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TAXATION BOARD OF REVIEW

BURTON v FEDERAL COMMISSIONER OF TAXATION

AM Donovan (Chairman) and RK Dodd (member)

28 April 1978

Ref Case No M. 184/1977; (1978) 78 ATC 187; 22 CTBR (NS) 406 (affirmed (1979) 38 FLR 330; 9 ATR 930; 79 ATC 4,318

TAXATION – DISALLOWANCE BY COMMISSIONER OF DEDUCTION CLAIMED BY STIPENDIARY MAGISTRATE OF COST OF TRAVELLING BY CAR BETWEEN HOME AND COURT CONFIRMED.

1. To a degree, travel is part of the taxpayer's work, and that has been recognised by the eventual allowance, about which there should have been no hesitation whatever, of the costs of moving between Beaufort Street and outstations. In the same way, a direct trip from home to an outstation and on the Beaufort Street, if it had occurred, would be allowable. But on the whole the forays the Magistrate makes are not enough to confer upon his work such an itinerant character as to enable the whole of his travel to be characterised as having been undertaken 'on his work'. The emphasis in relation to the travel in question remains upon those aspects of the matter that involve his simply moving between his home and his basic place of employment.

2. Accordingly, the carriage of the books and articles referred to by the Magistrate did not assist in coming to a conclusion that the taxpayer's employment was essentially itinerant, any more than it assisted in the context of the primary limb of the taxpayer's argument. The result was that the Commissioner's decision upon the objection was correct and that the assessment should be confirmed.

AM DONOVAN (CHAIRMAN): The taxpayer, Mr Burton SM was stationed at Beaufort Street Court (being the central Magistrates' Court in Perth). His situation was akin to Magistrates in the city court in that he was liable at all times to be called out to sit at other courts, – "outstations", this occurrence being pre-arranged or an emergency event. Mr Burton resided at Swan River, a suburb well served by public transport, 12 kilometres from Beaufort Central. He was not provided with a departmental car but received a travelling allowance of $180.

The taxpayer sought to deduct the cost of travelling by car between his home and Beaufort Street and return, and also sought to deduct the cost to outstations courts and return to Beaufort Street. The latter deduction was allowed, the former was not. The review is against this disallowance. It was Mr Burton's usual practice to travel by car to the central court (arriving 8.00 a.m.) "to sign papers and deal with other matters necessary for his work." Unscheduled appearances to outstations followed a request made to him by the Chief Magistrate around 9.00am. It was acknowledged because of the time factor (court commencing at 10.00am) and "as a matter of good sense and in the light of the proper performance of the tax payers duties", that travel by public transport was rejected.

Frequency of calls to outstations occurred about once a fortnight – on an irregular basis, possibly three in one week. Invariably the taxpayer returned to Beaufort Street unless required to sit very late. He supported this use of his car by the necessity to carry a brief case of notes, and text books (30 pounds gross weight), dictaphone and on occasions copy of evidence, exhibits, longhand notes legal periodicals etc., as such material was often required at outstations or to facilitate completion of his duties at home. Finally the taxpayer said that he thought it desirable because of his position to avoid public places, including public transport as "he feared the embarrassment or recognition in public and sought to avoid situations arising unnecessarily in which he had to disqualify himself from hearing a case."

It was suggested on the Commissioner's behalf that the taxpayer need not have worked at home when he had access to his chambers at Beaufort Street at night. I think that the Board

should reject this submission firmly as it has rejected it so many times in the past, and that as its reasons for such rejection have been stated so often they are not to be gone over yet another time on this occasion. I would however take the opportunity to say that I agree with the submission that was made in general terms that as far as this taxpayer is concerned, the scope of his judicial duties is not limited by the terms of any strict contract of employment, and that to a considerable degree he may himself determine the extent of his duties at least in so far as that personal determination leads to an increase in the scope of such duties.

The Commissioner's submission is that the purpose for which the taxpayer undertook the travel in question was to get from his home to his work and back to his home. That travel was not, it was said, undertaken in the course of gaining or producing the taxpayer's assessable income but was rather undertaken as a preliminary to the taxpayer engaging in income producing activities. The expenditure was incurred too soon or (in the case of the return journey) too late to be capable of being regarded as part of the taxpayer's income producing activities. Reference was made to a familiar line of authorities that have been referred to and discussed so often that I think it is unnecessary to labour them unduly again. They were principally: *Lunney v FCT* [1958] HCA 5; (1957-58) 100 CLR 478; *Lodge v FCT* 72 ATC 4174; [1972] HCA 49; (1972) 128 CLR 171; 46 ALJR 575; *Cooke v Knott* (1887) 2 Tax Cas 246; *Andrews v Astley* (1924) 8 Tax Cas 589; *Ricketts v Colquhoun* (1925) 1 KB 725; [1926] AC 1; (1926) 10 Tax Cas 118; *Nolder v Walters* (1930) 15 Tax Cas 380; (1930) 46 TLR 397; *Sanderson v Durbridge* [1955] 1 WLR 1087; (1955) 36 Tax Cas 239. Despite the not unfavourable reference made to *Ricketts v Colquhoun* in *Lunney's case* (*supra*) at p501 in the joint judgment of Williams, Kitto and Taylor JJ, I should have thought it possible that in the light of the different provisions of the Australian Act, and of the decision in *Green v FCT* [1950] HCA 20; (1950) 81 CLR 313; [1950] ALR 531; (1950) 9 ATD 142; 4 AITR 471, which was not referred to in the majority judgments in *Lunney's case*, the decision in *Ricketts v Colquhoun* would still be different if the provisions of the Australian Act, and of the decision in *Green v FCT* [1950] HCA 20; (1950) 81 CLR 313; [1950] ALR 531; (1950) 9 ATD 142; 4 AITR 471, which was not referred to in the majority judgments in *Lunney's case*, the decision in *Ricketts v Colquhoun* would surely be different if the same facts arose for decision under the *Income Tax Assessment Act* 1916.

But so to say is not to deny the plain authority of *Lunney's case* which rejected, as did the English cases referred to, 'the notion that expenditure incurred by a taxpayer in order to travel from his home to his place of business is, in any sense, a business expenditure or an expenditure incurred in, or in the course of, earning assessable income.' (See the joint judgment referred to at p501).

But the taxpayer's case, which I may say was very attractively and clearly presented, is that this was not a case of expenditure incurred by the taxpayer in order to travel from his home to his place of work. It was rather incurred to ensure that his car was available at his place of work for use when he is called away. That the process of so ensuring its availability in fact also resulted in his accomplishing his own travel to his place of work was only incidental to the main object, as was the travel of the taxpayer in *FCT v Vogt* 75 ATC 4,073 only incidental to the object of moving that taxpayer's musical instruments. The taxpayer's argument emphasised that for the proper performance of his duties the taxpayer saw himself as being required to have the car available for use at Beaufort Street. It was pointed out that the taxpayer could have left the car in the Beaufort Street car park and travelled home on public transport, restricting the use of the car solely to the purposes of his work and thus seemingly entitling him to deduct the whole of the expenses relating to it, including full depreciation and all running costs.

Put this way, the taxpayer's case seeks to avoid altogether the prohibition imposed by *Lunney's case* upon the deductibility of the cost of travel between home and work. That principle is one after all which despite the strength of the reasoning displayed by the joint judgment of Williams Kitto and Taylor JJ was not necessarily favoured by Dixon CJ, who at p486 of the report of *Lunney's case* said that 'if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion.' So while the principle is binding, there is no call to stretch it beyond its confines, and the taxpayer's argument claims that this case is so beyond those confines.

I have not found the matter easy to resolve, but upon a review of the whole of the evidence,

and including in that review the taxpayer's evidence that he would, because of his feeling of the inappropriateness of using public transport, have used his car to travel to and from work in any event, I have come to the conclusion that it is not possible to accede to the argument put for the taxpayer. I accept that there was a need for the taxpayer to have his car at Beaufort Street for the reasons stated, but when all is said and done; and there being no suggestion on behalf of the taxpayer that any question of apportionment is involved, I have to characterise the expense incurred and my best judgment is that it should be characterised after all as expenditure incurred in getting the taxpayer from his home to his work and return. In so saying, it should be emphasised That the carriage of books and exhibits is not enough to change this characterisation. Nor does the taxpayer's avoidance of public transport have any such effect.

In the latter case, there are additional problems: if travel (between home and work) by public transport were non-deductible, would it not only be the additional cost of private transport that would become deductible, and why would such additional cost be deductible? I am afraid that the only real effect of the taxpayer's aversion to the use of public transport is as previously stated, namely to support a conclusion that the cost of moving the car between home and work, with the taxpayer in it, is to be characterised as an expense related to the movement of the taxpayer between home and work rather than of the movement of the car itself into a position in which it is already for use in the taxpayer's work.

Since the hearing of this reference, judgment has been given in *FCT v Wiener* 78 ATC 4,006. In that case the successful taxpayer was a school teacher involved in a pilot teaching programme involving her moving between five different schools. As Smith J said at p4010 of the report: 'On four of the five working days the taxpayer's contract of employment required her to teach at not less than four different schools and to comply with an exacting timetable which kept her on the move throughout each of those days.' The taxpayer was held by Smith J dismissing an appeal by the Commissioner from this Board (as then constituted), to have been an itinerant teacher of whose work travel formed a fundamental part. Smith J based his analysis on English authorities culminating in *Taylor v Provan* [1975] AC 194; 49 Tax Cas 579, and upon the decision of Rath J in *FCT v Collings* (1976) 10 ALR 475; 6 ATR 476; 76 ATC 4,254. In a long and careful analysis Rath J examined the basis of *Lunney's case* and its relationship to the English authorities and it is not necessary to refer at length to what he said. It is useful however to cite what he says at p4267 of the report:

> 'It seems to me that, under s51(1) where the question is whether travelling expenses between home and work are deductible, and the case is not the simple one of the regular daily journey, it is necessary to pose the question inherent in the words of the provision, without the pre-conceived limitation that the element of choice in the place of the taxpayer's residence necessarily requires the answer that no deduction is to be made. In the general language used in *Ronpibon Tin NL v FCT* [1949] HCA 15; (1949) 78 CLR 47; (1949) 54 ALR 785; (1949) 8 ATD 431; 4 AITR 236; [1949] ALR (CN) 1055; 4 ATR 236 it is proper to ask whether the expense is to be found in whatever is productive of the assessable income; or in the more specific words of the later English cases, whether the expense was incurred in travelling on the taxpayer's work as distinct from travelling to and from his work. In the language of the joint judgment in *Lunney v FCT* ([1958] HCA 5; 100 CLR at 501) the question is whether the expense was an expenditure incurred in, or in the course of, earning assessable income.'

Can it be said that the present taxpayer's employment possessed an inherently itinerant character so that the cost of the whole of his daily travel should be said to have been incurred 'in travelling on the taxpayer's work as distinct from travelling to and from his work'. The question is one of degree, and once again I confess to having had some doubts about it. The taxpayer's work certainly has elements of that itinerant character which would be necessary for his claim to succeed upon the basis that was found to be appropriate in *Wiener's case*. In *Wiener's case* there was each day an assured actuality case of the taxpayer's car on her work. In this case there was, it is true, on each day a potentiality of use and there was quite a degree of actual use. To a degree, travel is part of the taxpayer's work, and of course that has been recognised by the eventual allowance, about which I may say there should have been no hesitation whatever, of the costs of moving between Beaufort Street and outstations. In the same way, a direct trip from home to an outstation and on the Beaufort Street, if it had occurred, would in my opinion be allowable. But on the whole I have come to the conclusion that the forays he makes are not enough to confer upon his work such an itinerant character as to enable the whole of his travel to be characterised as having been undertaken 'on his work'. The emphasis in my opinion in relation to the travel in

question remains upon those aspects of the matter that involve his simply moving between his home and his basic place of employment.

One other matter should be mentioned in this context. In *Wiener's case* a substantial amount of material was being carried by the taxpayer in her car, which had to be taken with her from the last school of the day to her home and then on the next morning to the first school on that day. (see the report of the case when it was before the Board: Case F20, 74 ATC 102). The reasoning of Smith J did not however place reliance on this fact, its essence being as previously stated that the taxpayer was an itinerant teacher of whose work travel formed a fundamental part, and that her employment was itself inherently itinerant. Likewise, in this case, I do not think that the question of the carriage of the work-association materials such as books and exhibits to which I have referred, is of critical importance.

Compare the kind of situation which arose for decision in *FCT v Vogt* (*supra*) where the taxpayer was allowed his expenses of travelling between his home and various places where he was engaged as a professional musician and to which he had to take his bulky musical instruments. Waddell J there considered, *inter alia*, that 'in a practical sense the expenditure should be attributed to the carriage of the taxpayer's instruments rather than to his travel to the places of performance', but went on (at p4078) to say that there might well be cases where, as a matter of fact the size and bulk of an instrument or the reasons for keeping it at home may make it difficult to determine whether expenditure incurred in circumstances similar to the present is deductible'.

My conclusion is that the carriage of the books and articles referred to does not assist in coming to a conclusion that the taxpayer's employment is essentially itinerant, any more than it assisted in the context of the primary limb of the taxpayer's argument. The result is that in my opinion the Commissioner's decision upon the objection was correct and that the assessment should be confirmed.
