UK Tax Bulletin

March 2018

FIELD COURT TAX CHAMBERS

FIELD COURT TAX CHAMBERS

Contents March 2018

FIELD COURT TAX CHAMBERS

Latest Rates of Inflation and Interest

The following are the current rates at February 2018

Current Rates	
Retail Price Index: February 2018	278.1
Inflation Rate: February 2018	3.6%
Indexation factor from March 1982: Frozen at December 2017	2.501

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 3% from 21st November 2017

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% - but this was increased to 1.50% from 13th November 2017

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%

Statutory Residence Test

An interesting point has recently arisen regarding the definition of days in the UK for the purposes of the statutory residence test. Ignoring for the moment the special deeming rule, a day in the UK is counted if the individual is in the UK at the end of the day, that is at midnight. That obviously relates to UK time so taking a flight at 23.30 might be pushing it a bit fine – not only because there could be a delay, but also because the time taken to get airborne and to leave UK airspace may mean that you will be regarded as still being in the UK at midnight.

That is perhaps easily understood and can be taken into account in planning your travel schedule – although not so easy if you are flying from Dublin to Paris, which necessarily takes you through UK airspace. It would be best to avoid such a flight late at night if you are counting your days – and essential to avoid it at any time if you are subject to the deeming rule where days of mere "presence" in the UK can be counted.

But what about the Country Tie. That is the UK tie which applies to leavers, where the individual is in the UK at midnight on the greatest number of days in the tax year. This almost certainly means that the test in respect of UK days is based on UK time and the test in respect of another country is the local time.

So the person who leaves the UK at say 23.30 UK time flying to Paris is likely to find himself with a UK day, and because he will arrive in France before midnight, he will have a day there as well. Two for the price of one. Or better still he could leave a little earlier, clearing UK airspace by midnight and arriving in Paris just in time to meet the midnight test there.

On the other hand, it could work in the opposite direction that if your flight is slightly delayed, you could end up with a UK day, and without the advantage of having a day in France if you arrive there after midnight local time.

(The HMRC Manual RDR3 says at paragraph 3.23 that work overseas starts when you board the aircraft in the UK; in the opposite direction, the overseas work stops when you disembark in the UK. That looks helpful – but it only applies to the duration of the overseas work and unfortunately does not have any application to whether you are present in the UK at midnight.)

I do not find the Country Tie to be particularly relevant most of the time, but where it could apply, this may be a helpful opportunity.

Personal Service Companies

A great deal has been written lately about the case of *Christa Ackroyd Media Ltd v HMRC TC 6334,* and the decision of the FTT is certainly deserving of close analysis.

The facts are pretty well known. Christa Ackroyd is a TV journalist who presented various BBC TV programmes for some years. Her company Christa Ackroyd Media Ltd entered into a contract with the BBC, and HMRC considered that the arrangements fell within the intermediaries legislation in section 48 – 61 ITEPA 2003 with the result that a substantial amount of tax unexpectedly arose. The reasons (and motivation) behind these arrangements are controversial and the subject of some dispute; no doubt we will hear more about that in due course.

The crucial issue here was to consider whether, if the services provided by Christa Ackroyd to the BBC had been provided under a contract directly between her and the BBC (rather than between the BBC and her company), would she have been regarded as an employee of the BBC under this hypothetical contract.

The difficulty here is that we have a real contract between two unrelated parties which we might have thought would be the proper basis for the assessment of tax. However, under the intermediaries legislation, we have to disregard the real contract between the real parties and to assume a hypothetical contract (with different parties) and then work out what the tax position would be had those different parties entered into such a contract.

I cannot help thinking of the judgment of the Court of Appeal in *Henriksen v Grafton Hotel Ltd [1942] 2 KB 184* where they said:

> *"It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not, or vice versa".*

I guess that this principle has no application in the face of specific legislation to the contrary.

Anyway, the Tribunal decided that Christa Ackroyd would have been an employee under the hypothetical contract with the BBC. The reasons given for this conclusion were that there was a mutuality of obligation; there was a sufficient degree of

control over the performance of her services, and the other provisions of the hypothetical contract were consistent with it being a contract of service.

The mutuality of obligation was said to be her obligation to perform the work offered and for the BBC to pay her for it. I have never been able to understand this interpretation of a mutuality of obligation. I am clearly wrong in thinking that the relevant mutuality in establishing a master/servant relationship is the obligation for the employer to provide or offer work and the obligation on the employee to accept and perform it. In this case, the BBC was not bound to call on the services of Christa Ackroyd – which could be said to exclude the mutuality of obligation.

The Tribunal also referred at length to the question of control which will clearly vary from case to case – and here, Christa Ackroyd had no set hours or set working days or set location. However, they concluded that the hypothetical contract satisfied the relevant condition which is that she was "subject to the others control in a sufficient degree to make that other master". So how much control is necessary for her to become an employee? Oh, that's easy; it is control to a sufficient degree for her to be an employee. That argument is so circular it is almost a perfect sphere.

However, leaving all this lot aside, the aspect which is intriguing me, is how to apply the judgment to other cases – for example to the position of a concert pianist.

We are told by the Tribunal in *Ackroyd* that we must consider the mutuality of obligation; the degree of control exercised by the putative employer; and whether the terms are consistent with a contract of employment - such as the provision of any necessary equipment, the provision of other benefits and whether the individual has to hire his own helpers.

Let us assume that a famous concert pianist is engaged to play Beethoven's Fifth Symphony at the Albert Hall. He turns up and they pay him – so there is your mutuality of obligation. Using the tests in *Ackroyd* do they have control over his services? You bet they do. He must attend at the Albert Hall on a specific day, at a specific time and will play a specific piece on a specific instrument.

In fact, we can be much more precise than that. The piece he is being paid to play has certain specific notes and he is required to play every one of them the right number of times - and in the right order. That is substantially more control than the BBC had over the services of Christa Ackroyd. Moving on to other provisions in the contract, he would not be permitted to send a substitute; nor would there be any holiday pay, sick pay or pension entitlement - just like Christa Ackroyd. Nor will he provide his own equipment because the piano will be provided and so will

all the supporting people in the orchestra and there would be no requirement for him to hire his own helpers. And of course, for the entire performance, he will be under the direction of the chap with a stick.

As a result of all this, it is inescapable on the basis of the judgment in *Ackroyd*, that the concert pianist would be regarded as an employee. But we know that he would not; he would be properly regarded as self-employed. This would be the case whether he was directly engaged or whether he provided his services through a company and we would have to consider the hypothetical contact which would have existed between him and those for whom the services were provided.

How can this be right when on the Christa Ackroyd tests, the case for him being an employee would be absolutely overwhelming? Answers on a postcard please.

Entrepreneurs Relief

A number of points have recently arisen regarding entrepreneurs' relief – none of which seemed to indicate that the relief is at risk, although there continues to be an anxiety about its longevity.

HMRC have published proposals designed to prevent the loss of entrepreneurs' relief when a person's shareholding is reduced below 5% by being diluted by the company's fundraising efforts. When new funding is being arranged, a small shareholder may be unable to make the further investment necessary to maintain their 5% holding and will face the complete loss of entitlement to entrepreneurs' relief. HMRC intends to remove this barrier to relief by allowing the individual to elect to be treated as having disposed of and immediately reacquired their shares at market value before the dilution takes place. Even more helpfully, the gain arising on that disposal (and which benefits from entrepreneurs' relief) will be deferred until there is an actual disposal.

The idea is to ensure that entrepreneurs are not discouraged from seeking external investment to finance business growth where it would cause their shareholding to become diluted.

Any gains arising following the dilution would not benefit from entrepreneurs' relief, but at least the gain up to that point can be protected. Regrettably, HMRC

do not propose to extend this new election to trustees on the grounds that it would be excessively complicated. Nevertheless, this is an extremely welcome development.

A second area of concern with entrepreneurs' relief is where there is a share disposal and the directors resign on the same day – which often occurs in a conventional takeover. Unless the shareholder is an employee on the date of disposal (and has been so for at least the previous twelve months), they will not qualify for entrepreneurs' relief on the disposal of their shares.

HMRC have confirmed their view that the statutory test of "the period of one year ending with the date of the disposal" would be satisfied where the directors resign on the same day – but not if the directors had resigned the day before the disposal.

There may be a midnight issue here as well. It is not unusual for such deals to be concluded late at night with the professionals pulling an all-nighter. In such cases, it is obviously crucial that the documents are all signed on the same day. It would be catastrophic if the documents all started to be signed at 11pm with all the minutes and resolutions etc (which would include the resignations) signed first and for the sale and purchase agreement not to be signed until after midnight.

Annual Payments

The recent case of *Hargreaves Lansdown Asset Management Ltd v HMRC* TC 6383 considers an old concept in new clothing. This is the meaning of an annual payment.

In very broad terms, Hargreaves Lansdown made what was described as loyalty payments to their established customers and the question was whether such payments were "annual payments" within section 683 ITTOIA 2005. This would make them taxable income giving rise to an obligation on Hargreaves Lansdown to deduct basic rate tax under section 901.

The views of HMRC were set out in HMRC Brief 04/13 and it was essentially their views set out in this Brief which were being challenged by Hargreaves Lansdown.

To qualify as an annual payment for the purposes of section 683 the payment has to be made under a legal obligation, be capable of recurrence, be income in the hands of the recipient and represent a "pure income profit".

The concept of pure income profit goes back a long time and was a key element for income taxable under Case VI of Schedule D – which of course no longer exists except in the memories (and souls) of advisers of a certain age.

The Tribunal analysed the facts of the case and concluded that in reality the payment was a rebate on Hargreaves Lansdown's commission and was not a "pure income profit" to the recipient. There were a number of things they had to do, or obligations they had to satisfy, to get the rebate – but more importantly, it was not a "profit" at all, but a reduction in the recipient's net costs.

The explanation by the Tribunal of the meaning pure income profit follows closely the traditional authorities which used to apply for Case VI and were said to be equally relevant in interpreting section 683 as part of the definition of an annual payment.

Evidence

Every now and again a case appears which is so unbelievable that you have to read it a few times to make sure your eyes did not deceive you.

The case of *Qureshi v HMRC* TC 6372 is one such case. Mrs Qureshi was charged a penalty of £2700 by HMRC for failing to submit her tax return for 2014/15.

Nothing unusual there, although Mrs Qureshi claimed that she had never received any notices requiring her to file a tax return. This was a penalty matter so the onus on proof was on HMRC to show that the notices under section 8 TMA 1970 had been sent to her.

HMRC did not have any evidence but said that the notices "must have been sent" and "would have been" sent to the address that HMRC had on file.

The Tribunal was seriously unimpressed:

> *"We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that would have or should have happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence".*

Oh, but it gets worse … and so much worse. I suggest that you sit down.

HMRC argued that evidence was not required because on evidential matters "*HMRC has an understanding with the Courts and Tribunals*".

You do not have to be a lawyer to be deeply shocked by such a suggestion. The Tribunal had this to say:

> *"We wish to make it clear beyond doubt that [HMRC], hold no privileged position. If the Courts and/or Tribunals had any "understanding" with HMRC concerning what evidence it does or does not need to adduce, that would be a betrayal of the duty of those sitting in our Courts or Tribunals….It is frankly incredible that the Respondents would seek to have or expect to have any kind of privileged position in litigation before Courts or Tribunals in this country and even if it did so, that the Courts and/or Tribunals would countenance or tolerate any such arrangement, understanding or any attempt to procure same".*

It is almost impossible to understand how such an argument ever came to be raised before a court. The more you think about it, the worse it gets, and it adds considerable support to those who feel that the conduct of litigation by HMRC needs rather more rigorous oversight.

Peter Vaines
Field Court Tax Chambers
31st March 2018

FIELD COURT TAX CHAMBERS

Contact
Peter Vaines
Field Court Tax Chambers
3 Field Court
Gray's Inn
London WC1R 5EP
Tel: 020 3693 3700
pv@fieldtax.com
www.fieldtax.com