Bulletin 197

Cstmrs

CH/3860/2005

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is an appeal by the Claimant, brought with my permission, against a decision of the Bexleyheath Appeal Tribunal made on 25 February 2005. For the reasons set out below that decision was in my judgment erroneous in law and I set it aside. In exercise of the power in paragraph 8(5)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000 I make the further finding of fact set out in below and substitute for the Tribunal's decision a decision to the same effect as that made by the Tribunal, save as follows:

> (i) the sum of £6,144.97 shall be substituted for the sum of £8,144.97 in paragraphs 1(a), (b) and (c) of the Decision Notice;
>
> (ii) in respect of the year 2002-3 there shall be deductible in respect of the car loan the sums of £244.93 in respect of loan interest and the sum of £1577.23 in respect of capital repayments;
>
> (iii) in respect of the year 2003-4 there shall be deductible in respect of the car loan the sums of £201.19 in respect of loan interest and the sum of £1670.66 in respect of capital repayments.

2. The Claimant is a woman now aged 41. She was employed as a tax consultant until October 2002, at a salary of about £40,000 per annum. However, in January 2002 she had a third right hip replacement, and had a further operation in June 2002. She was not able to return to work after June 2002, and her employment contract was terminated in October 2002. (p.66). In 1999 the Claimant had started, on a self-employed basis, a business as a tax practitioner, having passed her professional exams (p.877). She has continued to carry on this business since then.

3. The Claimant claimed housing and council tax benefit from the London Borough of Bromley ("the Council") in October 2002, but withdrew her claim from 1 October 2003 as she commenced employment on that date and considered that her earnings were above the relevant income level.

4. The decisions under appeal to the Tribunal were decisions, revised on 29 September 2004, as to the Claimant's entitlement to housing and council tax benefit in respect of the period from the date of the claim in October 2002 to 6 October 2003. (The precise period is of no importance to the issues in this appeal). The decisions under appeal led to the result that overpayments had been made to the Claimant, and included decisions that these overpayments were recoverable from the Claimant.

5. The issues in the appeal to the Tribunal concerned the expenses which were deductible from the Claimant's self-employed earnings in computing, for the purposes of housing and council tax benefit, the net profit of her business for the years ended 5 April 2003 and 2004. The provisions relating to the calculation of the net profit of self-employed earners are set out (in relation to housing benefit) in reg. 31 of the Housing Benefit (General) Regulations 1987. The provisions relating to council tax benefit are in materially identical terms.

6. The Tribunal consisted of a legally qualified and a financially qualified panel member. The Council was represented at the hearing, but the Claimant neither appeared nor was represented, and requested that the Tribunal proceed in her absence.

7. The Tribunal allowed the Claimant's appeal and directed the Council to recalculate the Claimant's entitlement to housing and council tax benefit in accordance with the directions set out in its Decision Notice, which dealt with the various expenses set out in the Claimant's accounts. The Tribunal did not deal with the question whether any remaining overpayment would be recoverable, taking the view that, if the recalculations showed that there had still been an overpayment, the issue of recoverability could be dealt with in a fresh appeal against the revised decisions.

8. The Council's recalculations, in accordance with the Tribunal's decision, produced the result, overall, that there were no overpayments, but rather that there were further sums due to the Claimant. In the Claimant's appeal to a Commissioner she contends that aspects of the Tribunal's decision were wrong, and that additional amounts of expenditure should have been held deductible.

9. An appeal to a Commissioner of course only lies on the ground of error of law by the Tribunal.

10. I propose to consider the Claimant's grounds of appeal by reference to the headings adopted in the grounds of appeal, which in turn correspond with the numbering in paragraph 1 of the Tribunal's Statement of Reasons (where the Tribunal set out the contents of its decision).

(a), (b) and (c) (gross profit for year ended 5 April 2003)

11. The Tribunal stated that the gross profit in the year ended 5 April 2003 was £8,144.97. That was a slip by the Tribunal. The gross profit was in fact £6,144.97. However, I would not have set aside the Tribunal's decision on this ground alone as the Council recognised the error and in revised calculations on 12 May 2005, implementing the Tribunal's decision, used the correct figure of £8,144.97. As, however, I am setting aside the Tribunal's decision on another ground, I have in my substituted decision, set out in paragraph 1 above, corrected the relevant figure.

(b)(i) and (e)(i) (rent allowable as a deduction in computing net profit of business)

12. In my judgment the Tribunal's reasoning, set out in paragraphs 14 to 22 of the Statement of Reasons, is clearly right. The Claimant relies on the fact that, in the calculation of her housing benefit, her liability for rent (i.e. in respect of the residential element of the premises) was taken as being £598.36 per 4 weeks, and contends that the difference between that and the actual rent of £775 per month should therefore be treated as the amount of the rent payable in respect of the business use of the premises and should therefore be a deductible expense. However, the Tribunal was in my judgment entitled to find that the amount of the rent payable in respect of the second bedroom (used for business purposes) was the difference between the actual rent of £775 per month and the rent officer's valuation for a one bedroom flat of £700 per month – i.e. £75 per month. The rent officer fixed the "local reference rent" - i.e. the general level of rent for a 1 bedrooom flat in the locality – at £650 per month. It was in effect that figure (which roughly equates to £598.36 per 4 weeks) which

was required by reg. 11(4)(a) of the 1987 Regulations to be used in calculating, for housing benefit purposes, the Claimant's liability for rent in respect of the residential element. But if the Tribunal, in order to determine the rent attributable to the second bedroom, had deducted that figure, rather than the £700 per month, from the total rent of £750 per month, it would not have been comparing like with like. In my judgment the Tribunal's approach was right. It was certainly an approach which was reasonably open to it. It involved no error of law.

(b)(iii) and (e)(iii) (postal etc expenses)

13. The Tribunal limited the sums deductible in respect of postage, stationery and photocopying to 10% of turnover, saying that it considered the sums claimed to be excessive. It said: "relying on the professional expertise of the financially qualified panel member, the tribunal considered that 10% of turnover was the maximum figure that could possibly be justified for this item ..." The Claimant has in support of her appeal produced receipts verifying the actual expenditure. However, that evidence was not before the Tribunal. On the evidence which was before the Tribunal it was in my judgment entitled to adopt the approach which it did. It did not err in law in doing so. The Claimant states, in her submissions in reply in this appeal, that as far as she was aware the purpose of the hearing before the Tribunal was to settle the disputes over the rent, vehicle loan, Lloyds bank accounts and costs/compensation, and that if she had realised that the items for postage etc, and the item for a bad debt (see below), were to be dealt with, she would have produced the additional evidence before the Tribunal. However, I note that in its written submission to the Tribunal the Council stated (p.11) that the Council had decided that the Claimant had not provided sufficient evidence to prove that any of the expenses listed in her profit and loss account were wholly and exclusively attributable to self-employment, and had therefore disallowed all expenses listed on those accounts. I would refer also to para. 4 on p.32 of the submission, where the Council requested the Tribunal "to consider each item of expenditure in the appellant's accounts." In my judgment the Claimant was therefore sufficiently on notice that all the expenses listed in the accounts were disputed. The burden lay on her to produce evidence justifying the expenses.

(c)(ii) and (f)(ii) (car finance)

14. In the winter of 1998 (i.e. before starting her business) the Claimant purchased her first car, and in October 2001 purchased a replacement car by means of a loan finance agreement. It is the sums of interest and capital repayment in respect of that loan which are in issue under this heading.

15. The Claimant's amended accounts for the year ended 5 April 2003 (p.824) show deductions for "motor expenses" £506.14, "finance" £244.93 and "loan capital repayment" £1,577.23. The sum for "finance" is 26.82% of the interest paid on the car loan in that year, and the sum for "loan capital repayment" is 26.82% of the capital repaid on the car loan in that year. The figure of 26.82% is the Claimant's business mileage in that year as a percentage of total mileage.

16. In respect of that year the Tribunal allowed the sum for "finance" (i.e interest), but not the sum for "loan capital repayment". It said:

> "No deduction was to be made for the capital repayment on the car loan by reason of regulation 31(5)(e) and (6). In particular, the tribunal finds that, according to normal accounting practice, a car is not "business equipment or machinery". The tribunal

relies on the professional expertise of its financially qualified panel member in so finding."

17. As regards the year ended 5 April 2004 the Claimant's accounts (p.591) show a sum for "finance" of £1871.85, which was stated to be an apportioned 57% of the amount actually paid. There was no separate figure for debt repayment. The Tribunal refused to allow any of this figure. It reasoned:

> "No deduction was to be made for the item "finance" in 2003/4. On the available evidence, the tribunal could not understand why the amount used in the calculation of this figure had increased from £840 in 2002/3 to £3,278 in 2003/4, particularly since the loan agreement for the car gave a total interest figure of £3,184.64 for the full *five* years of the agreement. For those reasons – and because, unlike the 2002/3 figures – the capital repayment on the loan was not separately itemised, the tribunal was not satisfied that the item did not include an element of capital repayment. As the burden was on [the Claimant] to prove on a balance of probabilities that the claimed deductions fell within the regulations, we decided that no deduction could be made for this item."

18. By reg. 31(3)(a) of the 1987 Regulations there are deductible from the earnings of an assessment period "subject to paragraphs (5) to (7) any expenses wholly and exclusively incurred in that period for the purposes of the employment". By reg. 31(6) "a deduction shall be made under paragraph (3)(a) in respect of the repayment of capital on any loan used for – (a) the replacement in the course of business of equipment or machinery." By reg. 31(8)(b) "a deduction shall be made ....in respect of .... (iii) any payment of interest on a loan taken out for the purposes of any employment."

19. The Claimant states, and I find as a fact on the basis of her evidence, as follows. At the time when the replacement car was purchased in October 2001 she was using her car for both domestic and (self-employed) business purposes. In the year 2000 to 2001 the business mileage was 178 miles and the total mileage was 300 miles (59% business mileage), and in the year 2001 to 2002 the business mileage was 434 miles and the total mileage was 900 miles (48% business mileage). I further find (see the Claimant's evidence at p.589 of the papers) that the Claimant replaced the previous car because it was uneconomical to keep repairing, and that she would have purchased the replacement car even if she did not run the business, but that she could not run the business without it. Her total turnover from the business was £960 in 2000 to 2001 and £2828 in 2001 to 2002.

20. The following issues in my judgment arise in relation to the deductibility of the loan interest and capital:

(1) Was the Tribunal right to hold that the loan interest is apportionable in accordance with the amounts of business/personal use?

(2) As regards the repayments of loan capital:

(a) Was the Tribunal right to hold that the replaced car was not "equipment or machinery" within the meaning of reg. 31(6)?

(b) If the Tribunal was wrong on that point, was the car replaced "in the course of business" within the meaning of that provision?

(c) Were the loan capital repayments apportionable, and if so on what basis?

21. It seemed to me that these questions raised issues of some potential general importance, and I therefore directed that the Secretary of State be invited to be joined as a party to this appeal, an invitation which was accepted. The Secretary of State has made written submissions in relation to the above issues.

22. Regulation 31 of the 1987 Regulations (headed "calculation of net profit of self-employed earners") provides, so far as directly material, as follows:

"(1) For the purposes of regulation 23 (average weekly earnings of self-employed earners) the earnings of a claimant to be taken into account shall be –

(a) in the case of a self-employed earner who is engaged in employment on his own account, the net profit derived from that employment;

(b) .....

(3) For the purposes of paragraph (1)(a) the net profit of the employment shall ..... be calculated by taking into account the earnings of the employment over the assessment period less –

(a) subject to paragraphs (5) to (7), any expenses wholly and exclusively incurred in that period for the purposes of that employment;

(b) .....

(5) Subject to paragraph (6), no deduction shall be made under paragraph (3)(a) .....in respect of –

(a) any capital expenditure;

(b) the depreciation of any capital asset;

(c) any sum employed or intended to be employed in the setting up or expansion of the employment;

(d) .....

(e) the repayment of capital on any loan taken out for the purposes of the employment;

(f) .....

(g) any debts, except bad debts proved to be such, but this sub-paragraph shall not apply to any expenses incurred in the recovery of a debt.

(6) A deduction shall be made under paragraph (3)(a) .....in respect of the repayment of capital on any loan used for –

(a) the replacement in the course of business of equipment or machinery; and

(b) the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair.

(7) The relevant authority shall refuse to make a deduction in respect of any expenses under paragraph (3)(a) .....where it is not satisfied given the nature and amount of the expense that it has been reasonably incurred.

(8) For the avoidance of doubt –

(a) a deduction shall not be made under paragraph (3)(a) ....in respect of any sum unless it has been expended for the purposes of the business;

(b) a deduction shall be made thereunder in respect of

.....

(iii) any payment of interest on a loan taken out for the purposes of the employment."

The repayments of loan interest

23. These were deductible to the extent that they were expenses "wholly and exclusively incurred ....for the purposes of [the] employment" (reg. 31(3)(a) and (8)(b)(iii)).

24. In R(FC) 1/91 it was held, in relation to the identical wording in the legislation there applicable, that motoring expenses (including road fund licence and insurance) and telephone expenses (including rental charges) were apportionable by reference to the amount of business use made of the car or telephone. Mr Commissioner Hallett, after a review of tax cases and practice, rejected the submission on behalf of the Secretary of State that items such as road fund licence and insurance, and telephone rental charges, could not be apportioned because (unlike, for example, petrol or the telephone call charges) no proportion or part of them could be said to relate exclusively to business use. He said (at para. 34):

> "When a motor car is used for the delivery of goods and stock, or by a barrister travelling from one court to another, or a plumber to attend a leak, that car is being used wholly and exclusively for business purposes and **all** the expenses of using that car should be allowed. It is not suggested that the cost of the petrol cannot be apportioned .... But the petrol in a car tank, where the car is also used for private purposes will often be consumed during one period of time on business and at another for private use. Why then, one may ask, cannot the licence fee, insurance premiums, maintenance costs be similarly apportioned so that the cost [is] attributable on a time

basis? There is absolutely no justification for a difference approach from that adopted by the Revenue on identical words. I agree ...that the practice of apportionment is not concessionary. It is simply a method of determining, on a time basis, what proportion of use is wholly and exclusively for business purposes."

25. In the absence of any authority at all, I would have been minded to think that there is a significant difference between, for example, the cost of petrol, which can be directly related to particular business use, and the cost of insurance or the road tax, which cannot, and that no part of insurance or road tax can properly be said to be "wholly and exclusively incurred" for the purpose of a business. However, I accept that I should follow the principle adopted in R(FC) 1/91. I further accept the Secretary of State's submission that there is no reason why that principle should not apply to the interest on the car loan, and that the apportionment should be in accordance with the amount of business mileage as a percentage of total mileage in the assessment periods in which the interest is paid.

The repayments of capital

26. I accept the Secretary of State's submission that the Tribunal was wrong to hold that these could not be deductible under reg. 31(6)(a) on the ground that (in its view) according to normal accounting practice the replaced car was not (in the Tribunal's words) "business equipment or machinery". The question whether a car is capable of being "equipment" or "machinery" is in my view not one which should depend on accounting practice, but rather is a question of the meaning of those words in the context in which they are used. In my judgment, in agreement with the Secretary of State's submission, a car is perfectly capable of falling within either of those words.

27. On the question whether the car was replaced "in the course of business", it seems to me sufficient that the Claimant required the car for the purposes of her business, and that the business mileage was significant, as a proportion of total mileage. It does not matter that the Claimant would have replaced the car even if she had not been carrying on a business. I therefore find that the car was replaced in the course of business.

28. Although, as a matter of first impression, it is perhaps even less easy to see that any part of a capital repayment on a loan which was taken out for dual purposes can be said to be "wholly and exclusively incurred" for the purposes of the business, I further hold, again in agreement with the Secretary of State's submission, that there is no reason why the principle in R(FC) 1/91 should not apply to the repayments of capital in the same way as to payments of interest. Again, I hold that the apportionment should be in accordance with the amount of business mileage as a percentage of total mileage in the assessment periods in which capital repayments were made.

29. It may be that questions of some difficulty would arise if, for example, the car were disposed of, but part of the loan remained outstanding, so that interest and capital repayments continued to be made. Would any or all of those repayments be expenses "wholly and exclusively incurred" for the purposes of the business? Fortunately I can leave such questions to be answered in a case in which they arise.

30. I therefore hold that the Tribunal was wrong not to allow any sum in respect of repayments of capital for 2002-3, and therefore also wrong to disallow the entire sum claimed in respect of the car loan for 2003-4. As regards the latter year, it did not matter that the

Tribunal could not say how much was interest and how much was capital repayment. The Claimant has in this appeal now provided the split as between capital and interest, and the relevant figures are set out in my decision in paragraph 1 above.

(f)(iii) (bad debt)

31. The Tribunal was in my judgment entitled to say (para. 13(i) of the Statement of Reasons) that it had insufficient evidence that there was an irrecoverable debt of £500 in respect of the year 2003/4. The Claimant has in this appeal provided some evidence of the debt, and has said (p.1151) that she did not present this evidence before the Tribunal because she was not aware that this item was disputed by the Council. However, I refer to what I said in paragraph 13 above.

(i) (tariff income from capital)

32. In para 1(i) of the Statement of Reasons the Tribunal said: "[the Claimant's] capital was as declared by her at various points throughout the period." In para. 23 of the Statement of Reasons the Tribunal said: "we accepted all the declarations of capital made by [the Claimant] at various points during the course of her claim as being true and complete".

33. The issue before the Tribunal in relation to capital was whether sums of capital which were only in the Claimant's current and savings accounts for very short periods should be treated as capital on which tariff income had to be calculated in respect of the periods when they were in the accounts, given that the Claimant contended (pp.816-7) (i) they were earmarked by the claimant for the payment of bills and (ii) (in some cases) they were deposits made out of income which was taken into account in calculating housing and council tax benefit and (iii) in other cases they represented sums lent to the Claimant by relatives for the purpose of paying her debts.

34. Although the Tribunal did not express itself as clearly as perhaps it might have done, what it meant was in my judgment that the amounts from time to time standing to the credit of the Claimant's savings and current accounts were to be taken as her capital. In other words, it rejected her submissions, summarised in para. 33 above, that the amounts which were only in the accounts for very short periods should not be treated as capital. In my judgment the Tribunal was clearly right to reject those submissions. The fact that an amount of capital is intended to be used by the claimant for the payment, within a very short period, of a debt does not prevent it being the claimant's capital. That is so even if the money has been lent to the claimant for that purpose by a relative, and even if it represents deposits of income which have been taken into account in assessing his or her income for housing/council tax benefit purposes. Although the Tribunal could have stated its reasons more fully and clearly, I do not think that it erred in law in relation to this aspect of its decision.

Compensation

35. The Tribunal had no jurisdiction to award compensation in respect of the matters complained of by the Claimant. I have no such jurisdiction either.

(signed on the original) **Charles Turnbull**
Commissioner
9 January 2007