UK Tax Bulletin

August 2017

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at July 2017

Current Rates	
Retail Price Index: July 2017	272.9
Inflation Rate: July 2017	3.6%
Indexation factor from March 1982:	
to June 2017	2.428
to July 2017	2.435

Interest on overdue tax

Interest on all unpaid tax is charged at the same rate.

The formula is Bank base rate plus 2.5% which gives a present rate of 2.75% from 23rd August 2016

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% from 16th August 2016

Repayment supplement

Interest on all overpaid tax is payable at the same rate.

The formula is Bank base rate minus 1% but with an overriding minimum of 0.5% which applies at the present time.

Official rate of interest

To 6th April 2014: 4%

To 6th April 2015: 3.25%

To 6th April 2017: 3%

From 6th April 2017: 2.5%

Summer/Autumn Finance Bill?

There is still no news but with Parliament resuming next week we may not have long to wait.

A suggestion has been made that we may have the Finance Bill within a week – but who knows. There has been no official (or as far as I am aware, unofficial) announcement.

General Anti-Abuse Rule

Just in case you were wondering whether we would ever have the benefit of a decision from the GAAR Panel, the first decision of the Panel has now been published. It considered the provision of gold bullion to employees in a manner which was designed not to give rise to income tax or NIC.

I suppose it is implicit that the scheme worked in the sense that the £300,000 which ended up in the hands of the employees was not taxable as earnings because it satisfied the specific provisions of ITEPA 2003 the related NIC legislation.

However, acting in accordance with the law does not protect you. The Panel explained in their decision that taxpayers are not free to reduce their liabilities to tax by lawful means. (I would expect that this sentence sends a shiver down the spine of anybody who regards the rule of law as important – and even more so to those who regard the rule of law as being the foundation of a civilized society.)

The case was referred by HMRC to the GAAR Panel to consider whether "*the arrangements entered into cannot reasonably be regarded as a reasonable course of action*". If so, HMRC would be on good ground to issue counteraction notices to nullify the perceived tax advantage. Indeed, even if the GAAR Panel took a contrary view, HMRC would not be bound by it and would be free to disregard it and issue their counteraction notice anyway.

The opinion of the GAAR Panel was that the arrangements were not a reasonable course of action. After all, the employer could have simply provided the employees with cash of an equivalent amount – and that would, of course, have been taxable.

> *"Had cash been used, and gold not been involved…neither the Company nor the Employees would have been in a substantially different economic or commercial position."*

I thought the following extracts from the opinion were also interesting.

> *"Merely because legislation deals with particular positions…does not mean that choosing a course of action to utilize that legislation is necessarily either a course of action that is not abnormal or a course of action that is not contrived."*

> *"The course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable."*

So now HMRC and the GAAR Panel virtually have the power to decide that whatever Parliament said (which for centuries has been a shining and fundamental principle), they did not really mean it because Parliament did not think about it properly. Had they thought about it some more, they would have enacted something a bit different - ie corresponding to the view of HMRC. I am not sure that Parliament will be too happy about these people having the power to change the law that Parliament has enacted, to something which they find preferable.

Regular readers may be familiar with my Eurostar example. I want to go to Paris but I am determined to avoid Air Passenger Duty. So I deliberately go by Eurostar with the specific purpose of avoiding the Duty. I get to the centre of Paris just the same; it may take a little longer and be less convenient than by air but I am happy to accept those aspects as the cost of avoiding the duty. It is ridiculous of course – but why should I not be charged APD. I satisfy all the criteria.

It might be said that my arrangements were not an unreasonable course of action. Why? Maybe because loads of people go by Eurostar. Well, loads of people have arranged to benefit their employees by way of an Employee Benefit Trust – and although that is not regarded as abnormal, you can bet it will soon become an unreasonable course of action if it results in a tax advantage.

But what if I don't go to Paris at all because I am absolutely determined to avoid paying the Air Passenger Duty. I just stay at home and do nothing. Would that be a reasonable course of action enabling me to avoid the APD? I don't think so. It would not be a course of action at all.

It might be said that my conclusions are unfounded because the taxpayer still has a right of appeal to the courts if he disagrees with the tax charge arising from the counteraction notice. That is right – except that the taxpayer would be subject to a penalty of 60% of the tax if his view is ultimately found to be wrong. (Do you think that HMRC would regard it as fair if they had to pay a 60% penalty to the taxpayer if his view were to prevail? No – I don't think so either).

There is clearly some way to go with this. At least I hope there is. I think that Montesquieu saw this coming in his *Spirit of the Laws* in 1748:

> *"There is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice."*

Business Property Relief

Last month I mentioned a Tribunal decision about Business Property Relief under section 105 IHTA 1984 which is a valuable relief, representing an effective exemption from inheritance tax. Terms and Conditions apply of course and in particular the relief will not apply if the business:

> *"consists wholly or mainly of one or more of the following, that is to say, dealing in securities stocks or shares, land or buildings or making or holding investments."*

Where land is involved, HMRC have been very reluctant to allow the relief and the Tribunals have consistently held that the letting of property is a business which consists wholly or mainly in the making or holding of investments, no matter how extensive the services provided.

This month we have the case of the *Executors of M Vignes v HMRC TC 6068* which concerned a livery business. Naturally land and buildings are an important part of any livery business. HMRC took the view that the business was nothing more than the letting or licensing of land for the use of others and therefore was an investment business – being the making or holding of investments.

However, the FTT rejected all the arguments of HMRC saying that no properly informed observer could have concluded that the business was that of holding investments. The FTT described the view of HMRC as a wholly artificial analysis. It is difficult to resist the observation that HMRC chose to advance a wholly artificial analysis in an attempt to win their case; this is behaviour which they regard as absolutely unacceptable and deserving of seriously penal sanctions – if done by anybody else.

Inevitably cases on business property relief are heavily dependent on their facts but one really important issue arose which may be of wide application.

It may be remembered that in other cases where land is involved, HMRC have been extremely keen on the following passage from the Upper Tribunal decision in *HMRC v Pawson [2013] UKUT 50:*

> *"The critical question however is whether these services were of such a nature and extent that they prevented the business from being mainly one of holding Fairhaven as an investment."*

The FTT in *Vignes* said that this was the wrong test. It started from the pre-conceived idea that the business is wholly or mainly one of making or holding investments and then to ask whether there are factors indicating to the contrary.

The FTT explained that the proper starting point is to make no assumption one way or the other but to establish the facts and determine whether the business is wholly or mainly one of making or holding investments.

I think this case might prove to be rather important.

Corporate Residence

The case of *Development Securities Plc (and Others) v HMRC TC 6007* was concerned with whether the Jersey subsidiaries of Development Securities Plc were resident in the UK or in Jersey.

This is a familiar issue on which there is lots of authority. This decision goes on for 127 pages and is an interesting read; it sets out the various principles involved, quoting widely from the numerous celebrated cases on the subject. However, the reasoning is not always easy to follow.

The Tribunal set out the following passage from *Wood v Holden [2007] STC 443*

> *"There is a difference between exercising management and control and, on the other hand, being able to influence those who exercise management and control. As highlighted in* Unit Construction*, there is another difference between on the one hand usurping the power of a local board to take decisions concerning the company and on the other hand ensuring that the local board knows what the parent company desires the decisions to be".*

However, the FTT found as a fact that:

> *"The Jersey directors were acting on the basis of what was, in effect, an instruction from the parent…. the board were simply doing what the parent wanted it to do and in effect instructed it to do".*

The conclusion was that the companies were UK resident.

A crucial aspect was the finding by the FTT that the Jersey companies had no commercial objective to their decisions, enabling them to conclude that the central management and control of each company was exercised at a higher level, namely where the decision to use the offshore company for wider group purposes, was taken.

An interesting feature of this case is that the FTT acknowledged that the Jersey companies were operated by highly experienced professionals who behaved entirely properly at all times. They gave full and independent consideration to all the questions facing them,

and would certainly not have been susceptible to being leant on by a third party. Their decisions were documented by full minutes.

However, although the decision making process and the decisions of the directors were reflected in the minutes signed by all the directors, the FTT regarded those minutes as less important than the notes taken by a Ms Hembury, an administrator who was not even present at the appeal hearing. Time and again the FTT referred to Ms Hembury's notes saying that:

> *"Whilst we accept that the typed minutes are important evidence, we regard them as somewhat secondary to Ms Hembury's notes".*

It is an odd concept that the formal minutes of board meetings signed by all the directors who took the decisions should be disregarded in favour of some handwritten notes by an administrator.

One can understand that if somebody's handwritten notes of a meeting revealed a smoking gun and therefore some serious impropriety in the proceedings, the notes could be highly significant. However, there is no suggestion here that the directors acted in any way improperly and the FTT were at pains to say so. So why their carefully considered and fully documented decisions should be disregarded is difficult to understand.

Another aspect which could prove to be significant is the reference by the FTT to the celebrated case of *De Beers Consolidated Mines Ltd v Howe [1907] UKHL 626* and the well known judgment of Lord Loreburn about where a company "keeps house and does business". Unfortunately the passage cited is incorrect as it introduces words (and a principle) which formed no part of the judgement of Lord Loreburn, nor of the decision of the House of Lords. It is difficult to assess the significance of this error, but as it was described by the FTT as the "starting point" in considering the matter, it would seem to be of some importance.

I guess that the whole decision is of such consequence that we will be hearing more about it in due course.

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