



TC02808

Appeal number: TC/2012/03051

INCOME TAX – undeclared profits – whether assessments ought to be reduced – burden on appellant to show she was overcharged – burden not discharged – assessments and penalty determination upheld – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LORRAINE HURD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
SONIA GABLE**

Sitting in public in Colchester on 12 November 2013

Martin Kennedy, Martin Kennedy & Co., Accountants, for the Appellant

David Glassonbury, Senior Officer, HMRC, for the Respondents

DECISION

5 1. The appellant, Mrs Lorraine Hurd, appeals against assessments to income tax and national insurance contributions (“NICs”) and penalty determinations as follows:

	Year ended 5 April:	2004	tax and NICs assessed:	£1,300.30
		2005		£2,754.10
10		2006		£3,324.10
		2007		£3,350.70
		2008		£1,754.90
	Year ended 5 April:	2004	penalty determined:	£520
15		2005		£1,102
		2006		£1,330
		2007		£1,340
		2008		£702

20 2. Mrs Hurd gave oral evidence on affirmation and we had before us a bundle of documents. From this evidence we find facts as follows.

25 3. In April 2008, the Respondents (“HMRC”) opened an enquiry into the tax return for the year 2007 submitted by Mrs Hurd’s husband. Mr Hurd was self-employed as a market trader with a greengrocery business. HMRC had information suggesting that Mr Hurd, in addition to his greengrocery business, was also involved in the buying and selling of cars. No income relative to this latter business had been declared by Mr Hurd on his return.

30 4. At a meeting held on 3 December 2008 in connection with that enquiry, which was attended by Mr Hurd, Mrs Hurd and their accountant, Mr Martin Kennedy (who appeared for Mrs Hurd before us), HMRC explained that they held the information referred to above and that unidentified lodgements and withdrawals from the enquiry year bank statements provided by Mr Hurd appeared to support HMRC’s suspicion that Mr Hurd was involved in the buying and selling of cars. Both Mr and Mrs Hurd denied at that meeting that they were involved in the buying and selling of cars. Mrs Hurd told us that she had been caught off-guard, as she had expected the meeting only to be concerned with Mr Hurd’s affairs, and she had felt intimidated.

35 5. HMRC asked Mr Kennedy to identify the source of the unidentified lodgements and the destination of the unidentified withdrawals and this resulted in
40 a disclosure that car selling had been undertaken by Mrs Hurd.

6. She stated that the business was run initially with a Mr Bradley Finch, and later with a friend of his, a Mr Nigel Ford. Mr Finch was sent to prison, for offences involving fraud and deception, towards the end of 2005, and Mr Ford had

died in 2008. Included in our papers was a letter dated 20 October 2010, which we were told was written by Mr Finch. It reads as follows:

‘Dear Sir,

5 Reference your letter asking me about the dealings I had with Mrs Hurd, when I was in the motor trade and dealing with my friend Nigel Ford, who by the way died some time ago.

There were various times when I sold cars to and from Mrs Hurd on behalf of Mr Ford. For this I received commissions, sometimes from Mrs Hurd and sometimes from Nigel. I usually received £100 cash, sometimes more.

10 I cannot give you exact dates as I have been under the doctor for some years, and have at times been on strong medication.

Respectfully,

B. Finch’

7. The disclosure referred to above was made by Mr Martin Kennedy (by a letter dated 23 February 2009) following the meeting on 3 December 2008. He told HMRC that Mrs Hurd had known Mr Finch for some years as a family friend and he had suggested to her that she should sell some cars on his behalf. He would buy a car at auction in Southampton, bring it to Clacton and pass it on to Mrs Hurd (who lived nearby) to sell. Any profit was split 50/50 between Mr Finch and Mrs Hurd. The cars were imported to Southampton from (we understood) Japan and sold at auction near the dockside. They were regarded as being cheap to buy and so it was expected that there would be sufficient profit from resale to give both Mr Finch and Mrs Hurd an income. Mr Kennedy told HMRC that this business activity had started during 2004. It had continued after Mr Finch’s imprisonment, Mrs Hurd then working with another individual (unnamed in the letter, but actually Mr Ford).

8. Mr Kennedy told HMRC in his letter dated 23 February 2009 that no ‘formal books’ had been kept, but that entries had been made in a diary. Disclosure of the vehicles sold and prices obtained was promised. Mr Kennedy suggested in his letter that the profit from the activity was ‘below any tax or national insurance threshold’ and this was offered as a justification for the fact that nothing had been declared to HMRC.

9. On 23 March 2009, Mr Kennedy wrote again to HMRC, disclosing Mr Ford’s name, and apologising for the fact that, as Mrs Hurd had kept no record of the vehicle registrations, it would not be possible to produce a list of vehicles sold. However figures for turnover and gross profit were given as follows:

	Year	Turnover	Gross Profit
	2004-2005	£43,490	£2,070
	2005-2006	£35,640	£2,140
40	2006-2007	£66,594	£3,970
	2007-2008	£48,480	£3,075
	2008-2009	£22,790	£2,070

10. HMRC asked to see the diary in which records had been kept – and any other records that had been kept. Mrs Hurd wrote on 2 June 2009 to HMRC apologising for ‘not being honest at our first meeting regarding car sales’, stating that there was only one (2006) diary and it did not contain much information on vehicles but did contain personal things. She offered to let him see the diary at Mr Kennedy’s office.

11. A meeting was held at Mr Kennedy’s office on 1 July 2009. There was a long note of the meeting (written by HMRC) with our papers. The diary for 2006 was handed to HMRC for examination. Mrs Hurd explained that she had had diaries for other relevant years but only the diary for 2006 had been retained. She had, in fact, shredded the diary for 2007 after HMRC had been made aware of the fact that her diaries contained information about car sales, because, she said, it had contained some very personal information. The figures for turnover and gross profit had been prepared largely from memory by Mrs Hurd.

12. Bank statements covering the relevant period were later provided to HMRC by Mrs Hurd. These included bank statements in Mr Hurd’s name, Mrs Hurd’s name, their joint names and in the name of Mrs L Bedder (a former married name of Mrs Hurd).

13. HMRC examined these bank statements and the approach HMRC adopted was to identify all lodgements over £500 and proceed on the assumption that they represented car sales (one car sale per lodgement). The number of sales for each tax year was then totalled and rounded up slightly to reflect the probability (in HMRC’s view) that some transactions would have been entirely in cash and not banked at all. Having estimated the number of transactions in each year in this way, HMRC assumed a profit on each sale of between £500 and £1,000, say, £750.

14. Mr Kennedy, on behalf of Mrs Hurd, accepted the reasoning behind HMRC’s approach and broadly agreed the number of car sales suggested, subject to a slight reduction (2 per year) to account for some of the unexplained lodgements being transfers in from savings or Mr Hurd’s business, to enable car purchases to be made. He contended, however, that the estimated profit per sale was far too high and that a realistic figure would be £290, instead of £750 – and the lower level of profit would have been split between Mrs Hurd and Mr Finch or Mr Ford. In round terms, HMRC’s figures produced profits over 6 years of £110,000, whereas Mr Kennedy suggested that the figure should be £39,440.

15. HMRC have accepted, from the evidence available to them, that the profit made by Mrs Hurd in 2008-09 was insufficient to generate a tax liability. Therefore HMRC assessed only for the years 2003-04 to 2007-08. In making the assessments a gross profit of £500, instead of £750, was estimated and an estimate for expenses was included in the calculation.

16. The assessments are on the basis of estimated income from self-employment (the trade of buying and selling cars) as follows:

	Tax Year	Estimated Profits assessed
5	2003-2004	£9,000
	2004-2005	£14,000
	2005-2006	£16,000
	2006-2007	£16,000
	2007-2008	£11,000

10 17. The penalty determination imposes penalties at a percentage of the total of tax and NICs charged on the assessments for each year. An abatement (from 100% of that total) of 10% (out of a maximum of 20%) has been allowed for disclosure; an abatement of 30% (out of a maximum of 40%) has been allowed for co-operation; and an abatement of 20% (out of a maximum of 40%) has been allowed for seriousness. Thus the total abatement allowed is 60%, leaving penalties charged at 40% of the tax and NICs assessed.

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20 18. The issue for us is whether Mrs Hurd has satisfied us that HMRC's estimated assessment is too high. There is little difference between the parties on the number of cars sold between 2003/04 and 2007/08 inclusive – HMRC estimate between 20 and 35 a year; Mrs Hurd estimates between 18 and 33 a year. The profit per vehicle assumed in the assessments made by HMRC is £500. The profit contended for by Mrs Hurd is £290 or £300 per vehicle of which she was entitled to only 50%. Mr Kennedy made no submission to the effect that the abatement allowed in the penalty determination (60%) ought to have been higher.

25 19. Mrs Hurd's evidence was that most of the cars sold for between £1,500 and £2,500, but that a few sold for more. She denied that she had attempted to hide moneys in the Bedder account from HMRC. She had not been forthcoming about the account because it was an account about which her husband was unaware and she was unwilling to disclose it for that reason. She admitted that she (and/or Mr Hurd) had claimed tax credits without declaring the income from the car sales. She denied that she was in partnership in the car selling business with Mr Hurd (or anyone else). She accepted that it was her fault that she had not kept any records.

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35 20. Mr Kennedy submitted that Mrs Hurd was the person who had the best idea of the profits earned from the car-selling business and that we should prefer her estimate over that contended for by HMRC.

Discussion and conclusion

21. Section 50(6)(c) Taxes Management Act 1970 ("TMA") relevantly provides as follows:

'If, on an appeal notified to the tribunal, the tribunal decides-

40 (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment ... shall be reduced accordingly, but otherwise the assessment ... shall stand good.'

22. As Park J said in *Hurley v Taylor (HM Inspector of Taxes)* 71 TC 268 at 286 (a case cited by Mr Glassonbury), by reference to an earlier enactment of section 50(6) TMA, which was in substantially similar terms to the present enactment:

'It is well settled by authority that this [i.e. section 50(6) TMA] places the onus of discharging the assessment on the taxpayer. If the Commissioners [now, the tribunal], having heard his case, are uncertain where the truth lies, they must dismiss the appeal and uphold the assessment.'

23. In practical terms, in our view, applying section 50(6) TMA in this case, we have no alternative to upholding the assessments and the penalty determinations unless we are satisfied that HMRC's assessment is in some respect unreasonable.

24. Mr Kennedy, for Mrs Hurd, has really only made two points which go to this issue. The first is that the likely average gross profit on the sales of cars carried out by Mrs Hurd was £290 (or £300) rather than £500 as HMRC have estimated – and that as Mrs Hurd was the person who carried out the sales, her estimate is to be preferred because she has the best idea of the profit realised. The second is that of that profit only 50% can be attributed to Mrs Hurd, because the other 50% accrued to Mr Finch (or Mr Ford).

25. We are quite unable to accept either point.

26. Mrs Hurd had no evidence to support her lower estimate of the average gross profit realised on the sales of cars carried out. She had admittedly shredded a diary that might have contained relevant evidence. She certainly ought to have had the best idea of the profit realised but it is entirely reasonable to have expected her to provide some contemporaneous evidence supporting her estimate, for example in the form of accounts, receipts, or journal notes. She provided no such evidence and the tribunal must also take into account that her credibility is seriously undermined by her admitted untruthfulness at earlier stages of the investigation. On consideration of all the evidence we find that HMRC's estimate of £500 gross profit per sale and their estimate of the number of sales are both entirely reasonable (even, in the case of the gross profit estimate, generous to Mrs Hurd) and that Mrs Hurd has not satisfied us that her lower estimate is to be preferred.

27. Also, we cannot accept that there ought to be a reduction in the amount of profit assessed on account of a supposed profit share with Mr Finch and/or Mr Ford. Again, Mrs Hurd has been unable to persuade us by evidence that 50% of the profit on sales completed by her accrued to Mr Finch and/or Mr Ford. For the reasons of lack of credibility explained above, we are not prepared to accept her oral statement to that effect, obviously self-serving as it is.

28. Furthermore, the letter apparently from Mr Finch which was produced, and which we have reproduced in full above, so far from supporting Mrs Hurd's case that 50% of the profit was paid to him (in relation to sales in which he was

involved) merely asserts that he received a commission (usually £100, sometimes more). He also states that he sold cars on behalf of Mr Ford (not Mrs Hurd) and that he received commissions sometimes from Mr Ford (not always from Mrs Hurd). In the light of all the evidence, we are not satisfied that there was in fact the profit sharing arrangement alleged by Mrs Hurd.

29. The assessments therefore must stand good.

30. As to the penalty determinations, no additional case was advanced by Mr Kennedy, for Mrs Hurd, as to why we should reduce them. In particular the abatements given by HMRC (which appear to us to be generous rather than harsh so far as Mrs Hurd is concerned) were not disputed. We therefore confirm the penalty determinations as well.

31. Interest on late payment of tax was not addressed at the hearing and must follow in the usual way.

32. For these reasons, we dismiss the appeal.

Right to apply for permission to appeal

33. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

JOHN WALTERS QC

TRIBUNAL JUDGE

RELEASE DATE: 29 July 2013