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Sweet & Maxwell
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SE1 8EZ
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Case Notes

***Samadian v HMRC*: deductibility of travel expenses when working from home**

Travel expenses: a policy issue

A recent Upper Tribunal (UT) decision, *Dr Samad Samadian v HMRC (Samadian)*,¹ suggests it is becoming more difficult for self-employed professionals and traders who use their home as a place of business to deduct travel expenses on journeys between their home and other fixed and predictable places of business. There is some evidence that this marks a tightening of HMRC practice,² though it may be that the older case law can justify the stance in *Samadian*³ and that nothing has really changed: it has merely been explained. In *Noel White v HMRC (Noel White)*⁴ the First-tier Tribunal (FTT) followed the approach of the UT, whilst stating that they were doing so purely on the basis of applying the statutory test.⁵ This note considers the case law as well as some of the policy issues surrounding this question. Even if this approach can be justified on the basis of the current case law and statute, is it logical and does it make sense in a world of increasingly flexible working, with so many using their home as a place of business?⁶

*Samadian*⁷ plays a major role in the line of travel expense cases stretching back to *Horton v Young (Horton)*⁸ and *Newsom v Robertson (Newsom)*,⁹ and relying in part on the leading case on the general test for deductibility of mixed business and personal expenses, *Mallalieu v Drummond (Mallalieu)*.¹⁰ The approach in the *Samadian* case also has the side-effect of more clearly and closely aligning the deductibility of travel expenses of the self-employed under the general “wholly and exclusively” test in section 34 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA) with the specific statutory regime governing travel deductions for employees in sections 337–342 of the Income Tax (Earnings and Pension) Act 2003 (ITEPA).

¹ *Dr Samad Samadian v HMRC* [2014] UKUT 13 (TCC); [2014] STC 763.

² G. Smith, “The way to go home” (2013) 171(4391) *Taxation* 8, 11.

³ *Samadian*, above fn.1, [2014] STC 763.

⁴ *Noel White v HMRC* [2014] UKFTT 214 (TC).

⁵ *Noel White*, above fn.4, [2014] UKFTT 214 (TC) at [67].

⁶ According to the Office of National Statistics there are now 4.2 million home workers in the UK—the highest since records began in 1998: see ONS, *Characteristics of Home Workers, 2014* (2014), available at: <http://www.ons.gov.uk/ons/rel/lmac/characteristics-of-home-workers/2014/rpt-home-workers.html> [Accessed June 17, 2014]. One-third of these home workers (defined as those who usually spend at least half of their work time using their home) are employees and the rest are self-employed. Another categorisation is that 1.5 million of the home workers work within their home or the grounds of their home and 2.7 million meet clients and customers elsewhere and only use their home as a base.

⁷ *Samadian*, above fn.1, [2014] STC 763.

⁸ *Horton v Young* (1971) 47 TC 60 (CA).

⁹ *Newsom v Robertson* (1952) 33 TC 452 (CA).

¹⁰ *Mallalieu v Drummond* [1983] STC 665 (HL).

The Office of Tax Simplification (OTS) has recently proposed clarification and simplification of the rules applying to employees.¹¹ In response the Government has announced a review of travel rules that will

“... aim to produce a new system that reflects working patterns in the 21st century. The government does not intend that any new system would provide relief for private travel or ordinary commuting. However the government is open to exploring different principles and methods for determining when travel expenses should attract tax relief and will invite views on this in a structured way as part of the review.”¹²

The announcement suggests that only employee expenses will be reviewed. This would be a lost opportunity. As work practices change and the line between employment and self-employment becomes more and more difficult to draw, it is important that the travel expenses rules for the self-employed should be examined side by side with those for employees to improve horizontal equity and reduce tax distortions in the structuring of working arrangements.

***Samadian*: the FTT decision**

In *Samadian*¹³ the taxpayer was a consultant geriatrician employed full-time by the National Health Service (NHS), and working principally at two NHS hospitals in south London. He had a permanent office and secretarial support at one of the NHS hospitals. In common with many medical doctors, he also carried on a busy professional private practice as a self-employed medical practitioner. In his self-employed capacity he met with patients in weekly out-patient sessions in consulting rooms hired by him at two private hospitals in London (St Anthony’s and Parkside). The rooms were hired out for three-hour sessions, a removable name plate could be placed on the door, and the rooms contained basic office furniture and some medical instruments, though the taxpayer generally used his own instruments that he kept at his home. If his patients required hospital admittance, Dr Samadian supervised their care, usually at St Anthony’s where he would typically have six to eight patients at any one time and where he made ward rounds every evening except Sunday. He occasionally visited his patients at their homes or other places of care. He did not have an office or administrative support at either of the two private hospitals, but could receive communications by way of a pigeon hole shared with other doctors with a surname starting with “S”. On these facts, the FTT found that Dr Samadian had a place of business, in the sense of a “generally fixed and predictable” place at which he performed work in his private practice, at both St Anthony’s and Parkside.¹⁴ Dr Samadian also maintained a separate office at his home for his professional practice, where he kept files relating to his private patients and where he undertook the majority of the administration work and correspondence

¹¹ Office of Tax Simplification, *Review of employee benefits and expenses: second report* (January 2014), available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275795/PU1616_OTTS_employee_benefits_final_report.pdf [Accessed June 10, 2014]. The proposals are discussed in more detail at the end of this note.

¹² HM Treasury, *Employee benefits in kind and expenses: an update* (2014), available at: <https://www.gov.uk/government/publications/employee-benefits-in-kind-and-expenses-an-update/employee-benefits-in-kind-and-expenses-an-update> [Accessed June 10, 2014].

¹³ *Samadian*, above fn.1, [2014] STC 763.

¹⁴ *Dr Samad Samadian v HMRC* [2013] UKFTT 115 (TC) (*Samadian (FTT)*) at [83] and [101].

related to his professional private practice.¹⁵ Importantly, the FTT also found that his home office constituted another place of business of his professional private practice.

At issue in the case was the deductibility in computing the taxpayer's self-employment income of three types of car travel expenses: (a) travel between the NHS hospitals and the private hospitals; (b) travel between his home and the private hospitals; and (c) travel between the NHS hospitals and his private patients' homes. Dr Samadian and HMRC had come to a preliminary agreement that certain other travel was deductible under section 34 of ITTOIA¹⁶ as being "wholly and exclusively" for the purposes of his profession, namely his travel between the private hospitals, between the private hospitals and his patients' homes or other care location, and between his home and his patients' homes or other care location. It was also agreed that travel between his home and the NHS hospitals and travel between the two NHS hospitals was not deductible in computing his income from self-employment.

The FTT ruled in HMRC's favour on (a) travel between the NHS hospitals and private hospitals and (b) travel between his home and the private hospitals, deciding that such travel did not satisfy the "wholly and exclusively test" in section 34 of ITTOIA. In relation to issue (b), the FTT concluded that the taxpayer

"... must have a mixed object in his general pattern of travelling between his home and his places of business at Parkside/St Anthony's. Part of his object in making those journeys must, inescapably in our view, be in order to maintain a private place of residence that is geographically separate from the two hospitals. It follows that even though we find he has a place of business also at his home, his travel between home and those two locations cannot be deductible, on the basis of the reasoning in *Mallalieu* ..."¹⁷

The FTT found for the taxpayer on (c), deciding such travel was generally deductible, absent some specific non-business motive in any particular journey between the NHS hospital and the patient's home. Dr Samadian appealed to the UT on (a) and (b). HMRC chose not to appeal on (c).

Samadian in the UT

In the UT, Sales J upheld the decision of the FTT against the taxpayer on both (a) and (b), with the result that the taxpayer's travel between his home/NHS hospitals and the private hospitals was not deductible. The judge began by agreeing with the FTT in its characterisation of the taxpayer's home¹⁸ and the private hospitals as places of business,¹⁹ and thus with the FTT's overall findings that the taxpayer had a number of places of business rather than a single "business base." Although Sales J acknowledged that the reasoning in some of the previous cases had relied on

¹⁵ *Samadian (FTT)*, above fn.14, [2013] UKFTT 115 (TC) at [92] and [101].

¹⁶ Technically, for the tax periods up to 2004–05 the relevant legislation was s.74 ICTA, but the FTT and UT accepted that the effect of the old and new legislation was the same: see *Samadian*, above fn.1, [2014] STC 763 at [10]–[12].

¹⁷ *Samadian (FTT)*, above fn.14, [2013] UKFTT 115 (TC) at [94].

¹⁸ *Samadian*, above fn.1, [2014] STC 763 at [9]. HMRC had pressed the point before the UT that the FTT had not determined the taxpayer's home was his "business base", but only that he had one of a number of places of business there.

¹⁹ *Samadian*, above fn.1, [2014] STC 763 at [22].

locating “the base” of a taxpayer’s business,²⁰ he concluded that the “wholly and exclusively” test does not depend on identifying a single base of business, though it may in some circumstances be useful to do so. Further, the judge ruled that the FTT was right to consider such an approach was not of assistance in the present case.²¹

Sales J then turned to the key question of whether travel between the taxpayer’s home and the private hospitals (being travel between the taxpayer’s places of business) was “wholly and exclusively” for the purposes of his profession. Sales J held that these journeys did not satisfy the high threshold in section 34 of ITTOIA. The judge began by outlining what he thought the appropriate test to be, from his reading of section 34 of ITTOIA and *Mallalieu*:

“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 purpose is applicable, and the language used in the relevant provisions likewise supports that view.”²²

Sales J then proceeded to apply that test strictly, beginning with Dr Samadian’s journey from the private hospitals to his home at the end of the day. The judge dismissed the taxpayer’s arguments that his journey home was just an inevitable, foreseen effect of (1) his having had to make the outward journey from home to the private hospital, with the sole purpose of carrying on his private practice and (2) his home being located at his office, with the sole purpose of the journey to get to the office which happened to be located at his home. Sales J concluded:

“I reject both those 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.”²³

In arriving at this conclusion Sales J cited as support a number of statements from *Newsom*, including Romer LJ’s famous description of the barrister’s travel between his chambers in London and his home in Whipsnade:

“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.”²⁴

Turning next to the outward journeys from home to the private hospitals, Sales J similarly concluded that it was obvious that those journeys were made partly for the purpose of conducting the taxpayer’s private practice at the hospitals and partly for the purpose of enabling him to

²⁰ Most notably the judgment of Denning LJ in *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

²¹ *Samadian*, above fn.1, [2014] STC 763 at [23].

²² *Samadian*, above fn.1, [2014] STC 763 at [25].

²³ *Samadian*, above fn.1, [2014] STC 763 at [30].

²⁴ *Newsom*, above fn.9, (1952) 33 TC 452 (CA) at 17, cited by Sales J in *Samadian*, above fn.1, [2014] STC 763 at [31].

maintain his home at a location of his choosing.²⁵ Again, the judge drew heavily on *Newsom*, and in particular Romer LJ's reasoning that the barrister's morning journey to London was 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.”²⁶

Given the importance Sales J placed on *Newsom*,²⁷ it was important for him to add that in his view the FTT was wrong to distinguish *Newsom* on the grounds that the barrister did not have a place of business at his home. On the judge's interpretation of the findings of the Special Commissioners in *Newsom*, the barrister used his home as “a settled and predictable place where he did work in his practice”, just as the FTT had described Dr Samadian's arrangement.²⁸ In the Court of Appeal in *Newsom*,²⁹ Denning LJ had focused on the importance of a single base for the profession and apparently elevated this to a test,³⁰ but other members of the Court of Appeal did not do so and this was not consistent with the facts as found in that case. According to Sales J, understanding *Newsom*³¹ in this way made the case closely analogous to the present one, and provided “further, direct and powerful support” for the FTT's (and his) conclusion on this issue.³²

Finally, the judge concluded that the reasoning applicable to journeys between the taxpayer's home and the private hospitals also applied to journeys between the NHS hospitals and the private hospitals: “... the purpose of all these journeys includes a private purpose and hence cannot satisfy the statutory test.”³³

After deciding the particular issues before him, Sales J took the opportunity to conclude his judgment by setting out heretofore unarticulated categories of deductible and non-deductible travel for self-employed persons, which the judge concluded “would attract broad public acceptance”.³⁴ The first category of deductible travel was travel related to “itinerant work”, which in Dr Samadian's case covered his visits to his patients' homes and which HMRC had already agreed was deductible. This finding is in line with the previous authorities, including *Horton*.³⁵ It is also broadly consistent with the rules for employees, which permit a deduction for “on the job” travel³⁶ as well as travel from the employee's home to “temporary workplaces.”³⁷ The second

²⁵ *Samadian*, above fn.1, [2014] STC 763 at [32].

²⁶ *Newsom*, above fn.9, (1952) 33 TC 452 (CA) at 17–18, cited by Sales J in *Samadian*, above fn.1, [2014] STC 763 at [33].

²⁷ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

²⁸ *Samadian*, above fn.1, [2014] STC 763 at [36].

²⁹ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

³⁰ *Powell v Jackman* [2004] EWHC 550 (Ch); [2004] STC 645.

³¹ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

³² *Samadian*, above fn.1, [2014] STC 763 at [37].

³³ *Samadian*, above fn.1, [2014] STC 763 at [41].

³⁴ *Samadian*, above fn.1, [2014] STC 763 at [46].

³⁵ *Horton*, above fn.8, (1971) 47 TC 60 (CA).

³⁶ For HMRC's views on the distinction between “on the job” and “to the job” travel see HMRC, *490: Employee travel—a tax and National Insurance contributions guide* (2014) (*HMRC Employee Travel Guide 490*), available at: <https://www.gov.uk/government/publications/490-employee-travel-a-tax-and-nics-guide> [Accessed June 17, 2014], para.2.5.

³⁷ “Temporary workplace” is defined in ITEPA s.339.

category of deductible travel was travel between places of business for purely business purposes. In *Samadian*,³⁸ the taxpayer's travel between private hospitals and also between his patients' homes and the private hospitals would fall into this category, and indeed HMRC had agreed that this travel was deductible. Again, this is relatively uncontroversial, and it is also broadly consistent with the treatment of employees, who are permitted a deduction for travel "in the performance of the duties of the employment" under section 337 of ITEPA as well as for travel for the employee's "necessary attendance at any place in the performance of the duties of the employment" under section 338 of ITEPA.

The third, and most controversial category, was travel between home—even where the home is used as a place of business—and places of business, which the judge held was not deductible (except in very exceptional circumstances).³⁹ As just discussed, most of the analysis in *Sales J*'s judgment centred on this type of travel.

Further analysis

*Samadian*⁴⁰ represents a strict application of the "wholly and exclusively" test to travel expenses of the self-employed who carry out business activities at home and other predictable locations. It may represent a shift in HMRC practice, apparently in response to information gathered in a general project targeting the tax affairs of self-employed medical doctors,⁴¹ but the writing has been on the wall for some time, at least since the decision in *Powell v Jackman (Powell)*,⁴² which concerned a taxpayer operating a milk round under a franchise agreement with Unigate. In *Powell*,⁴³ Lewison J held that the special commissioner in that case had erred in law in looking for the base of the trading operation. He pointed out that, as explained above, only Denning LJ in *Newsom*⁴⁴ had elevated that to a test. The true test remained the statutory one. Lewison J went on to distinguish the case before him, where he found that the expenses were not deductible. The key concept is predictability. Mr Horton's places of work as a bricklayer were not predictable; the milkman's round area was. This emphasis on predictability is reflected in HMRC's Business Income Manual, which rests heavily on *Powell*.⁴⁵

Whether the *Samadian* UT decision⁴⁶ can be characterised as a shift in the law depends on whether one views *Horton*⁴⁷ or *Newsom*⁴⁸ as the logical starting point for the analysis. *Horton*⁴⁹

³⁸ *Samadian*, above fn.1, [2014] STC 763.

³⁹ *Sales J* provided one example of such exceptional circumstances—if Dr Samadian had travelled from home to a private hospital, and then discovered he had forgotten a patient's notes at his home thus requiring him to drive home, retrieve the notes, and return to the private hospital, the expenses related to the note-retrieval journey would be deductible: see *Samadian*, above fn.1, [2014] STC 763 at [27].

⁴⁰ *Samadian*, above fn.1, [2014] STC 763.

⁴¹ Smith, above fn.2, 11.

⁴² *Powell*, above fn.30, [2004] STC 645.

⁴³ *Powell*, above fn.30, [2004] STC 645.

⁴⁴ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

⁴⁵ HMRC, Business Income Manual BIM37635, *Wholly and exclusively: duality of, or non-trade, purpose: travel costs: home to work: predictability of places of work*, available at: <http://www.hmrc.gov.uk/manuals/bimmanual/bim37635.htm> [Accessed June 17, 2014].

⁴⁶ *Samadian*, above fn.1, [2014] STC 763.

⁴⁷ *Horton*, above fn.8, (1971) 47 TC 60 (CA).

⁴⁸ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

⁴⁹ *Horton*, above fn.8, (1971) 47 TC 60 (CA).

has often been cited as establishing that if one's home is a place of business then travel between that place and other places of business are deductible. *Newsom*,⁵⁰ on the other hand, is seen as supporting the proposition that there is a high hurdle for deducting travel from home to a regular place of business, even if the taxpayer also regularly works at home. In any event, under this new *Samadian* formulation, travel expenses will be deductible in relation to itinerant work and for journeys between places of business for purely business purposes only. Travel expenses for journeys between home (even where the home is used as place of business) and regular places of business will be non-deductible (other than in very exceptional circumstance). In practice, the formulation seems to restrict the ability of self-employed persons to deduct travel between home and other fixed and predictable places of business further than had been understood to be the case for many years, with real consequences for many taxpayers.⁵¹ The impact can also be seen in the FTT's application of *Samadian* in *Noel White*.⁵²

The *Samadian* formulation for travel expenses raises a number of issues. First, in Dr Samadian's situation his travel to his patients' homes from his house/hospitals clearly qualified as "itinerant work" but his travel between his home and the two private hospitals in London did not. This is despite the fact that he did not have access to dedicated offices at those hospitals and, in theory, could have chosen to meet his patients in the consulting rooms of any of a number of hospitals (or surgeries) in the London area. This raises the question whether if Dr Samadian had instead met patients at less fixed and predictable locations, say any of five or seven or nine different hospitals, would that have qualified as "itinerant work"?

It is also noteworthy that this third newly articulated category is similar in its effect to the rules governing employees, where travel from home to a "permanent workplace" is non-deductible as merely ordinary commuting. "Permanent workplace" for this purpose is defined in HMRC guidance:

"A place where an employee works is a permanent workplace if he or she attends it regularly for the performance of the duties of the employment. But it will not be a permanent workplace if it is a temporary workplace. A temporary workplace is somewhere the employee goes only to perform a task of limited duration or for a temporary purpose."⁵³

These other terms are then defined in turn with many examples given. This could provide policy grounds for supporting the decision in *Samadian*⁵⁴ on the basis that it advances horizontal equity and neutrality between the taxation of employees and the self-employed. It seems that Sales J was influenced by Dr Samadian's concurrent employment with the NHS. If his travel between his home and his two NHS hospitals was not deductible in computing his employment income, why should he be able to deduct travel between his home and the two private hospitals in computing his self-employment income? Would such a finding "attract broad public acceptance", to borrow the judge's turn of phrase? Perhaps or perhaps not, but of course the

⁵⁰ *Newsom*, above fn.9, (1952) 33 TC 452 (CA).

⁵¹ The practical consequences could include opening up past accounts under discovery powers as discussed by Smith, above fn.2, 11.

⁵² *Noel White*, above fn.4, [2014] UKFTT 214 (TC) at [58] and [67]–[68].

⁵³ *HMRC Employee Travel Guide 490*, above fn.36, para.3.9.

⁵⁴ *Samadian*, above fn.1, [2014] STC 763.

current legal position is that employees are subject to a statutory code on travel expenses in ITEPA whilst ITTOIA, governing the self-employed, does not contain any such code.

It might well be that the answer lies in statutory alignment of the treatment of the employed and the self-employed on travel expenses, at least in terms of what amounts to ordinary commuting, but the statutory code in ITEPA requires lengthy guidance to elaborate and give detailed examples and the part of the guidance on what amounts to a permanent workplace for employees is complex and uncertain, so it is not the best of models.

The OTS's review of employee benefits and expenses has designated this area as one that requires reform, stating:

“One of the key complexities in the current legislation is the definition of ordinary commuting, based on the artificial distinction between a permanent and a temporary workplace. As shown in the examples above, the definitions often rely on subjective tests and complex considerations such as ‘regular’ and ‘necessary’ attendance at a workplace, ‘a task of limited duration’, and understanding HMRC’s interpretation of ‘for some temporary purpose’”.⁵⁵

Consequently, the OTS has proposed that a clear definition of a permanent workplace should be created by statute for employees. They say:

“Our preference from a simplification point of view is to have a rule that says an employee can have only one permanent workplace, being the place where they spend the greatest part of their working time. However, if costing shows that this route would be too expensive for the Exchequer, we recommend amending Section 339 ITEPA 2003 to redefine ‘permanent’ and ‘temporary’ workplace by introducing a statutory percentage test, probably at 30 per cent”.⁵⁶

Despite this proposal being held out as a simplification, the OTS report then requires almost two pages to explain what it means by this 30 per cent rule. This is not a simple problem and it may not be amenable to a simple solution. As set out above, however, the Government has decided to consult on the issue (even though it has made clear that it will not want to relax the rules for ordinary commuting significantly). If this is a serious policy-making exercise it needs to examine the rules for the self-employed at the same time as it looks at those for employees. Perhaps in that sense the *Samadian* case⁵⁷ will have been a step in the right direction, even though it is currently causing concern for many taxpayers. [Ⓞ]

Judith Freedman and Glen Loutzenhiser

⁵⁵ Office of Tax Simplification, above fn.11, para.6.8.

⁵⁶ Office of Tax Simplification, above fn.11, paras 6.35–6.41.

⁵⁷ *Samadian*, above fn.1, [2014] STC 763.

[Ⓞ] Business expenses; Business travel; Employees; Expenses; Homeworkers; Income tax; Self-employment; Tax policy; Wholly and exclusively rule