lease undertake construction work throughout the UK, Mr Sambhi's employment is inherently mobile, and he can be required to work at any of Lend Lease's construction sites in the UK. When Mr Sambhi was initially engaged by Lend Lease, his terms of employment were set out in an offer letter dated 24 April 2007, which included the following statement:

As National Contractors we operate throughout the country and, whilst every effort will be made to keep you in your home area, you could be called upon to travel to projects necessitating living away from home, if the occasion arose.

10. These terms of employment were subsequently amended by letters dated 13 August 2013 and 9 August 2016. The 13 August 2013 letter stated that (save as specifically provided), the terms of Mr Sambhi's employment contract remained the same, and no change was made to the statement mentioned above. The terms of the 9 August 2016 letter did make changes to the terms of Mr Sambhi's employment contract, and included the following statement:

Due to the nature of your role, it is a fundamental requirement of your employment that you are required to be mobile in order to support the project nature of the Lendlease business.

Your temporary place of work will initially be at the Bluesky project site. During the duration of your employment you will be expected to be flexible and work at any other project locations within the UK, as directed by the company from time to time.

11. Prior to 2013, Mr Sambhi worked on projects in the Birmingham area, and was able to commute to them from his home on a daily basis. Since September 2013, his work has taken him further away to Greater London, and he has had to live in temporary accommodation from Monday to Friday. Mr Sambhi incurs travel and subsistence costs, which are reimbursed by Lend Lease, who deduct PAYE and national insurance from these payments.

12. Since September 2013, Mr Sambhi has worked on the following projects around Greater London:

	Project and Location	Start	Finish
1	Elliott School, Putney, London	September 2013	April 2015
2	Corporation of London Guildhall, London	April 2015	December 2015
3	Ruskin Square, Croydon	January 2016	April 2016
4	Queens Hospital, Romford	April 2016	July 2016
5	Project Bluesky, Regents Place, London	July 2016	January 2017
6	20 Jermyn Street, London	January 2017	November 2017
7	Devonshire Square, London	November 2017	February 2018
8	20 Jermyn Street, London	February 2018	June 2018
9	Ruskin Square, Croydon	June 2018 March 2019	March 2019 Present (part-time)
10	Bishopsgate Plaza, Bishopsgate, London	March 2019	July 2019 (part-time)
11	St John's Bosco Academy, Battersea, London	July 2019	September 2019 (part-time)

13. Since September 2013, Mr Sambhi has occupied temporary accommodation at the following addresses:

Address	Dates	Distance from Birmingham home
46 Aldborough Road South, Seven Kings, Ilford	September 2013 to October 2014	143 miles
40 Winns Terrace, Walthamstow	October 2014 to December 2017	130 miles
Romford	December 2017 to present	

14. Mr Sambhi's evidence was that he travelled between his home in Birmingham and the temporary accommodation on Sunday evenings (and back on Friday evenings), and travelled to and from his temporary accommodation and the construction site each weekday.

15. The members of the Tribunal are familiar with Greater London geography, and are aware of the various locations at which Mr Sambhi worked and had (since 2013) his temporary accommodation. Maps were produced in evidence showing these locations, as were tables of the distance in miles of one project from the previous project, the distance from Mr Sambhi's temporary accommodation at the time to the site, and the commuting time (using public transport).

16. In broad terms, projects 2, 5, 6, 7, 8, and 10 were located in central London (they are all within easy walking distance of an underground station in TfL's fare Zone 1). The other projects are located away from central London, and the approximate fare zones of the projects and of Mr Sambhi's temporary accommodation are (very broadly) as follows:

	Location	
1	Elliott School, Putney, London	Zone 3, SW London
3	Ruskin Square, Croydon	Zone 5, S London
4	Queens Hospital, Romford	Zone 6, NE London
9	Ruskin Square, Croydon	Zone 5, S London
11	St John's Bosco Academy, Battersea, London	Zone 2, SW London
	46 Aldborough Road South, Seven Kings, Ilford	Zone 4, NE London
	40 Wins Terrace, Walthamstow	Zone 3, NE London

17. It can be seen that only project 4 (Queens Hospital, Romford) was in (very broadly) the same part of Greater London as Mr Sambhi's temporary accommodation. For all the other projects, he would have had to travel either into central London, or across central London to either South or South West London. Some of these journeys would have required Mr Sambhi to use different modes of public transport, having to change, for example, from the Underground to National Rail suburban services, and then to a bus. However, fares for all of the locations were within the TfL Oyster card scheme, and the cost of a monthly season ticket from his temporary accommodation to the various sites and journey times for the tax years under appeal were as follows

Journey	TfL Zones	Monthly cost	Journey time (min)*	Distance (miles)
Seven Kings to Elliott School	1-6	£240	100/93 mins	14.3
Walthamstow to Guildhall	1-4	£180	60 mins	7.5
Walthamstow to Ruskin Square	1-6	£240	90 mins	23.2
Walthamstow to Queens Hospital	1-6	£240	100 mins	11.3
Walthamstow to Bluesky	1-4	£180	58 mins	8.2
Walthamstow to Jermyn St	1-4	£180	60 mins	9.9

*Where there are two figures is because there was a change in temporary accommodation (and travel time in consequence) during the project

18. It is not obvious to us why a TfL zone 1-6 card was required for the journey from Seven Kings to Putney, as we are aware that Seven Kings station is in TfL zone 4, and East Putney Underground Station is on the boundary of Zones 2 and 3, and so a TfL zone 1-4 card would have been adequate – but as this was not challenged by HMRC, we do not propose to take this any further.

MATTERS IN ISSUE

19. It is common ground that Mr Sambhi's entitlement to relief under s338 ITEPA depends, first, on whether a construction site is capable of being a "temporary workplace" within the meaning of s339(2), and then, secondly, whether it is prevented from being a "temporary workplace" by s339(4) and (5). It is common ground also that each of the various project locations are potentially capable of being temporary workplaces, as each one is for a limited duration or for a temporary purpose.

20. So, the only issue in dispute is whether any of the sites are prevented from being temporary workplaces by either s339(4) or s339(5). Section 339(5) provides for the "24-month rule", and HMRC submit that it is the operation of this rule that means that Mr Sambhi cannot claim relief under s338.

21. The first limb of the 24-month rule is whether there is "a period of continuous work" at the particular location (the legislation refers to a "place"). This is defined in s339(6) as being where

the duties of the employment are performed to a significant extent

HMRC's manuals at EIM 32080 and in Guide 490 (Employee Travel) state that this test is met where 40% or more of the taxpayer's working time is spent there. It is not disputed that this test is satisfied for all the sites at which Mr Sambhi worked in the tax years under appeal (there was a period of part-time work in subsequent years, but this is not in issue in this appeal).

22. The second limb is that the period of continuous work must either last for more than 24 months, or comprise all (or almost all) the periods for which the taxpayer is likely to hold his employment. Providing each site is considered separately, it is not disputed that this test is *not* satisfied. Mr Sambhi's engagement on each project was for less than 24 months, and as he had worked for Lend Lease since 2007 (and continues to be employed by them), none of the projects constitute all (or almost all) the period of his employment.

23. The only issue in this appeal is the application of s339(7) to his transfer from one project to the next. His transfer by Lend Lease from one project to the next constitutes an actual modification of the place at which the duties of his employment are performed. The question is whether this change has

any substantial effect on [Mr Sambhi's] journey, or expenses of travelling, to and from the place where they are performed.

24. We were referred to the following cases, all decisions of the First-tier Tribunal, and so none are binding on us.

25. *Williams* [2012] UKFTT 378 (TC) concerned a tunneller who initially worked on the Heathrow Terminal 5 project, the expectation was that he would work on this project for 16 months, but the project was extended, and he was only transferred to his next project (at Kings Cross) more than 24 months later. Various issues are discussed in the decision, none of which are relevant to this appeal. The decision did not consider whether a transfer from Heathrow to Kings Cross had a "substantial effect" on Mr William's journey, as the point appears to have been conceded by HMRC. We therefore find this decision of little help to us.

26. In *Ratcliffe* [2013] UKFTT 420 (TC) and in *Nowak* [2019] UKFTT 511 (TC), the appellant was engaged under a series of short term contracts, and therefore the effect of s339(4)(b) was to treat each place at which he worked as being his permanent workplace. These decisions are therefore of no relevance to this appeal.

27. In *Wragg* [2014] UKFTT 553, the appellant had his permanent home in or around Liverpool. For a short period, he worked on tunnels in Liverpool. From August 2006 to August 2007 he worked on a tunnel system in Stratford (East London) relating to the Olympic games, and from September 2007 until August 2009 he worked on a tunnel in the Croydon area (South London). Following the Croydon project, he worked on the A3 tunnel at Hindhead (Surrey). For each project he rented temporary accommodation near the project. As with Mr Sambhi, he commuted at weekends between his temporary accommodation and his home in Liverpool, and commuted each weekday between the temporary accommodation and the construction site. But unlike Mr Sambhi, Mr Wragg rented new temporary accommodation for each project, so that the temporary accommodation was close to the construction site in question. At the hearing, once the facts of the case became clear, the HMRC representative conceded the appeal, which was therefore allowed by consent. The tribunal therefore never had to consider whether the transfers between different projects had a "substantial effect" on Mr Wragg's journey.

HMRC'S SUBMISSIONS

28. HMRC accept that the Elliott School project in Putney was a temporary workplace, and have allowed Mr Sambhi's claim for relief in respect of travelling and subsistence allowances from September 2013 to April 2015. But HMRC submit that there was no substantial effect on Mr Sambhi's journey when he transferred to the project at Guildhall – when considering the journey from Mr Sambhi's permanent home in Birmingham to the relevant constructions site. If HMRC are correct, then the Elliott School and Guildhall projects are treated as a single workplace. HMRC then go on to submit that there is no substantial effect on Mr Sambhi's journey for each subsequent change in project location. In consequence, all of the sites in Greater London are treated as a single workplace, and the 24-month rule is then applied to deny relief.

MR SAMBHI'S SUBMISSIONS

29. Ms Black submitted that HMRC's analysis was wrong for four reasons. First, the statutory test is framed by reference to the "journey" – and Mr Sambhi travels each week from his home to the temporary accommodation, and then from the temporary accommodation to the particular construction site. The journey to be analysed is therefore the journey from the temporary accommodation to the site – not a hypothetical trip from Birmingham to the site (a journey he never makes). Ms Black submits that the fact that Mr Sambhi has claimed travel expenses from his home in Birmingham does not negate this, as *Nolder* (cited above) established that if a workplace is temporary, it follows that all travel costs are relieved.

30. Secondly, the changes in the locations of the constructions sites at which Mr Sambhi worked did have a substantial effect on the Appellant's journeys. "Substantial" is not defined in the legislation, and should therefore bear its natural meaning. Ms Black submits that "substantial" in this context means "material". We were taken through each of Mr Sambhi's journeys from his temporary accommodation to each of the various project sites, and were taken to the modes of transport used, the time taken, and the cost.

31. Thirdly, Ms Black submits that HMRC have departed from their own guidance in Guide 490 (at 3.24), which states that construction sites are considered as temporary workplaces if the employee's attendance at the site is not expected to last longer than 24 months. The Guide also gives an example (at 4.9) of a change in the location of a workplace, but in circumstances where (by chance) the journey time and cost remain roughly the same, and this is accepted as a change in the location of the workplace. Ms Black submits that the mere fact that Mr Sambhi's daily journey time or cost may not vary when he is transferred from one site to another falls within this guidance.

32. Finally, Ms Black submits that the implication of HMRC's submissions is that much of Greater London (bounded by Putney, Croydon, and Romford) is a "geographical area". This would appear to fall within s339(8). But s339(8) requires that the contractual duties of Mr Sambhi's employment are defined by reference to an area, which is not the case here. HMRC cannot artificially create a different "area" rule through an expansive interpretation of ss339(5) and (7).

DISCUSSION

33. One of the striking facts in this appeal is that when Mr Sambhi was transferred to work on the Elliott School project in Putney (in South West London), the location he chose for his temporary accommodation was in Ilford in North East London – on the diagonally opposite side of Greater London from the location of the project, and with the result that his weekday commute was long and expensive. Although he moved part-way through this project, it was to Walthamstow, also in North East London and also on the diagonally opposite side of London to the location of the project. He could not have chosen more awkward and expensive locations

from which to commute to Putney. His temporary accommodation is now in Romford, also in North East London.

34. He must have made a deliberate decision not to change the location of his temporary accommodation to minimise his daily commute when the location of the project construction sites changed. This is quite different from the facts in *Wragg*. This does rather beg the question of whether the "temporary accommodation" was really temporary? In substance, did Mr Sambhi have a second home in London, from which he commuted daily to the various workplaces? We note, for example, that he rented his accommodation in Walthamstow for over three years, and this does have a feel of permanence.

35. This approach would be consistent with Ms Black's submission that the journey that needed to be considered for the "substantial effect" test was only the weekday journey from the temporary accommodation to the relevant construction site, and not the weekend journey from Birmingham to the temporary accommodation and back.

36. But, even if we were to find that Mr Sambhi is entitled to relief under s338 ITEPA, having read the *Nolder v Walters* decision, we are far from convinced that it provides authority for the proposition that Mr Sambhi would be entitled to claim the expenses of his travel between Birmingham and his "temporary accommodation".

37. However, these points have not been raised by HMRC, and as neither Ms Black nor Mr Sambhi had an opportunity to respond to them, we take them no further.

38. We consider that the correct approach in this case is to consider the journeys from Mr Sambhi's home in Birmingham to the various construction sites, via the temporary accommodation – but to average them over the week.

39. We have assumed that the journey time driving from Mr Sambhi's home in Birmingham to the temporary accommodation in Ilford is 2hr 50 mins and to Walthamstow is 2hr 40 mins (assuming an average speed of approx. 50 mph over the entire journey). The average mileage allowance paid by Lend Lease was 35.4p/mile (this is based on Mr Sambhi's declared mileage of 19,220 for 2014/15, and the Lend Lease mileage allowance payment to him of £6805).

40. On a weekly basis Mr Sambhi's weekly journey pattern is as follows:

Project	Birmingham-Accommodation (return)			Accommodation-Workplace (return)			Total			
	Miles	Time min	Cost £	Miles	Time min	Cost £	Miles	Time min	Time Diff	Cost £
Elliott School	286	340	120.38	38.4	200	11.08	478.0	1340		175.76
Elliott School	260	320	113.30	34.4	186	11.08	423.0	1250		168.68
Guildhall	260	320	113.30	15.0	120	8.31	335.0	920	-5.5hr	154.84
Ruskin Square	260	320	113.30	46.4	180	11.08	492.0	1220	5hr	168.68
Queens Hospital	260	320	113.30	24.4	200	8.31	382.0	1320	1.67hr	168.68
Bluesky	260	320	113.30	16.4	116	8.31	342.0	900	-7hr	154.84
Jermyn Street	260	320	113.30	18.2	120	8.31	351.0	920	0.33hr	154.84

41. It can be seen from this table that the weekly travel costs incurred by Mr Sambhi differ by no more that £14 on changing from one project location to another.

42. We agree with Ms Black that – particularly in the context of public transport in London – it is more important to consider journey time than mileage – as the straight line distance between two points does not necessarily reflect the true nature of the journey. When considering journey time, the differences arising on change in project location vary by greater amounts.

43. In considering the change in project location from Elliott School to Guildhall, we have considered the change in journey after Mr Sambhi moved from Ilford to Walthamstow (as his decision to change his temporary accommodation is not a relevant criterion for our assessment). So, the change in project location from Elliott School to Guildhall reduced weekly journey time by 5.5hrs , and reduced weekly travel costs by £13.85. Based on twelve "trips" per week (ten weekday trips and two weekend trips), the average reduction in one-way trip time is about 28 mins

44. The change in project location from Guildhall to Ruskin Square increased weekly journey time by 5hrs and increased weekly travel costs by £13.85. The average increase in one-way trip time is 25 mins.

45. The change in project location from Ruskin Square to Queens Hospital increased weekly journey time by 1.67hrs. The weekly travel costs are unchanged. The average increase in one-way trip time is about 8 minutes.

46. The change in project location from Queens Hospital to Bluesky reduced weekly journey time by 7 hours and reduced weekly travel costs by £13.85. The average reduction in one-way trip time is 35 minutes.

47. The change in project location from Bluesky to Jermyn Street increased weekly journey time by 0.33hr. There was no change in weekly travel costs. The average increase in one-way trip time was about 2 minutes.

48. As "substantial" is not defined in the legislation, it must take on its natural meaning, given its context.

49. We were given an extract from an online dictionary (Lexico.com – powered by Oxford) which gives the following definition for "substantial":

ADJECTIVE

1 Of considerable importance, size, or worth.

'a substantial amount of cash'

1.1 Strongly built or made.

'a row of substantial Victorian villas'

1.2 (of a meal) large and filling.

'breakfast is a substantial buffet'

'the first meal of the day should be substantial'

1.3 Important in material or social terms; wealthy.

'a substantial Devon family'

2 Concerning the essentials of something.

'there was substantial agreement on changing policies'

3 Real and tangible rather than imaginary.

'spirits are shadowy, human beings substantial'

50. The essence of all these definitions is the emphasis on size. We find that for something to have a "substantial effect", the effect must be sizable. We disagree with Ms Black's submission that substantial is equivalent to material in this context.

51. The question before us is whether there was a substantial change to the journeys made by Mr Sambhi when the project locations changed, or whether there was a substantial change in his expenses of travelling.

52. We find a change of no more than £14 in his weekly travel costs on changing workplace is not substantial.

53. Given the differences in scale and mode of transport - particularly when comparing the weekend journeys to and from Birmingham in a car, with the weekday journeys in Greater London on various modes of public transport – judging whether there is any substantial effect on the journey inevitably has to be impressionistic. Looking at the average change in the time taken for each of the twelve "trips" may be somewhat "rough and ready", but we find that it gives a reasonable basis on which to judge whether the overall effect is "substantial". The greatest change in the one-way trip time (averaged over a week) is just over half an hour. We do not consider that this gives rise to a "substantial effect".

CONCLUSION

54. The appeal is therefore dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE

RELEASE DATE: 20 MAY 2020