



**TC03254**

**Appeal number: TC/2011/00170**

*Income Tax – determination of assessments*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DAVID J WALSH**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHARLES HELLIER  
CHRISTOPHER JENKINS**

**Sitting in public in Southampton on 24 October 2013**

**The Appellant in person**

**Simon Bates for the Respondents**

## DECISION

### Introduction.

5 1. This appeal concerns Mr Walsh's taxable income for the years 2002/03 to 2005/6. HMRC have made assessments, or amendments to Mr Walsh's self assessments, for each of those years which are the subject of this appeal.

2. Mr Walsh did not dispute that his tax returns for these years had underdeclared his income. The issue before us was limited to determining the amount of his taxable  
10 income for each year.

### The Hearing.

3. Mr Tovey of Taylorcocks is Mr Walsh's accountant. For the last six years or so he has been conducting Mr Walsh's case in relation to the assessments. On 21 October 2013 he had confirmed that he would be attending the hearing.

15 4. The date set for the hearing was 24 October 2013. At 5:51 pm on 23 October Mr Tovey e-mailed the tribunal seeking a postponement of the hearing. He said that his 90-year-old mother was currently in hospital with a suspected heart attack, and that he himself had suffered chest pains.

20 5. Before the time set for the hearing the tribunal chairman was notified that Mr Tovey's son was waiting outside to deliver a letter from Mr Tovey. Mr Jenkins was not present. The tribunal chairman received him in the presence of Mr Bates and was told that his grandmother had been suffering from dementia, had fallen a couple of days ago and was in hospital. His father he said was visiting her. He then left for work.

25 6. We asked our clerk to try to contact Mr Tovey by phone. He tried Taylorcocks and Mr Tovey's mobile number without success. He left messages for Mr Tovey. We also asked the clerk to try to contact Mr Walsh.

30 7. At 10.25 am Mr Walsh arrived in person. We explained what we had heard from Mr Tovey and asked whether he thought he was able to represent himself. Mr Jenkins explained that this was his opportunity to tell us why HMRC's figures were wrong. Mr Walsh was a little uncertain but was willing to try.

35 8. It seemed to us that it was just to proceed without the benefit Mr Tovey's assistance. Mr Walsh's own evidence would be crucial in any event and the matter had dragged on for some time. We indicated that following the hearing we would send a draft of our decision to Mr Tovey for his comments before we issued it formally. It was sent to him but no comments were received.

### The evidence.

9. We had before us three volumes of correspondence between the parties. We heard oral evidence from Mr Walsh. We read a witness statement of Corinne Clarke an Officer of HMRC. Ms Clark was present and gave no formal evidence. We find the facts as they appear below.

5 **Background.**

10. Mr Walsh was a director of Insight Services Limited until October 2002. The company provided night time track work for London railway concerns such as Network Rail. The jobs were in London and those undertaking them would drive up to London to do the work in the company's vans.

10 11. In January 2002 Mr Walsh was contacted by the Child Support Agency ("CSA"), claiming that he was the father of a child and should make support payments. He told us that he had disputed the claim but had not been successful. He had incurred legal fees. The action, he said, had affected his state of his mind and he began to drink heavily. This got worse, and in October 2002 he resigned from Insight.

15 12. He told us that his co-director at Insight tried to help him get his act together and he was coaxed to continue doing some work at Insight. He said he went in now and again for less than two days a week, but he was "not that bothered". It seems that in 2003/4 he continued in much the same way but slowly began to improve so that by the middle of that year he was drinking less and more engaged in work.

20 13. Mr Walsh said he had transferred his shareholding in Insight to his mother in 2002. An internal HMRC note indicated that an accountant who, at an earlier stage, had acted for Mr Walsh had indicated that Mr Walsh had lied about his means to the CSA. We thought it likely that the share transfer might have been for a similar purpose. We also took into account that this might cast some general doubt on Mr  
25 Walsh's credibility.

14. Mr Walsh lives next door to his mother and has the advantage that she provides his meals. He seems to live a modest lifestyle and we estimated living expenses in relation to the relevant earlier years to be of the following order.

Mortgage	1500
Council tax	1200
Insurance	500
Electricity	500
Telephone	400
Food -- lunch and breakfast only	2000
Holidays	1000

Clothes has some goods etc	1500
Drink	4000
<b>Total</b>	<b>£12,600</b>

15. To this needed to be added the CSA payments and the legal costs in 2002 associated with defending that claim. Mr Walsh told is that he had ridden a motorbike but had stopped in 2002 and that he had a boat which he kept in his drive.

5 16. We concluded that to the nearest £5000 his expenditure in 2002 (when he had incurred legal costs) was of the order of the £25,000 and about £15,000 per annum in the other years under appeal.

10 17. Mr Walsh told us that during 2002 and 2003 he had lived mainly on income he had accumulated in the past from his work with Insight. He says, and HMRC accepted, that he had withdrawn £52,000 from his bank account in 2002. This seemed to us not inconsistent with a plan to show to the CSA a lower level of assets and to disguise his wealth.

18. HMRC opened an enquiry into Mr Walsh's 2004/05 tax return in December 2006, and into his 2005/06 return in January 2008.

15 19. After some discussion and correspondence HMRC made amendments to the 2004/05 and 2005/06 self assessments, and issued assessments under section 29 TMA 1970 for 2002/03 and 2003/04. Following further discussions HMRC contended before us that Mr Walsh's taxable income from Insight in relation to the years under appeal was as shown in the following table:

Tax year	Taxable profits from Insight work
2002/03	11,400
2003/04	14,000
2004/05	15,000
2005/06	22,000

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20. The assessments and figures in the table above relating to 2004/05 and 2005/06 were estimated from an analysis of Mr Walsh's bank accounts, records from Insight, and other information supplied by Mr Walsh. The figure for 2003/04 is an estimate obtained by indexing the 2004/05 figure back to 2003/04. The 2002/03 figure was half  
25 the 2003/04 figure indexed back.

In assessing 2002/03 and 2003/04 by reference to the calculations for 2004/05 HMRC relied on an assumption that what had happened in 2004/05 had happened in previous years. This assumption, dignified by the phrase "the presumption of continuity" justifies HMRC's approach, but it is not a principle which is binding on this tribunal.  
5 The tribunal's task is to determine the likely amount of income, tax payable, from the evidence before it. If that evidence suggests that behaviour or events in one year were likely to have been repeated in the prior year, then that finding will be relevant to the tribunal's determination. But if there is evidence suggesting that the events of one year are unique, or that the pattern of behaviour in the prior year was different, the tribunal  
10 may be justified in finding a different result arises in the prior year. It is a question of evidence and the burden of proof.

As Judge Sinfield noted in *Guide Dogs for the Blind Association v HMRC* [2012] UKFTT 687 (TC) at [16] the presumption of continuity is only a presumption which may be rebutted. And in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) at [38] the  
15 tribunal said:

“In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A, it must be assumed that it happened in the prior year. An officer is not bound by law and in the  
20 absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will  
25 generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in  
30 those circumstances continuity is unlikely to be present.”

### **The Years in Question**

21. We start by considering the years for which assessments had been made on the basis of bank accounts etc. The conclusions we reach under these headings take into consideration our later discussion of the overall amounts of money available to Mr  
35 Walsh and his expenditure in each of the years. We there conclude that such considerations do not cast doubt on our conclusions in the following sections.

#### **22. 2004/05**

23. The evidence from Insight's accounting records and the accompanying invoices from 2005 recounted below (para [42]) indicates that Mr Walsh issued monthly  
40 invoices to Insight during this period for the work he did for it.

24. Mr Walsh's Barclays bank account received payments of £1200 from Insight in May, June and December 2004. A further £1200 credit appeared in July. Deposits made into this account in June, August, September and October and November of

similar amounts matched payments out of his mother's account at Barclays bank. His mother's cheques had sequential numbers starting 100001. It was thus likely to have been a new account. The amounts of the deposits (and the cheques) gave us the clear impression that they filled in the gaps in the payments of £1200 per month in which Mr Walsh was not receiving in those months from Insight.

25. We concluded that it was likely that the sums received from his mother were routed through her new account for his benefit and in return for the work he did for Insight. We asked Mr Walsh whether this was the case and he said it was not. But he gave no explanation for his mother's new account, the regularity of the payments and then matching to his normal £1200 monthly payment from Insight. We therefore did not believe him.

26. Thus we concluded that Mr Walsh's income from Insight included all the amounts credited to his Barclays account in that year. In total that was £11,440. This is consistent with the 2005 invoices referred to above.

27. Mr Walsh had told us that during the year he had worked for about two nights a week for Insight and earned about £110 per night. Over the year that amounted to £10,500. We concluded that this was consistent with income from Insight of £11,440, the amount credited to his bank account.

28. In addition Mr Walsh's card balances were reimbursed by Insight. HMRC accepted, on the basis of calculation for 2005/06 that, because of the prevalence of petrol payments (which would relate to filling the van to go to London), about 85% of card costs were the reimbursement of expenses incurred by Mr Walsh for the purposes of his work. The total reimbursed in this year was £12,387. There was no evidence before us on which we could conclude that any of the expense other than 85% was for the purposes of Mr Walsh's work. We therefore concluded that 15% of this figure or some £1,850 was additional income from Insight.

29. The evidence from Insight in 2005/06 indicated that in addition to credit card reimbursement and direct payments, Insight made payments for medical and other insurance for Mr Walsh. The total amount of them in that year with some £490. It seems to is likely that a similar payment was made in 2004/05.

30. Thus we conclude that Mr Walsh's net assessable income from his work with Insight in 2004/05 was £13,780. There was no evidence that he had other taxable income in this year.

#### 2005/06

31. For this year Mr Walsh's tax return declared income from his work at Insight of £9,682, being gross turnover of £10,960 less expenses of £1,278.

32. An extract from Insight's accounting ledger for payments to Mr Walsh for the 12 months from October 2005 shows payments made under four headings: payments as a subcontractor, credit card expenses reimbursed, accidental death, Royal Sun Alliance, and critical illness. The latter three total £40.91 per month. The monthly

total of these figures appeared on invoices from Mr Walsh to Insight. These invoices were dated the first of each month and were in a numbered sequence number starting (for 1 October) with 23.

5 33. The subcontractor payments over the 12 months average about £4000 per month. These payments are all reflected in credits to Mr Walsh's doctors bank account for that year. An analysis of Mr Walsh's Barclays account shows that the payments from Insight for that year totalled £15,885. There is also an unexplained receipt in its account of £923.45.

10 34. A schedule of credit card payments reimbursements and shows reimbursement of £9628.30 this year. HMRC accepted that about 85% of that was related to reimbursed petrol. There was no evidence that any of the remainder represented expenses incurred for the business. We conclude that  $15\% \times £9628 = £1,444$  represented additional income from Insight bracket or was not shown to be other than that).

15 35. We conclude that Mr Walsh's taxable income for this year from Insight comprised:

- (1) £15,885 direct payments
- (2) £1,444 of credit card expense reimbursement and
- (3)  $12 \times £40.91 = £490.92$ , the benefit of insurance payments,

20 That is a total of £17,819.

36. Our consideration of Mr Walsh's lifestyle and our estimate of his expenses did not indicate to us that Mr Walsh had income from other sources and this year.

37. We conclude that Mr Walsh's total income from Insight for this year was £17,819.

25 2002/03

38. For this year Mr Walsh's tax return declared dividend income of £11,666 and £4400 in salary. Both of these amounts we understood derived from Insight.

30 39. In the two preceding years Mr Walsh had declared a similar salary and dividends of £23K and £30K. Thus his aggregate income for these years was some £15K higher on average.

40. We accept that Mr Walsh ceased to be a director of Insight in October 2002. We accept that there after he would not have received emoluments as a director.

35 41. The documents before us included invoices rendered by Mr Walsh to Insight for the 12 months from 1 October 2005. These invoices were sequentially numbered and dated the first of each month. The 1 October 2005 invoice was numbered 023. It seems likely to us that prior to 1 October 2005 the invoices had been rendered monthly as part of the same sequence. That meant that it was likely that the first

invoice had been dated 1 December 2003. Thus formal payments to Mr Walsh as a contractor did not appear to have started until December 2003 in the 2002/03 year.

42. We accepted Mr Walsh's evidence that he was, by the autumn of 2002/03 drinking heavily and not really bothered about work, but that he gradually got himself sorted out. We conclude that it is unlikely that he did much work for Insight after  
5 October 2002 and thus that it is unlikely that payments of at the level of those received after November 2003 would have been received before that date.

43. Nevertheless we were not convinced that Mr Walsh would have received no payment for the little work he did after October 2002. If for example he had worked  
10 one day a fortnight in over the remaining six months of the tax year he would have received some £1200. He said that he did work on some days. It also seemed likely to us that the insurances paid on his behalf in the period after October 2005 were paid in earlier years. That would add some £490 to his profits from the year. We conclude that all this suggests that he received, either as employment income or as other  
15 income, some £2,000 in addition to his salary this year.

44. We have noted that in prior years Mr Walsh had received dividends from his shares in Insight. It appears that in October 2002 to his shares were transferred to his mother. The following five years' tax returns declare no dividend income but it re-emerges in 2009/10. At a meeting in October 2005 Mr Walsh's then accountant is  
20 recorded as saying that the dividends on the shares has been voted but not actually paid. That seems to us unlikely in view of the steady flow of dividends in earlier and later years. We conclude that they were paid to his mother.

45. HMRC did not contend that dividends belonged beneficially to Mr Walsh (with Mrs Walsh acting as a mere nominee). The re-emergence of Mr Walsh's dividend  
25 income suggests the shares were later transferred back to him. That suggested that the transfer to his mother might have been part of some family arrangement, perhaps intended to avoid for a period the clutches of the CSA. Such an arrangement could be a settlement for tax purposes. However the evidence before it was not enough to conclude that the dividend income should be imputed to Mr Walsh under the  
30 settlement provisions in the intervening period.

46. We conclude that Mr Walsh's declared income for 2002/03 should be treated as increased by £2000 - either as additional employment income or as part of the profits of a contracting business.

#### 2003/04

35 47. Mr Walsh's evidence was that during this period he began to come to terms with his problems.

48. Our conclusions on the invoice sequence indicated that he would have started formal invoicing in December 2003 for work done in November 2003.

49. The subcontracting payments on the later invoices were on average £1412 per month. Allowing for some inflation five months' worth of payments would have been some £7100.

50. To this should be added a sum for insurance (again we think that £490 is likely) and for credit card reimbursements (for which we think that £600 is likely for the six-month period). We therefore put his earnings as £8150 for the six months.

51. There was no evidence of unreimbursed expenses to reduce his earnings, despite the claim in his tax return. We conclude that (apart from reimbursed petrol credit card costs) that there were no deductible expenses.

52. Again it seems likely to us that Mr Walsh did some work earlier in the year and was paid for it. That would have been in a way which was apart from the formal invoicing mechanic. Taking Mr Walsh's statement to us that he did go into work now and again but for less than two days a week, we put this at £2000 for the period.

53. We conclude that Mr Walsh's income from Insight in this year was £10,150.

Overall comparison of income and expenditure

54. On our rough estimate of Mr Walsh's expenditure of £25,000 for 2002/03 and £15,000 per annum for the remaining years, the income which we believe he received would have exceeded his expenditure/fall short in over the whole period by some £10,000.

55. There was evidence that Mr Walsh had lent £14,000 to his brother in 2005 and some rather cloudy evidence about a loan of £20,000 from his mother and of £10,000 to Insight. We think that the loan from his mother is likely to have been part of his attempt to hide his assets from the CSA and may have represented dividend income which he had received from Insight. But as we have said HMRC had accepted that at the beginning of the period Mr Walsh had withdrawn £52,000 in cash. We concluded that any excess of expenditure (including the loan to his brother) over income would have been funded by this cash and that the evidence did not support a conclusion that he had other sources of income or that his income from Insight was greater than that we have determined.

**Conclusions**

56. We determine the appeal as follows:

Year	Taxable Profit	Salary from Insight	Dividends
2002/03	nil	6,400	11,666
2003/04	10,150	Nil	Nil
2004/05	13,780	Nil	Nil

2005/06	17,819	Nil	Nil
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### **Rights of Appeal**

57. 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.

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**CHARLES HELLIER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 23 January 2014**