

Claim Your Trip Around Australia As A Tax Deduction

Phone 13000 22682

For website technical support, email technicalservices@bantacs.com.au

For all accounting & tax support contact one of our offices or just go to www.taxquestions.com.au

NEW SOUTH WALES

Sydney 1300 367 688
sydney@bantacs.com.au

Burwood 1300 367 688
burwood@bantacs.com.au

Central Coast 02 4390 8512
centralcoast@bantacs.com.au

Hornsby 1300 241 248
hornsby@bantacs.com.au

QUEENSLAND

Brisbane 1300 911 227
brisbane@bantacs.com.au

Caboolture 07 5497 6777
admin@bantacsningi.com.au

Gold Coast 0435 437 586
goldcoast@bantacs.com.au

Mackay & Whitsundays
07 4951 1848
mackay@bantacs.com.au

Ningi 07 5497 6777
admin@bantacsningi.com.au

Toowoomba 07 4638 2022
toowoomba@bantacs.com.au

VICTORIA

Melbourne 03 9111 5150
melbourne@bantacs.com.au

North Melbourne 1300 123 842
northmelbourne@bantacs.com.au

SOUTH AUSTRALIA

Adelaide 08 8352 7588
adelaide@bantacs.com.au

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Important – This booklet is simply a collection of Newsflash articles relevant to claiming your trip around Australia as a tax deduction. The articles are transferred from Newsflash into this booklet so it is best read from the back page forwards to ensure you are reading the latest article on the topic first. Note that the information contained in this booklet is not updated regularly so it is important that you seek professional advice before acting on it.

If You Can't BAN TACS At Least Minimise It Legally

Claiming your Trip Around Australia as a Tax Deduction

Summary:

Looking forward to going back to work after the Christmas holidays? Think about those vital looking middle age people that throw in the daily grind the minute their children grow up to take on a nomadic lifestyle picking fruit. It's not just an ideal lifestyle, with careful planning, you can claim all your travel costs and basic living expenses as a tax deduction. With that sort of tax refund every year, fruit picking pay rates look a lot more attractive. There is much more than just fruit picking work out there and the work is easy to organise through job networks such as No Boundaries and Work About Australia.

As a result of Case S29 85 ATC 276 the ATO accepts that Shearers and for that matter any travelling workers on a circuit, are able to claim their motor vehicle costs, meals and accommodation from the moment they leave home. The ATO states in TR95/34 at paragraph 9, it is how you go about your work not your occupation that counts and at paragraph 43 it gives an example of Valerie the fruit picker. There are five basic rules that need to be abided by to align yourself with Shearers' case:

- 1) Have a web of workplaces. This means you must organise the next farm you visit before you leave the current one and go to more than one farm before returning home.
- 2) Keep the necessary diaries, log books and written evidence to substantiate your claims.
- 3) Maintain a home other than the farms you visit i.e. a bedroom at your adult child's home.
- 4) Do not set up permanent accommodation where you are working i.e. do not take a lease on a house or flat.
- 5) Do not stay anywhere for longer than 6 months and make sure you live in temporary accommodation such as a tent or caravan.

If you can't meet the above you will still be able to claim your car expenses if you need to carry more than 18kgs of tools or equipment that is large and awkward (ie a ladder) with you. Regardless of any of the above you may also qualify for a zone rebates so make sure you keep the details of the names and dates of every town you visit. Before you embark on this adventure make sure you get more details by reading the rest of this booklet.

Introduction:

If you are considering fruit picking or a similar circuit (i.e. shearing) your way around Australia, with careful planning and record keeping you can claim your motor vehicle expenses (including depreciation), meals and accommodation as a tax deduction against the income you earn. In all these expenses your argument for deductibility is strengthened by being self employed i.e. contract to the farmers and provide them with an ABN. If you take this option make sure you get advice on your tax withholding responsibilities.

As a result of Case S29 85 ATC 276 the ATO accepts that Shearers, on a circuit, are able to claim their motor vehicle costs, meals and accommodation from the moment they leave home. Fruit Pickers should do everything they can to align their circumstances to that of a Shearer. It is how you go about your work not your occupation that counts, refer TR95/34 at paragraph 9:

The question of whether an employee's work is itinerant is one of fact, to be determined according to individual circumstances. It is the nature of each individual's duties not their occupation or industry that determines if they are engaged in itinerant work.

If you have a spouse your taxable income may well be low enough for him or her to claim you as a dependant. Due to the different method of calculating separate net income compared with taxable income, spouses may well be able to claim each other as dependants even though you are both taxable enough to benefit from the rebate. If you have children the reduction in your taxable income will probably increase your Centrelink entitlement.

Claiming a vehicle:

You are entitled to a deduction if one of the following applies to you:

- (a) you are itinerant
- (b) carrying bulky equipment or
- (b) you are a contractor whose home is the base of your operations.

A classic case that covers all three of these points is a shearer's case called **S29 85 ATC 276**. This case is so relevant that the conclusions drawn by two of the judges are reproduced in full at the end of this booklet. In summary, a self employed shearer was allowed a deduction for car travel from his home to the various sheds where he was engaged from time to time. The shearer's home could be classed as his base of operations because he organised his shearing engagements from home and maintained his shearing equipment there. The judge stated that this was only possible because the shearer was self employed i.e. independently contracted to many different farmers. But there are cases where an employees home was considered a base of operations. For example *FCT v Collings* 76 ATC 454 a computer consultant first tried to fix the problem from home via the telephone line but ended up having to travel to the main computer.

In *S29 85 ATC 276* much weight was also given to the fact that the shearer had to carry shearing equipment, in his car, weighing more than 18kg and the fact that his work was itinerant.

In light of this decision, the commissioner ruled, in *IT2273*, that expenses incurred by shearers in travelling between home and places where they exercise their trade or between home and place of assembly for a shearing tour and on return travel to home are deductible. *IT2273* has since been replaced by *TR95/34*.

If you are working for wages i.e. not self employed like the shearer was, you are more likely to succeed with your claim on the basis you are required to carry bulky equipment or the itinerant nature of your employment.

Bulky Equipment:

Equipment is considered bulky if it is heavy or large. To be classified as heavy the equipment needs to be at least 18kg. The equipment does not need to weigh 18kg (*S29 85 ATC 276*) to be considered large it just has to be awkward to transport any other way than by the vehicle. Each of these three examples would be considered bulky equipment in their own right, a ladder, drum kit and boxes of books and papers that would be too much to carry in one trip on public transport (*F.C. of T. v. Wiener* 78 ATC 4006)

You must have a good reason for carrying the equipment. If there is no safe storage at work for your equipment you can justify taking it to and from work each day. In *Case 43/94 94 ATC 387* a flight sergeant was not permitted to claim for transporting his tools to and from work because his employer provided him with his own personal locker where they could have been left. On the other hand a container on a building site to which all the workers had a key was not considered safe storage so carrying equipment to and from the site could be justified. Fruit pickers and shearers would have no trouble claiming for carrying bulky equipment to the next farm but if they don't camp on the farm that they are working on they may have trouble claiming transporting the tools from the local caravan park to the farm each day if the farmer provides lockers.

The equipment must be relevant to the work you are doing.

Itinerant:

The question here is, are you itinerant, therefore travelling for work rather than travelling to and from work. Fruit pickers and shearers who maintain a home but travel to more than one farm before returning to that home could argue they have a Web of Workplaces and are therefore itinerant workers. If it is not suitable to maintain your current home you could consider moving your personal effects to a room at your parents or

children's home and use that as your home base. To have a web of workplaces you need to have another job to go to before you leave the current one. You cannot claim itinerancy if you are travelling around on spec looking for work.

www.workaboutaustraila.com.au can help you organise your web of workplaces.

TR95/34 is the bible in this regard, it is available from the ATO Web Site. Some of the relevant paragraphs are reproduced below.

TR95/34 states, at paragraph 43:

“Example: Valerie is a fruit picker. She does not have a regular circuit, but organises her next job before completing the work at the current farm. Valerie normally works and lives at many properties before returning home, remaining at each farm for two to three weeks. Valerie is engaged in itinerant employment because:
(a) her employment has a web of work places; and
(b) there is continual travel from one farm to another before returning to her normal place of residence.”

But TR95/34 at paragraph 49 states:

“Example: Hai is a fruit picker who travels around with the view of finding work. When he finds work, he will stay in that location until the work is completed and then move on in search of other jobs in the industry. Hai is not engaged in itinerant employment and his travelling and transport costs are not an allowable deduction because the expenses are incurred too early to be regarded as being in the course of carrying out the duties of his employment.”

TR95/34 states at paragraph 55:

“Example: Ian is a shearer who has agreements with various property owners and therefore travels on a circuit to the same farms each year returning home only periodically. When he finishes work at a property, he travels directly to the next property on his circuit. Although there is no uncertainty in Ian's employment pattern, his work is considered itinerant.
This is because:
(a) travel is a fundamental part of his work;
(b) his work structure displays a “web” of workplaces; and
(c) he continually moves from one place of work to another before returning home.”

But TR95/34 at paragraph 42 states:

“Example: Ryan is a shearer who works at various farms. Ryan is usually contacted at short notice and advised which property he is required to attend. The farms are located at varying distances from his residence. Each day Ryan travels to a single farm and returns to his normal place of residence each night. Ryan is not engaged in itinerant employment because:
(a) travel is not a fundamental part of his duties; and
(b) there is no continual movement between farms. He merely travels to work and returns home each day.”

Claiming meals and accommodation:

When are Meals and Accommodation Tax Deductible?

MT2029 considers IT2273 which originated from S29 85 ATC 276, the shearer's case referred to above, and extracts from which are quoted in references below. MT2029 at paragraph 2 states:

“Where a taxpayer's base of operations is his home ...or ... the activities by which assessable income is produced are of an itinerant nature, travelling expenses to and from home necessary to carry out the activities will also qualify as an allowable income tax deduction.”

Then in paragraph 5 MT2029 states:

“Allied to the principles referred to in para. 2 is a further long established principle of income tax law that, where the activities by which assessable income is produced involve travelling and staying away from home so that the travelling expenses are an allowable income tax deduction, the expenses of travelling include the cost of accommodation and meals away from home. This means that shearers travelling between home and places where they exercise their trade or between home and place of assembly for a shearing tour would be entitled to deductions under subsection 51(1) of ITAA 1936 for the cost of accommodation and meals associated with that travel and while engaged in shearing work”.

Interestingly, while the judge in S29 85 ATC 276 placed a lot of emphasis on the fact the shearer was self employed, MT2029 is a ruling in relation to fringe benefits tax so is only applicable to employees. It should then be safe to assume that the ATO accepts Shearer’s travelling expenses are tax deductible whether they are employees or self employed because it is the nature of their activities i.e. itinerancy that makes it tax deductible.

The object, of fruit pickers should be to align themselves as much as possible with the routine of shearers as discussed in S29 85 ATC 276 below. As employee shearers are sometimes employees of each farm they go to it should not matter that a fruit picker enters into a new employment relationship each time they travel from farm to farm. Nevertheless an ABN and bulky tools can help.

When are you travelling and not living away from home?

The cost of establishing another home close to your place of work is not tax deductible (Case X4) so it is important that you are considered to be travelling for work, not living away from home. If you stay at the same farm for more than 21 days you are starting to cross that line. It may be worth packing up and at least moving to a farm on the other end of town. Don’t forget to organise your new farm before you leave the old. MT2030 is a ruling on FBT and living-away-from-home allowance but makes the following interesting statement:

Paragraph 41: There will be circumstances, however, when an employee is away from his or her home base for a brief period in which it may be difficult to conclude whether the employee is living away from home or travelling. As a practical general rule, where the period away does not exceed 21 days the allowance will be treated as a travelling allowance rather than a living-away-from-home allowance. For longer periods, it will be necessary to determine the nature of the allowance with guidance provided by this Ruling.

TR98/9 is a ruling on self education expenses. At paragraph 93 the key points to determining whether a new home has been established are listed as follows - note none are conclusive on their own.

The total duration of the travel:

Whether the taxpayer stays in one place or moves frequently from place to place;

The nature of the accommodation, e.g. hotel, motel, long term accommodation;

Whether the taxpayer is accompanied by his or her family;

Whether the taxpayer is maintaining a home at the previous location while away.

The first two examples look at how long you are in the one spot without returning home but moving onto the next place of work breaks the pattern of establishing a new home as much as returning home. Example 6 states:

Don travels to London to undertake a 3 week course of study to maintain and improve knowledge relevant to his income-earning activities. He stays in hotel accommodation until the end of the 3 week period when he decides he should extend his stay and complete a more extensive 6 month course of study. He rents an apartment and arranges for his family to join him in London. Expenditure on accommodation and meals during the initial 3 week period is deductible as Don is away from home. However, depending on all the relevant facts, Don may be considered to have established a new home for the period of his stay in the apartment with his family.

Again the 21 day line is drawn though if the nature of your accommodation is more temporary than an apartment you would be able to stay longer and still be considered travelling. Based on example 6 above I would not like to push this past 6 months without first getting an ATO ruling.

All the above is based on the assumption that you still have a home to return to. It does not matter that someone else is living there taking care of it for you. However, to have it commercially rented may jeopardise your claim. If this is the case it may be advisable to move your personal effects into a room at your parents' or adult children's home and make that your home base.

Substantiation:

The ATO may see the above as considerable risk to revenue or as they call it opening the floodgates. So they will be looking for every opportunity to deny deductions. Accordingly, it is imperative that all your records and facts are beyond reproach. Please follow the substantiation rules, listed below, to the letter.

Claiming a vehicle:

If you intend to claim for more than 5,000km per owner of the car a log book will need to be maintained. The speedo readings at the start and end of each financial year will have to be recorded and written evidence for all expenses relating to the vehicle kept.

If claiming less than 5,000km per owner of the vehicle you need to keep a detailed reasonable estimate of the kilometres travelled to which you apply the ATO set rate. Note each owner can claim only up to 5,000km in their individual returns and should be the one driving for those 5,000km. For further details on motor vehicle substantiation refer our booklet on that subject which is available from our Web Site www.bantacs.com.au. That booklet will also help you decide whether you would get a better claim by reducing your claim to 5,000km per driver compared to log book method.

Claiming meals and accommodation:

The following is based on the assumption you are not paid a travel allowance by your employer. Written evidence must be kept for all accommodation unless it would be unreasonable for the ATO to expect a receipt - for example, electricity in a caravan park paid for by putting coins in a meter that did not issue a receipt. In these cases a diary entry should be made. Please keep a diary just to record your daily out of pockets. This includes money put into washing machines at Laundromats. Written evidence (or diary entries if receipts are impossible) must be kept for all meals - don't forget snacks or drinks. You can even claim for a glass of wine, etc with your meal. The diary entry should include all the details required to be on written evidence as follows.

Written evidence must be a document from the supplier and include the name of the supplier, the amount of the expense, a description of the goods or services, the date of incurring the expenses and the date of the document if different. If a description of the goods or the name of the supplier are not on the receipt you may write them on.

Because you will be away from home for more than 5 nights you must keep a travel diary. The diary must include particulars of each income earning activity undertaken during the relevant travel. Entries must be made before the activity ends or as soon as possible afterwards. Setting out the nature of the activity, the day and approximate time it began, how long it lasted and where the activity took place. This is to determine how much of your travel was a private expense. It should not be a problem claiming your weekend accommodation when you have worked a full week either side.

Our web site www.bantacs.com.au has worksheets in the travelling workers section that will help you keep the necessary records.

Claiming a dependant spouse:

The following is based on the assumption you do not have dependant children. Whether you are entitled to a dependant spouse rebate is determined by your spouse's separate net income, not his/her taxable income. Separate net income is calculated by taking the spouse's taxable income and adding back tax agent fees, donations, superannuation contributions and other deductions claimed that do not relate directly to the earning of income. Any of the claims, stated in previous paragraphs, regarding travel expenses would not have to be

added back. Then you can deduct costs directly related to earning income such as clothing for work and other related items even if they are not tax deductible. A claim is also available for the cost of travelling to and from work but I have assumed that that has already been claimed on the basis that you are itinerant. Basically, separate net income is the amount of money your spouse brings into the home after deducting all costs associated with going to work whether they are deductible or not, but not after deducting income tax. For full details on calculating separate net income refer IT2391 which is available from the ATO web site.

TD98/5 states that motor vehicle expenses used to reduce separate net income can be calculated on the ATO's set rate without being limited to 5,000km. This means if your spouse did more than 5,000km but had to reduce the amount claimed in his or her tax return the balance can be claimed against separate net income. Further, if your spouse used the log book method in his or her return when calculating the separate net income that deduction could be added back and substituted with the set rate per kilometre.

Thresholds and rates vary from year to year but as a rough guide if a dependant's separate net income is under \$7,000 a claim should be considered. As separate net income is usually lower than taxable income, while you may have a tax liability that can benefit from claiming your spouse as a dependant spouse, your spouse may also benefit from claiming you as a dependant spouse. Obviously, you can't both claim for the same expenses, joint expenses will have to be shared.

Zones:

To claim a zone rebate (tax offset) you must be in a zone for 183 days of the financial year. The 183 days can be accumulated over 2 years. If in the previous year you did not claim a zone rebate and over the 2 years you have been in a zone for 183 days you can claim the zone rebate in the second year. For some workers on fly in fly out arrangements this means they may only be able to claim a zone rebate every second year.

The rebate for being in a special zone is \$1,173 in tax credits that you can use to pay your tax instead of the instalments deducted from your pay. Accordingly, when you do your tax return some of your instalments should be refunded. Certainly worth the effort of tracking where you have been. You can check what zone applies to your area by going to the ATO web site www.ato.gov.au, simply put the word zone in the search box. While you are there you should read TR 94/27 to get more detail on how to qualify.

On the bottom end of the scale the rebate for a zone B resident is only \$57. Many parts of Queensland are zone B including big towns such as Mackay and Townsville. While the \$57 might not be worth much being in any zone helps towards your 183 days. The calculation first asks has the taxpayer been in any or various zones for 183 days. If so they can claim a rebate. How much they can claim is determined by picking the best 183 days. For example if you have spent 200 days in a zone B and 50 days in a special zone your rebate would be made up of two parts. \$1,173 divided by 183 times 50 would be your entitlement for the special zone rebate. The balance would only be paid at the zone B rate i.e. \$57 divided by 183 times 133. The total rebate is \$361 which is a vast improvement on \$57 simply for being in a special zone for 50 days. As you can see the main purpose in zone B is to get your 183 days up so you can benefit from every day in other zones. You only have to be in the zone for part of the day for the whole day to qualify.

This trick can be useful when planning your holidays. If you live in a zone B record every day or part there of that you are in another zone area to boost your claim. If you work in a mine on a fly in fly out basis and don't quiet spend 183 days per year there, you only need to go to a zone B to top up your quota.

If you have dependant children and or a spouse you are entitled to claim a zone rebate for them too if they were with you.

Ruling for Travelling Workers

A fruit picker who attended one of our workshops wanted to know if he could still claim his travel even though he had sold his home, so his caravan was his normal abode. He asked us to apply to the ATO for a ruling on the issue.

The ruling came back as we expected stating that because he did not have another home base, his home was his caravan so he was not itinerant as every night he went back to his home. We did, without stretching the truth try to argue that his home was in Melbourne where his parents and children lived. He was on the electoral roll down there but unfortunately he had not really set up a home in either of the houses. Most of his

personal effects were with him and the ATO considered it relevant that he only visited Melbourne for a total of 11 days during that year.

I accept the ATO's opinion that he must have a home base to be considered itinerant and so be able to claim his motor vehicle, meals and accommodation costs. But I am concerned at them introducing the issue of how many times you visit your home during the year.

Travellers please make an effort to visit your home regularly as it is not worth missing out on claiming your motor vehicle expenses, food and accommodation for most of the year for the sake of not taking some time off at home.

Travelling Workers' Main Residence Exemption

It has come to our attention that some travelling workers own a home which they have never lived in. If this is the case you cannot exempt that home from capital gains tax. You need to be aware of the following sections of CGT law, available in detail on the ATO web site refer the 1997 ITAA:

- 118-110 – There must be a dwelling transferred with the land when it is sold for the main residence exemption to apply.
- 118-115 - A caravan can be a dwelling
- 118-135 – A dwelling becomes your main residence when you first move into it. If you move into it as soon as practical after purchasing it, it is your main residence from the date of purchase.
- 118-145 – You can exempt a dwelling as your main residence for up to 6 years after you move out and rent it out providing you are not using your exemption on any other dwelling. If you do not rent the property out or use it for any other income producing purpose then your main residence exemption can stay over the property indefinitely. Note you restart the 6 year period every time you move back in.
- 118-150 – If you buy vacant land or a property that needs to be repaired before you move into it you can exempt it as your main residence for up to 4 years before you move in providing you move in as soon as the repairs are finished or a house is built on the land and you live there for at least 3 months. Note this is the only circumstance where you can use your main residence exemption before you move in.

Capital Gains Tax is a tax on inflation. If after you finish travelling you decide you want to live in a different area to the house, even if you have paid off the house and houses in the new area are a similar price, you will not have the money to change houses after you have paid the ATO tax on the normally inflationary increase in the value of the house since you purchased it. So it maybe worth stopping what you are doing and moving into a house you intend to eventually be your home. TD51 states that the ATO consider the following factors relevant in determining whether you have actually made a house your home:

- * How long you stay there
- * If your personal belongings are there
- * Whether you are on the electoral roll there
- * Whether your intention in being there was to make the place your home.
- * Where your immediate family lives
- * Where your mail is delivered
- * The phone and electricity are connected

Note no time period is specified but based on 118-150 3 months should be sufficient.

Travelling Worker's & CGT Main Residence Exemption

In order to be able to claim their food and accommodation traveling workers must have a home base. More information on this is available in our Claim Your Trip Around Australia As A Tax Deduction Booklet. On our web site. When considering where your home base is, you should make sure you take into account the CGT consequences.

If you still own a home while you are traveling you will want to take advantage of the 6 year absence rule to continue to exempt it from CGT as your main residence while renting it out. Note you can only do this if you have first lived in the house.

Renting out part of the house and leaving the other part to be considered your home base will mean expenses and CGT will need to be apportioned. You cannot use the absence rule if you are still classing part of the home as your main residence accordingly only that part will be exempt from CGT not the portion of it that is rented out. If the house was first rented after 20th August, 1996 this will reset the cost base at the market value when it first became income producing. On the other side only a portion of the interest, rates and other expenses on the home will be tax deductible because part of the home is used as your private residence.

It is much simpler to set up home somewhere else. The longer you can live in this new home before you actually travel the better your argument that it is truly your home base.

Zone Tricks

To claim a zone rebate (tax offset) you must be in a zone for 183 days of the financial year. The 183 days can be accumulated over 2 years. If in the previous year you did not claim a zone rebate and over the 2 years you have been in a zone for 183 days you can claim the zone rebate in the second year. For some workers on fly in fly out arrangements this means they may only be able to claim a zone rebate every second year.

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What to Do Now?

Visit our web site www.bantacs.com.au for helpful worksheets, a checklist and locations of workshops to help you get it right first time. To organise your web of workplaces go to www.workaboutaustralia.com.au

Note:

The above are extracts only from rulings and discussions of possible interpretations. It is merely an introduction to the issues - the rulings quoted should be read in their full context and professional assistance should be sought in interpreting them. No responsibility is taken by the writer for actions taken as a result of this booklet without further consultation.

In Payne's case the High Court ruled that taxpayers were not entitled to claim for travel from one place of employment to another if it is not for the same employer. This was contrary to a long accepted principle by the ATO and not what the ATO was trying to argue in that case. The ATO issued a statement saying it will be necessary to change the law so that travel between one employer and the other are deductible. This has happened and the ATO has not withdrawn any rulings so the above stands.

If you would like to be sure your circumstances fit consider applying for an ATO private ruling. If you stick to the circumstances covered in that ruling it will be binding on the ATO.

Fruit Pickers Beware of Tax Bills

Fruit pickers are taxed at a flat rate of 13%, by their employers, on every dollar they earn. But this is only a method of collecting tax, it is not their real tax rate. They are subject to tax at the same rate as all other taxpayers and this is reconciled when they complete their income tax return. The 13% rate is an arbitrary amount based on the assumption that fruit pickers do not work all year round. For example they may do 3 months work then not earn anything while travelling to the new location or waiting for a season to begin.

No tax is payable the first \$18,20 earned in any year and if you earn less than \$20,542 for the whole year the low income rebate will mean you pay no tax at all. But once you start earning more than that you tax rate will be at least 19% so the 13% will not be enough to cover it. Of course with all these lovely tax deductions you probably won't go much over the \$20,000.

Note the above only applies to Fruit Pickers who are residents of Australia for tax purposes.

Reference

S29 85 ATC 276

Dr P. Gerber (Member):

The taxpayers in these references agreed to have their cases heard together since the facts in each are undistinguishable. Both are itinerant shearers, each has claimed car travel expenses from home to the various sheds where they are engaged. Each engagement is subject to a standard contract and the taxpayers are remunerated on a "per head" basis. Suffice it to say that (with the exception of engagements by one head contractor) each of the taxpayers is self-employed, setting off each morning by car to a particular shed where he has been engaged; each engagement can vary from a single day's work to several weeks or more. The standard form agreement, I find, includes an implied term that the shearer will provide his own combs and cutters etc. Each taxpayer brought his standard equipment to the hearing and estimated that, put end to end, including a change of clothes, the weight carried is of the order of 18 kg. A further feature needs to be added; each shearer uses his home not only as a residence but as a place where he sharpens, cleans and maintains his equipment as well as seeking engagements by the use of his telephone. On occasion, each would ring around to get a team of shearers or shed hands together. The claim in each case has been denied on the basis:

1. That the expenditure is private;

when it is all said and done, the claim involves merely home to work travel expenditure, and thus is no different from the kind of travel exhaustively analysed in *Haley v. F.C. of T.; Lunney v. F.C. of T. (1958) 100 C.L.R. 478*, where such expenditure was held to lack the necessary nexus with the derivation of income. In other words, in order to be deductible in terms of sec. 51(1), it is not sufficient that the *purpose* of the expenditure is incidental or relevant to the derivation of assessable income, but it must be of a *character* incidental or relevant to such derivation. Even if it were possible to say that the essential purpose of the expenditure was to enable the taxpayers to derive their assessable income, there would still be no warrant for saying, in the language of sec. 51 that it was "incurred in gaining or producing the assessable income" or "necessarily incurred in carrying on a business for the purpose of gaining or producing such income".

2. From the time of *Nolder v. Walters (1930) 15 T.C. 380*, courts have been at pains to erect qualifications to the principle enunciated in that case. In *Nolder* a pilot claimed car expenses for travelling at all relevant hours of the day or night to London airport when public transport was unavailable; *Rowlatt J.* stated (at p. 387):

" I do not think that this gentleman can be allowed the use of his motor car. It is true he cannot sleep in the office; neither can anybody else. He has to get there, and sometimes quickly, and he has to get there not always at regular times. After all, that is only a question of getting there, but while he is getting there he is not in the performance of his duties."

His Honour summed up the law (at p. 387) in the following useful passage:

" 'In the performance of the duties' means in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office. A man who holds an office or employment has, equally necessarily, to do other things incidentally, and spend money incidentally, because he has the office. He has to get to the place of employment, for one thing. If he had not got the employment he could stay at home. As he has got the employment he has necessarily got to get there, and it costs him something, if it is only shoe leather, to get there; but that is not in the performance of the office, because in getting there he is not doing the duties, or doing the work of the office. Incidentally, he is obliged to do that, but it is not in doing the work of the office, which begins when he arrives, and sets to work to perform his duties. That seems to me to be quite a clear rule. I think that is what was said by the learned Lords in *Ricketts' case* (*Ricketts v. Colquhoun* (1926) A.C. 1), and I think it is what a great many people have understood for a very long time."

3. If this were all, it would follow that the taxpayers must fail. However, I feel that they may be able to bring themselves into one of the exceptions. These were enumerated and analysed by Lusher J. in *Garrett v. F.C. of T.* [82 ATC 4060](#) at p. 4063, a case on which both parties relied. Thus, his Honour approved the *rationes* of *F.C. of T. v. Vogt* [75 ATC 4073](#) and *F.C. of T. v. Ballesty* [77 ATC 4181](#) in both of which the taxpayers succeeded in obtaining a deduction for the travel expenditure incurred in circumstances which can only be described as exceptional. It was held in *Vogt's case* (at 82 ATC 4063):

" . . . where a taxpayer, for example, keeps necessary equipment or instruments reasonably at his home and which he needs for the purpose of performing his work at his various places of work and, by reason of their bulk or otherwise, these need to be transported by vehicle from the home to such places, and where the equipment was used at home for purposes of practice, the expenditure was deductible within the section [sec. 51(1)], even though the taxpayer was also thereby transported. This is because the expenditure incurred was part of the operations of earning the income and was essential to the carriage of the instruments rather than the taxpayer's own travel."

4. I find that there are also exceptional circumstances in these references which enable the taxpayers to succeed. The evidence establishes that the taxpayers' homes constitute their bases of operation in the sense that they sought their employment from day to day or as the case may be from their homes by the use of their telephones. In addition they were the places where they kept their equipment in working order. In my view, this is sufficient to bring the expenditure within the ambit of sec. 51(1).

5. Great reliance was placed by the Commissioner on the decision of Board of Review No. 2 in (1967) *18 T.B.R.D. Case T42* at p. 203. In that case, the taxpayer was a shearer who likewise claimed car expenses for travel from home to sheds. In that case, the majority held that the ratio of *Lunney* applied and, on the facts, denied that the taxpayer's home was his place of business. The majority stated expressly:

" All that need to be said is that the evidence would not support a finding that the taxpayer had a place of business at his home."

It is trite to point out that each case depends on its facts. On the facts in these references, I am satisfied that the home of each of the taxpayers was his base of operation.

6. The Commissioner submitted that this finding should nevertheless afford little comfort to the taxpayers if the Board were to find that they were "servants" as distinguished from independent contractors. Thus, the Commissioner's representative argued cogently that these taxpayers were servants in reliance on the award which refers to shearers as "employees" (sec. 3) and those who employ them as "employers". The Pastoral Industry Award 1965 states *inter alia*:

" Cl. 10(a) Before the commencement of work for which an employee within this section of the award has been engaged, the employer and the employee shall sign a written agreement under the terms of or to the effect of the provisions of the agreement in Schedule 'A' appropriate to the employee's classification. Failure to sign such an agreement before the commencement of work shall be a breach of this award by both the employer and the employee."

Clause 48 provides:

" The shearing or crutching and incidentals operation shall be carried on under the direction of the employer or person in charge of the shed (in this award with an overseer)."

7. Without itemising each of the various provisions which support the Commissioner's contention that shearers engaged pursuant to the award are "servants", it should be pointed out that the "control test" was originally devised to determine vicarious liability *viz.* a master is vicariously liable for the torts of his servants in the course of their employment; he is not liable for the torts of his independent contractor. As Fleming points out in his sixth edition on *The Law of Torts* (at p. 342):

" This test is the product of economic conditions in which the employer had the competence to instruct the labourer in the techniques of performing his work. In a preponderantly agricultural and primitive industrial society the master was usually at least his servant's equal in knowledge and experience, and the control test postulates this combination of managerial and technical functions in the person of the employer. But the technological

developments since the late nineteenth century and the corresponding changes in the structure of modern business, combined with the trend of professionals entering full-time salaried employment instead of private practice, have belied this assumption, and it is found increasingly difficult to apply the control test as a meaningful working rule to many modern situations. More often than not, the skilled craftsman or professional worker is engaged for the very reason that he possesses the 'know-how' which his employer lacks. Industrial relations have changed to the point where even a crane-driver's assertion 'I take no orders from anybody' is regarded as the normal attitude of a skilled man who knows his job and will carry it out in his way."

8. The "control test" has since given way to the "organisation test". Lord *Denning* put it clearly in *Stevenson v. Macdonald (1952) 1 T.L.R. 101*:

" It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

9. Doing the best I can, it seems to me that applying the "organisation test", the taxpayers are independent contractors rather than servants. It was submitted on behalf of the taxpayers that shearers were not covered by the Tasmanian *Workers' Compensation Act*. However, my own limited investigations do not support that submission. On the contrary, having entered into a standard agreement I am satisfied that, whatever else the relationship with the employer, a shearer injured during the carrying on of his contractual duties is covered for weekly payments of compensation and/or any other benefits provided for by that legislation. Thus Pt I sec. 4(3)(b) applies to work of a casual nature. In the result, the travel each day arises from the nature of the employment itself, being classically an itinerant one, so that each taxpayer travels in the performance of his employment from the moment he leaves home to the moment of his return; cf. *Taylor v. Provan (1975) A.C. 194*.

10. I would allow both appeals. Quantum was not disputed in either reference.

Dr. G.W. Beck (Member):

I have read the decision of my colleague, Dr Gerber, and agree with his conclusion. However, in the light of the accepted facts that here are two itinerant shearers travelling from home to sheds all over the place and, at the same time, transporting certain essential equipment, it seems to me appropriate to apply the principle enunciated in *F.C. of T. v. Wiener 78 ATC 4006*. There, *Smith J.* expressed the background to his reasons as follows (at p. 4009):

" When *Taylor v. Provan (1975) A.C. 194* ultimately came before the House of Lords in all the speeches the authority of *Ricketts v. Colquhoun* was accepted and all the learned law Lords applied Lord *Cave's* test in that case, namely that in order that travelling expenses should be deductible they must be expenses which the taxpayer as holder of an office was obliged to incur by the very fact that he held the office and had to perform its duties. Differences between the majority and minority judgments in *Taylor v. Provan* turned not upon principle, but upon the proper inference to be drawn from the facts. In his speech Lord *Simon of Glaisdale* speaking of Lord *Cave's* test said at p. 221:

'Applying the rule in *Ricketts v. Colquhoun (1926) A.C. 1* -- i.e. that the obligation to incur the expenses of travelling in question must arise out of the nature of the office or employment itself, and not out of the circumstances of the particular person appointed to the office or employed under the contract of employment -- two different classes of travelling expenses readily come to mind. The first is where the office or employment is of itself inherently an itinerant one. . . . In such cases the taxpayer may well be travelling in the performance of the duties of the office or employment from the moment of his leaving home to the moment of his return there -- a visit to any head office might well be purely incidental or fortuitous."

2. Here the employment of these shearers is "inherently itinerant" and all of the travelling in issue must be regarded as arising out of the nature of the employment itself.

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