

MALLALIEU v DRUMMOND

A Help or a Hindrance

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For any tax professional seeking to obtain a tax deduction on behalf of his clients the decision of the House of Lords in *Mallalieu v Drummond* (1983) 57 TC 330 is to say the least an inconvenience. The purpose of this article is not to criticise the decision; that would be idle and disrespectful. It is to examine the reasoning by which their Lordships reached their decision to see what effect it may have on other taxpayers seeking a tax deduction for similar (or indeed dissimilar) expenditure.

Every reader will be familiar with the facts. Miss Mallalieu (as she then was) practised as a barrister with a busy court practice and it was necessary for her to adhere to the notes for guidance on dress in court issued by the Bar Council. Miss Mallalieu accordingly purchased white blouses and black clothing (of unobtrusive nature, long sleeved and high to the neck etc) but as she did not find such clothing suitable for her personal purposes, she did not wear these clothes otherwise than for work. The Commissioners found as a fact that her sole motive in incurring the expenditure was to satisfy the requirements of her profession.

Under the circumstances one can perhaps have a degree of sympathy for Miss Mallalieu when one compares this finding of fact with the requirement of section 74(a) TA 1988 that the expenditure must be incurred wholly and exclusively for the purposes of the profession. With such a finding of fact it would seem inevitable that the decision would be in her favour. Unfortunately not. The Commissioners found otherwise and eventually the House of Lords agreed with them.

It has to be said that the Commissioners' decision did not start auspiciously. It recites the facts found, the first one being that Miss Mallalieu is an attractive blonde barrister. Whether this is a finding of fact or law is not clear but it is disconcertingly irrelevant. There is no doubt that it is an accurate statement but one wonders why it was necessary to say so. Even Lord Brightman said that it would be absurd to suppose that there exists one law for the blonde barrister and another for the brunette, a point to which we shall return.

The principal judgment in the House of Lords was given by Lord Brightman who concluded that although Miss Mallalieu's sole object in incurring the expenditure was to satisfy the requirements of her profession, that was not enough because she had another subconscious motive. This subconscious motive was the provision of clothing to satisfy her needs as a human being: this was a personal purpose causing the expenditure to be disallowed.

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Lord Brightman explained that the lower courts had directed their attention to the object in the mind of the taxpayer when incurring the expenditure. They had held that what was present in the taxpayer's mind at the time was conclusive but Lord Brightman was unable to accept this narrow approach: it was necessary to consider her subconscious motive. It is not clear what evidence was adduced to determine Miss Mallalieu's subconscious motive but possibly it was a necessary inference that anybody buying clothes must have considerations of warmth and decency in their mind as well. So we must not be confined to looking at what is in the taxpayer's mind when incurring expenditure, we must also look at what she might (or must) have been thinking when buying clothes. The mind begins to boggle at the possibilities which it is perhaps inappropriate to develop here.

An obvious analogy can be drawn with the position of a self-employed nurse. It would seem that a self-employed nurse would be in exactly the same position as Miss Mallalieu. The clothes she buys for the purposes of her profession (her uniform) are wholly dictated by the requirements of her profession. She would not be permitted to pursue her profession without being dressed in the appropriate clothing. So it was with Miss Mallalieu who would not have been permitted to appear in court unless so clothed. The nurse's uniform provides her with warmth and decency and satisfies her requirements as a human being. The nurse puts these clothes on before going to work and changes into other clothing when she returns home, except on the odd occasion which can be disregarded. So it was with Miss Mallalieu. The nurse does not feel that her uniform is suitable for social wear, she has a wardrobe of other clothes which she prefers to wear - and so on. It is difficult to see any distinction between the nurse's uniform and Miss Mallalieu's black clothing. All purposes, motives and objects seem to be identical. Miss Mallalieu's black clothing was just as much a uniform for her calling as the nurse's uniform was for hers. The only difference seems to be that one can buy dark clothing which is capable of satisfying the requirements for court dress in *Marks and Spencer* (because some people, other than Miss Mallalieu, find them suitable for social wear) whereas a nurse's uniform may not be so widely available, or viewed by others in the same light. It is difficult to see how, if s.74 imposes a subjective test (and it seems that this is not in doubt), these considerations have any bearing on Miss Mallalieu's purpose, conscious or otherwise, in incurring the expenditure.

The next example is the self-employed waiter: the uniform supposed by Lord Brightman to be suitable for a self-employed waiter was tails but these days waiters seem more often to appear in a black jacket and striped trousers. That is their uniform and I imagine that Lord Brightman would be happy to allow a deduction for the expenditure. It is not too long ago (and in my observation the practice is by no means extinct) that male barristers wore exactly the same uniform of black jacket and striped trousers.

Lord Brightman's answer to these examples is that it is a matter of degree: he did not feel that his decision should cause any problems in the uniform type of case. With respect it seems to raise an enormous problem which is crucial to the whole issue. It may well be a matter of degree but what shades of distinction can be made between a barrister in his uniform and a waiter in his. His Lordship acknowledged that there were other cases where it is "essential" (the importation of this requirement raises a number of questions) that the "self-employed person should provide himself with and maintain a particular design of clothing in order to obtain any engagements at all in the business that he conducts". Given the notes for guidance on dress in court it could be reasonably thought that Lord Brightman was referring specifically to barristers - but clearly not.

The distinction was said to be that any professional person who was unacceptably dressed would find himself subject to a sanction; in the case of a barrister it would be that he would not be permitted to plead in court but another professional person such as an accountant or solicitor would merely be the subject of opprobrium to a varying extent. It seemed illogical to his Lordship that the entitlement to a tax deduction should depend upon the degree of sanction which would apply. However, with respect this seems to be the whole point. It is the degree of sanction which turns a dual purpose into a wholly and exclusive purpose. But this is really a diversion. If, as it is supposed, clothing must necessarily be purchased with at least a subconscious motive of satisfying the requirements of warmth and decency it surely does not matter whether the clothing is a uniform or not. Can it be said that the waiter and the nurse when buying their uniform clothing does not have the subconscious motive of fulfilling this personal need. And if not, why not. Why should only Miss Mallalieu be burdened with this subconscious motive?

This reasoning would appear to be quite helpful to taxpayers who are not at the Bar. It seems to be fundamental to the decision that a distinction can be drawn between the uniform case such as a nurse and the case where the self-employed person is not required to provide himself with and maintain particular clothing for the purposes of his profession. To the extent that clothing is (to use Lord Brightman's test) "essential" for the purposes of the profession, the considerations of warmth and decency do not even have to be considered. This opens the door to relief for such expenditure somewhat wider than it was before; the fact that I cannot reconcile this reasoning with the disallowance for barristers' clothing is an intellectual handicap I shall have to live with.

Lord Brightman seemed to find it objectionable that if Miss Mallalieu's argument was right it would be open to every self-employed person to set against his gross income the cost of the upkeep of a complete wardrobe of clothes so long as he reserves such clothes strictly for use only at work. Whilst these remarks clearly address the use made of the clothes and not the purpose for incurring the expenditure in the first place, it might reasonably be inferred that one followed from the other. Why this should be so repugnant is not clear. If a self-employed person can satisfy this strict test why should he not be entitled to a deduction? After all, what better grounds can there be for tax deduction than that you buy something wholly and exclusively for the purposes of your profession and use it wholly and exclusively for the purposes of your profession? If Lord Brightman feels that a tax deduction is inappropriate in such circumstances it is difficult to see how any expenditure would be allowable.

A similar observation can be made in respect of Lord Brightman's rejection of the notion that there can be one law for the blonde barrister who lacks a wardrobe of dark clothes and another law for the brunette whose wardrobe of everyday clothes contains many dresses suitable for court appearance. With respect this seems to be the very heart of the matter. It is not a question of having two laws; the law is the same but different people have different purposes when they incur expenditure. If I fly to New York for the exclusive purpose of a business meeting and fly back immediately afterwards the expenditure would be tax deductible. If my colleague flies to New York on holiday the expenditure would be disallowed. The trip will be the same, the cost will be the same, we may even be on the same flight, but it will be undertaken for a different purpose. If Miss Mallalieu had regarded these clothes suitable for social purposes she would no doubt have had a dual purpose irrespective of the colour of her hair. Indeed, the frailness of the point seems to be exemplified by Lord Brightman's own example of the medical consultant who flies to the South of France for a week staying at the house of a friend and attending medically upon him. "If a week's stay on the Riviera was not an object of the consultant, if the consultant's only

object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of the expenditure" and was not prohibited.

This passage is intended to explain the difference between object and effect but it is difficult to see how this is not equally applicable to Miss Mallalieu's clothing. Her sole object was the professional purpose; the satisfaction of warmth and decency was merely an incidental effect. If one can recategorise the warmth and decency as a subconscious motive why cannot the doctor have a subconscious motive (possibly not too deeply submerged) that a week on the Cote d'Azur would be rather agreeable. Be that as it may, it is clearly of great help to have such a colourful example of the distinction between object and effect - even if again it is difficult to reconcile the analysis with the ultimate conclusion regarding Miss Mallalieu's clothing.

A curious point arises from the case which is not adequately explained. One reason why even the most optimistic advocate may have had doubts about Miss Mallalieu's case is that she admittedly travelled from home to chambers dressed in her professional clothing. On the basis that travelling from home to chambers is a personal and not a professional purpose (see *Newsom v Robertson* (1952) 33 TC 452) and that this was her usual manner of conducting herself, a private purpose seems clearly to be established. However, for reasons which are unclear, this point was deliberately not taken by the Inland Revenue. One can think of any number of circumstances when one would prefer the Inland Revenue not to take a similar point and it may be helpful in other cases to ask them not to do so.

The above comments do little more than scratch the surface of the practical problems arising in applying the decision in *Mallalieu v Drummond* to the more general context of deduction for expenditure of self-employed individuals. It may not be wholly fair to say that the ultimate decision was special to the facts, putting the position of barristers' clothing beyond dispute, but there is ample material in Lord Brightman's judgment to assist in claiming a deduction for a whole variety of expenditure which might otherwise have been rejected out of hand. Perhaps Miss Mallalieu's robe had a silver lining.