



TC02096

Appeal number: TC/2011/04322

*Income Tax – Self Assessment – failure to keep records – Notice of Enquiry
– Documents required to be produced – failure to produce documents –
Closure – Late production of documents – Assessment to Tax – Loss of Tax
– Penalties – Appeals dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT LARKIN

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE GRETTA PRITCHARD, BL, MBA, WS
IAN CONDIE, CA**

Sitting in public at George House, Edinburgh on 26 April 2012

Brian McRitchie for the Appellant

**Mrs Chris Cowen, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

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DECISION

Background

1. This is an appeal by Robert Larkin against:

- 5 (1) Closure Notices in respect of tax years ending 05.04.2005 and 05.04.2008;
- (2) Assessments to Income Tax for the tax years ending 05.04.2004, 05.04.2005, 05.04.2006, 05.04.2007 and 05.04.2008 all dated 06.10.2010; and
- 10 (3) An amended penalty determination in respect of the tax years 2003-04 – 2007-08 dated 07.02.2011, all issued by HMRC.

The Hearing

2. The Appellant Mr Robert Larkin appeared and gave evidence. He was represented by Mr Brian McRitchie his financial adviser. His accountant Mrs Shirley Paterson, CA of Paterson, Accountants is seriously ill. The assessing officer Ms Lyn Grant appeared and gave evidence and was credible. HMRC was represented by Ms C Cowen. The written evidence lodged prior to the Tribunal is in two folios, consecutively numbered sections 1-8, with each section separately paginated. Where reference is made to any page in Section/Page number it will be treated as repeated here.

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20 Preliminary matter

3. On the morning of the hearing Mr Larkin produced a very large bundle of documents. He said he had obtained these from Newtown Cars. He gave the impression at first these were recent acquisitions which he had forwarded to HMRC who had taken no account of the contents and who had not produced them in the folios which would disadvantage him. He wished them to be admitted in evidence. Ms Cowen said HMRC had had the documents and had analysed them and had corresponded with Mr Larkin but had advised him why they considered they were of no value to him or them. The chairman explained to Mr Larkin the Tribunal would need to adjourn to take account of the lateness of production of his own evidence which HMRC were not obliged to lodge and to have a look at the contents.

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Preliminary decision

4. After adjourning, the Tribunal decided to admit the documentation which will, where appropriate, be referred to as Section 9.

Adjournment

5. There was during the hearing one adjournment granted to allow both parties to discuss the possibility of a settlement but this was not achieved and Mr Larkin thereafter sustained his Appeal. The Appeal proceeded following the adjournment.

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6. Legislation

(1) Taxes Management Act 1970 (TMA1970), Sections 9A, 12B, 19A, 28A, 29, 36, 97AA and 100.

(2) Finance Act 2008

5 (a) Schedule 36, para. 1.

(b) Schedule 39, para. 9.

7. Cases referred to at the Tribunal

Regina v General; Commissioners of Income Tax for Havering 49TC179

Mohamed Abdour Rouf v HMRC (2009) 6XA96/07

10 *Norman v Golder* (HMIT) 26TC293

T Haythornwaite & Sons Ltd v Kelly (HMIT) 11TC657

Nicholson v Morris (HMIT) 51TC95

Hurley v Taylor (HMIT) 71TC268

Jonas v Bamford (HMIT) 51TC1

15 *Coy v Kyme* (HMIT 59TC447)

8. Findings in Fact

20 (1) Robert Larkin was in full time employment till approximately 13 November 2003. However, in June of that year he had acquired a taxi. The taxi licence was in his name but he could not be the nominated driver as he had lost his driving licence. His wife was nominated but the taxi was driven by several other drivers.

25 (2) Business was generated through Newtown Cars in Livingston, the area where Mr Larkin lives and where his drivers live and where the taxi operated. As well as fare journeys he was also supplied with a radio system and a taxi fare meter. He used the radio for receiving fare journey instructions. He also generated a number of contracts, principally for delivery and collection of
30 schoolchildren to and from school on school days. He remained on station awaiting instructions at various locations in Livingston. He did not always return home between fares.

35 (3) Mr Larkin started taxi driving himself once his driving licence was restored and he had stopped full-time employment on 13 November 2003. He continued to allow other drivers to use his taxi.

(4) Mr Larkin admitted to HMRC at a meeting on 11 February 2010 and also at the Tribunal that he had failed to keep proper records in his years of business until recently.

5 (5) When he made his first return for the part year 2003-04, an assessment was issued by HMRC to which Mr Larkin objected on 8 April 2010 following an enquiry conducted into later returns by HMRC. HMRC have not objected to the lateness of the appeal so that return forms part of this Appeal.

10 (6) In his part year return, 2003-04 Mr Larkin submitted in his tax return that he had had an income of £3,927.00 gross in respect of his taxi driving from November 2003 to April 2004 with a gross profit of £2,727.00. He then claimed administrative expenses of £195 and motor expenses of £1,822 giving a net profit before tax of £639.

15 (7) In his return for 2004-05 which was completed by his accountant Mrs Shirley Paterson of Paterson Accountancy, Uphall, he declared a gross income of £22,088 giving a gross profit of £17,408 after deducting cost of sales. Expenses of £10,142 were claimed which included administrative expenses and
20 motor expenses showing a net profit of £7,266. From that he deducted capital allowance of £1,878 giving a taxable profit of £5,391.

(8) Following the submission of the tax return to 5 April 2005 Ms Lyn Grant, the Inspector of Taxes in the local compliance office of HMRC for small and
25 medium enterprises instigated an enquiry into Mr Larkin's tax return (Section 5 p1/2), under Section 9A TMA. She also wrote to Paterson Accountancy requesting all financial accounts, sales records, ledgers and bank statements and all the paperwork associated with Mr Larkin's business as a taxi owner and
30 driver in particular to include the taxi inspection certificate to show the mileage of the vehicle for the year to 5 April 2005. She also wished a number of queries to be answered. Again she had specific enquiries about the number of persons driving the taxi (or taxis if he had more than one). She also wanted all vouchers for expenditure.

35 (9) On 15 August 2006 Paterson Accountancy replied with a large amount of information. However, no note of personal drawings by Mr Larkin had been kept. Mrs Paterson also advised that her client informed her there were no other drivers using the taxi of which there was only one. This was false information provided to her by Mr Larkin.

40 (10) Mr Larkin was on 31 August 2006 asked to produce all his personal bank account statements as he did not keep business bank accounts. As the appropriate taxi certificate had not been kept she asked for a mandate to be
45 signed for a report from the local council who held the records which would show the mileage of the taxi for one year. The household had two cars. The second car was Mrs Larkin's. She also asked again for tariff information not previously supplied, with regard to the taxi fares. She wished to link the taxi

mileage to the tariffs to assist in calculating income. She was of course also allowing for the calculation to have a deduction for “station to fare source” mileage.

5 (11) The mileages were eventually obtained by Miss Grant from Lothian and Borders Police. These were:-

On 27 February 2004 – 153,255

10 On 1 March 2005 – 226,086.

(12) By January 2007 all bank statements had still not been produced. Indeed not all accounts had been advised.

15 (13) Ms Grant advised she wished all the requested information by 1 March 2007 in order to advance to a conclusion, and invited Mrs Paterson and Mr Larkin to a meeting. Ms Grant also wrote to Mr Larkin directly on 7 March 2007 giving notice of the requirement to produce specific documents in 30 days and advising of his right to appeal the notice. When these were not
20 produced Mr Larkin was given a further 14 days and put on notice of penalties. He could not attend the first meeting so a second date was arranged.

(14) On 30 May 2007 Mrs Paterson intimated to Ms Grant the tax inspector that Mr Larkin was refusing to produce his personal bank statements which he
25 considered an invasion of his privacy. The correspondence continued with no progress and no meeting, and Mr Larkin refusing production of further bank accounts, so a penalty notice was issued on 28 June 2007.

(15) A meeting was finally arranged for 30 October 2007 at 12.00pm in
30 Paterson Accountancy’s office. As Mrs Larkin was also to attend a mandate to breach confidentiality between the spouses was required and obtained. The meeting was cancelled.

(16) Ms Grant then requested a questionnaire be completed with regard to
35 lifestyle and how Mr and Mrs Larkin managed to move house from 75 Vancouver Avenue to a new house costing £235,000 at 18 Eastcroft Court, both Livingston when their income was low. It transpired they had inherited sums and also an ISA had paid out £37,000. Their new mortgage was £636.44 per month. They also support two children. Mrs Larkin is in employment. They
40 have a number of finance company instalment payments. Mr Larkin still held out his business commenced in December 2003. Although the taxi licence was issued in June he claimed it took till December to sort out the paperwork. This was not true. He had had other drivers driving the taxi. They continued driving even after he started driving the taxi himself.

45 (17) On 4 March 2008 Ms Grant finally decided Mr Larkin’s 2005 Tax Return was not complete and correct. The Tribunal was satisfied and finds she had

5 sound reasons including lack of credibility on record keeping with claims of
recordkeeping not matching what had been produced; lack of a daily record of
cash takings; no cash reconciliations with bank statements; overclaims for the
cost of being a member of Newtown Cars; no record of tips; no clear evidence
10 of who was driving the taxi; no evidence of payment by other drivers for the
use of the taxi (referred to in the trade as a “weigh-in”); calculation of mileage
of the car with the tariffs quoted suggested higher trading income than stated
allowing for a 20% personal use despite no allocation by Mr Larkin in respect
of the taxi expenses such as insurance when he claimed 40-50% personal use;
15 petrol receipts suggesting Mr Larkin worked over Christmas and New Year with
extra tariff payment entitlement. The letter is at Section 5 P82/3/4/5/6, and is
referred to for its full terms. She also calculated the likely additional taxable net
profit at £18,150. It was suggested to Mr Larkin that HMRC would be
interested in a settlement and would also take other years into consideration.

15 (18) By June 2008 HMRC requested a full statement of Mr Larkin’s assets and
liabilities which was never fully completed.

20 (19) On 17 December 2008 Mrs Paterson wrote confirming Mr Larkin would
like to settle. She also confirmed other drivers had had the use of the taxi.
However, it was still claimed Mr Larkin’s business did not start till 1 December
2003. The other drivers kept cash payments but contract payments went to Mr
Larkin.

25 (20) It was also suggested that only Mr Larkin drove in the tax year 2006-07.
However in Section 9 it was evident that was untrue as the information printed
off from Newtown Cabs showed other drivers using the taxi.

30 (21) On 17 June 2009 Ms Grant instigated an enquiry into Mr Larkin’s 2007-
08 tax return. A similar exercise to the enquiry into the 2004-05 return was
carried out. She again requested standard information as before. Nothing
happened. Eventually on 17 August 2009 some information was produced but
questions raised by Ms Grant went unanswered. A meeting was arranged for
11 February 2010. A full note is contained at Section 5 P142-7, confirmed as
35 correct by all parties. It is treated as repeated here, and from it the Tribunal
finds that with regard to the 2007-08 tax return that:-

(a) the sales records were not contemporaneous;

40 (b) there were clear gaps – no Saturday or Sunday sales and some week days
with no sales. Despite this there were full records showing the car was fuelled
twice on Saturday 9 June 2007 at 1.38pm and 2.56pm;

(c) only 150 out of 365 days had recorded sales;

45 (d) gaps in fuelling receipts indicated an attempt to provide a more realistic
fuel to takings ratio. It was accepted fuel receipts were missing but there

were to be accounted for as personal use. This is not the correct method of calculation;

5 (e) daily entries were on the low side with one day showing only £18.80;

(f) the mileage covered was not reflected in sales;

10 (g) £962 of expenses not vouched. In the vouched expenses was £60 parking fine which is not allowable.

15 (22) After discussion about mileage and weigh-in Ms Grant undertook to rework her figures for 2005 and use the RPI for the subsequent years. Mr Larkin admitted there were inaccuracies and that he had not told the truth previously. He was advised about penalties. It was agreed that a settlement was the best way forward.

20 (23) Ms Grant carried out the reworking and came out with a figure of increased net profit for 2004-05 of £13,366. She then calculated 2005-06, 2006-07 and 2007-08, in a most detailed letter of 17 February 2010. She attached a business economic exercise she used as a framework given the lack of accurate information afforded her by Mr Larkin.

25 (24) She issued the appropriate Notice of Assessment on 29 March 2010 to keep to the time limits for the issuing of such assessments in respect of appropriate tax years.

30 (25) A revised calculation was submitted by Mrs Paterson to take account of Mr Larkin's assessment of the mileages of the other drivers, and increased personal mileage allowance. She lodged an appeal against the 2003-04 assessment.

(26) Many arguments were addressed by Ms Grant.

35 (27) On 10 August 2010, Mr Larkin offered £10,000 as a settlement figure. £24,000 was the figure sought. On 22 September 2010, he wrote to Ms Grant withdrawing this offer.

40 (28) On 22 September 2010 Ms Grant was sent Section 9. She analysed this most carefully. She actually looked at Google Maps and the journeys recorded for the year 2006-07 which was what was available. The Tribunal finds that her full consideration of these schedules was advantageous and helpful to Mr Larkin and allowed her to recalculate. She had been told Mr Larkin was the only driver which she had correctly suspected was untrue. When she had the records she was able to identify and calculate their journeys. She did not have a note of the sales. She did it herself using the information on the Section 9 Schedules which showed that each fare journey was from one address to another address and who the driver was. She used the tariffs produced by Mr Larkin to calculate fares.

5 (29) Ms Grant had been told by Mr Larkin he had not driven the taxi between June – December 2003 as he worked 12 hour shifts at Salvesens. She did not believe he took no payment from others using his taxi. She believed he had received payment. He finally accepted that his drivers met his costs such as insurance but he did not consider that as income.

10 (30) The Tribunal find she was entitled on the evidence to make calculations based on her examination of the records finally produced which she had done with a good grace despite the lateness of the production of the Newtown Cabs print outs of the journey and driver records, and to Mr Larkin's advantage.

15 (31) When the closure notices she finally issued were appealed the enquiry was not re-opened but all subsequent evidence produced was fully considered by Ms Grant.

20 (32) A review was conducted but the decisions were not revised. Penalties were imposed but allowances were made. The penalty is 100% of the additional liabilities. Abatements were given – 20% disclosure, 30% for co-operation and a further 15% making a total abatement of 65%. The Tribunal found Ms Grant had rebated to Mr Larkin's advantage.

Submissions

25 *For HMRC*

30 9. For HMRC Ms Cowen submitted that the returns for the tax years to 05.04.04, 05.04.05, 05.04.06, 05.04.07 and 05.04.08 were inaccurate and incomplete. Mr Larkin had admitted as much. Enquiries were made specifically into the 2005 and 2008 returns. There is a legal requirement to self assess when income is generated which is chargeable to tax. The book keeping by Mr Larkin did not comply with the statutory requirements. The test for Ms Grant who was the assessing officer is in TMA 1970 S29 and provides she will where it is discovered that income has not been assessed make an assessment which in her opinion ought to be charged in order to make good the loss of tax. That is subject to the condition that the situation was brought about carelessly or deliberately. Ms Grant used her judgement in light of the information available. She used the facts before her, looked at mileage and tariffs, personal use, fuel etc and concluded her enquiries fairly. She was satisfied Mr Larkin was careless.

40 10. Mr Larkin by contrast proved unwilling to co-operate fully, to disclose all the information required and to provide proper returns. He had given evidence of recognising the error of his ways. He was negligent. There had been room for negotiation on quantum and any evidence favourable to Mr Larkin which could be substantiated was taken into account. He had not given due care and attention to his record keeping. She relied on the case of *Mohammed Rouf v HMRC* 2009 6XA96/07 to establish Mr Larkin had not provided complete and reliable information. She asked

that HMRC's assessments and penalties be upheld. He had not met the onus of proof required to show the assessments were not the assessments of a reasonable officer. Assessment is not an exact science. Ms Grant had wide experience of taxi businesses and used her experience to assess.

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11. In her opinion Ms Grant had made generous concessions on the penalties. Interest was also running on the outstanding tax.

12. She moved for the appeals to be dismissed.

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For Mr Larkin

13. Mr McRitchie for Mr Larkin accepted Mr Larkin had admitted his book keeping was not up to scratch. He had produced Section 9 this morning in a bid to show that his records were not as inaccurate as had been suggested. Mr Larkin had always held out that the other drivers of his taxi did not pay him and sustained that argument still. He had had an accountant. Mrs Paterson is very ill. Mr Larkin considered she could have been more pro-active. Mr Larkin considered he was suffering injustice and should be relieved of the assessments and penalties.

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Decision

14. The appeals against the closure notices with respect to the enquiries for the tax years 2003-04 and 2007-08 are refused. The appeals against the assessments for the tax years to 05.04.04, 05.04.05, 05.04.06, 05.04.07 and 05.04.08 are refused.

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15. The appeals against penalty are refused.

Reasons for decision

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16. Mr Larkin was not credible. From the start of the morning when he requested the lodgement of Section 9 to the end of his evidence he made statements which were often wholly unfounded. He suggested Ms Grant had ignored the Section 9 material which consisted of print outs of the records of journeys made by Mr Larkin's taxi from July 2007, showing the pick-ups and destinations and the identity of the driver. Ms Grant had gone to considerable lengths to check the likely sales achieved using Google Maps to calculate distances and used known tariffs to calculate the fare. It was well beyond any duty or responsibility she had and showed great consideration to Mr Larkin. He was aware from correspondence that she had made allowances for that and had recalculated figures. Yet when asking to have the documents lodged he told the Tribunal HMRC had ignored them, taken no account of them. Worse he assured us they would show he had given all the requested information to HMRC.

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17. Instead all that it did was prove he had for a long time given false information to HMRC with regard to his taxi being used. The Tribunal became aware from Mr Larkin's evidence the taxi was in fairly constant use. He even at one point referred to the possibility he had not done some of the contract work the proceeds of

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which he received even if another driver did the journey because he might have been driving at night. So his records not containing any calculations based on night or weekend work were thereby suspect. His refusal to produce correct bank statements or other material requested also left a poor impression. Although he protested the Business Economic exercise was not a reasonable method for calculating the under declaration, he did not provide adequate alternatives by showing good records etc to dispense Ms Grant's calculations. She showed she was a diligent and gracious tax officer. Ms Grant had been reasonable at all times. She had been tolerant of delays and failures for what eventually turned out to be years before there was sufficient material for her to attempt to assess Mr Larkin's liability to HMRC. She allowed every reasonable concession for personal use, and in relation to the penalties that Mr Larkin could possibly have hoped for. He made what could only be described as a derisory offer in settlement and then withdrew it. It was clear from his and Ms Grant's comments that she had made a number of concessions in attempts to achieve a settlement but Mr Larkin was simply not co-operating, which appeared to the Tribunal to be very irresponsible considering his admissions in the witness box of failing to keep records.

18. In all the circumstances the appeals were therefore refused.

19. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**GRETTA PRITCHARD
TRIBUNAL JUDGE**

RELEASE DATE: 21 June 2012