UK Tax Bulletin

March 2019

FIELD COURT TAX CHAMBERS

FIELD COURT TAX CHAMBERS

Contents March 2019

FIELD COURT TAX CHAMBERS

Latest Rates of Inflation and Interest

The following are the current rates at March 2019

Current Rates	
Retail Price Index: February 2019	285.0
January 2019	283.0
Inflation Rate: February 2019	2.5%
January 2019	2.5%
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 3.25% from 21st August 2018

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.75% from 13th August 2018

Repayment supplement

Interest on overpaid tax is payable at the same rate from 21st August 2018

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

Except IHT where the rate is 0.75%

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%

Vans

The recent case of *HMRC v Coca Cola European Partners Great Britain Ltd [2019] UKUT 90* explains everything you want to know about the distinction between cars and vans. I guess that may not be a whole lot.

However it may be of some interest because the distinction between a car and a van is relevant not only to whether the employee is subject to income tax on a benefit in kind It is also important to the employer because of the possible liability to Class 1A NIC – and you can just imagine that for a large employer with loads of vans, that could be a serious liability.

The distinction is also relevant to VAT and the entitlement to reclaim input tax on the cost of the vehicle. Unfortunately, the definition of a van for the purposes of VAT is not the same as that for income tax (No, I don't know either) but the principles explained in this case may still have a wide application.

Coco Cola European Partners Great Britain Ltd (I think we can assume that they are a substantial organisation) provided their technicians with vehicles for the purposes of doing their work.

Coca Cola clearly thought that these vehicles were vans and not subject to a benefit in kind charge on their employees, or indeed to a Class 1A NIC charge on the company. However, HMRC disagreed and said that the vehicles were actually "cars" and therefore subject to tax and NIC.

Section 115 ITEPA 2003 defines a van for this purpose. The relevant part of the definition is that the vehicle is:

> "a vehicle of a construction primarily suited for the conveyance of goods or burden of any description".

The company supplied three types of vehicle, a Vivaro, a VW Kombi 1 and a VW Kombi 2.

The First Tier Tribunal said that the key question was not whether a vehicle would be regarded as a van in ordinary parlance, nor by reference to the commonly understood meaning of "van". They said that if Parliament had wished to rely on commonly understood meanings it could simply have left the terms undefined. Instead, Parliament enacted prescriptive definitions of *car* and *van* and it was therefore necessary to consider whether the primary suitability of the vehicle

was for the conveyance of goods or burden. The FTT concluded that if the vehicle is of a construction marginally more suitable for the conveyance of goods than it is for any other use, its primary suitability is for conveying goods.

The FTT acknowledged that vehicles which are primarily suited for the conveyance of goods will share features with vehicles primarily suited to the conveyance of passengers. However, after an exhaustive analysis of all its characteristics, the FTT decided that on balance, the Vivaro should properly be described as a van within the meaning of Section 115. The Upper Tribunal upheld this conclusion.

The finely balanced nature of the test was demonstrated by a similar analysis of the Kombi vehicles. The slightly different configuration of these vehicles, including the fact that they had seats in the front for the driver and a passenger (I am not kidding), caused the FTT to conclude that they were not vans.

The Upper Tribunal said that the FTT had decided as a question of fact that the Kombi vehicles were equally suitable for the conveyance of goods and passengers, and they declined to interfere with their decision.

This may not be entirely satisfactory for a number of reasons, not least that the Kombi range of vehicles definitely look like vans and anybody buying one would almost certainly think that they were buying a van – even though it had a seat for the driver. However, we know from the Tribunal that the way in which an ordinary person might view the position is irrelevant. Maybe the vans (sorry, cars) should have a Health Warning stuck on the side, or something to warn taxpayers of the tax implications.

Personal Service Companies

A year ago, the case of *Christa Ackroyd Media Limited v HMRC TC 6334* was decided by the First Tier Tribunal and concerned the use of a personal service company.

Christa Ackroyd was a TV journalist who presented various BBC TV programmes. Her company, Christa Ackroyd Media Limited, entered into a contract with the BBC for the provision of her services. HMRC considered that the arrangements fell within the intermediaries legislation in Sections 48-61 ITEPA 2003 with the result that additional tax liabilities arose.

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 relationship would have been had those different parties entered into such a contract.

Accordingly, the crucial issue was 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), she would have been regarded as an employee of the BBC under this hypothetical contract.

The Tribunal decided that Christa Ackroyd would have been an employee of the BBC under this hypothetical contract. The reason they gave for this conclusion was that there was a mutuality of obligations; 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 decision is controversial and is said to be under appeal. The matter has become complicated by the recent decision of the First Tier Tribunal in *Albatel Limited v HMRC TC 7045* which deals with a remarkably similar set of circumstances.

In this case, Miss Lorraine Kelly was an extremely popular TV presenter and her company, Albatel Ltd, contracted to provide her services to ITV Breakfast Limited for a period of two and a half years. Exactly the same issue applied here as in Christa Ackroyd's case – that is to say, whether a hypothetical contract between ITV and Miss Kelly would have been a contract of employment.

The Tribunal went through all the indicia of a contract of service compared with a contract for services and all the usual authorities dealing with mutuality of obligation, control, place of work, and rights of substitution.

It may be thought that the essential facts relating to Lorraine Kelly and Christa Ackroyd were not materially different, but the Tribunal decided that in the case of Miss Kelly, the level of control fell substantially below the degree required to demonstrate a contract of service. In addition, she was not entitled to sick pay, holiday pay or any other benefits to which employees would generally be entitled. (Er, neither was Christa Ackroyd). Most significantly, the Tribunal decided that ITV was not employing a "servant" but was rather purchasing a product, namely the brand and individual personality of Lorraine Kelly.

The Tribunal concluded that:

> "the relationship between Miss Kelly and ITV was a contract for services and not that of employer and employee".

I don't want to be picky, but Miss Kelly and ITV did not have a relationship. This must therefore have been judicial shorthand for saying that the hypothetical contract would not have been a contract of service.

Interestingly, the Tribunal said little about the case of Christa Ackroyd. HMRC drew a direct parallel with the case of Christa Ackroyd but clearly the Tribunal did not feel it was sufficiently strong to influence their decision in this case.

Although it is possible to point to some differences between these cases, most of the differences in the factual background do not amount to very much – except perhaps the argument that Miss Kelly was a brand which was being exploited by ITV.

The contrast between these two cases is extremely important having regard to the substantial number of cases where HMRC are challenging personal service companies, and it will be very interesting to see how they are reconciled when (I assume) they go to appeal.

ATED Related CGT

It is well known that where a property within the ATED regime is disposed of, the increase in value of the property since 5th April 2013 is subject to capital gains tax, even in the hands of a non resident company or other relevant entity.

There is a substantial amount of duplication with the Non-Residents' Capital Gains Tax charge which applies to all UK residential properties (whether or not they are within the charge to ATED) and which charges capital gains tax on the increase in value from 6th April 2015.

As a simplification measure, the ATED-related CGT charge is being abolished with effect from 6th April 2019 and any capital gains arising on the disposal of the UK residential property by a company will thereafter be chargeable to corporation tax. ATED itself is not being abolished – but you can't have everything.

Interestingly, ATED-related CGT is currently chargeable at 28% whereas corporation tax on the gains will be charged at 19% (and falling to 17% next year). Accordingly, it would appear highly advantageous for any disposal by a company of UK residential property presently subject to ATED, to be deferred until 6th April 2019.

Cleansing Mixed Funds

The rules relating to the cleansing of mixed funds provide an extremely helpful relief by enabling the difficulties of mixed funds to be avoided by separating the capital and income elements so that the taxable element can be retained abroad, and the clean capital element can be remitted without a charge to income tax or capital gains tax.

The rules for unmixing a mixed fund were introduced in 2017 and apply for 2017/18 and 2018/19 – that is to say, they expire on 6th April 2019. Unfortunately, the rules are horrendously complicated and although the prize for unmixing can be very substantial where the mixed fund contains a large amount of money (the rules only apply to money), the risk of anything going wrong is so high that it has discouraged many people from taking advantage of these welcome provisions.

The professional bodies (STEP, CIOT, ICAEW and The Law Society) have done sterling work in preparing a guidance note on the application of the cleansing rules and on many of the problem areas to which they give rise. Furthermore, they have sought and obtained the agreement of HMRC to a large part of these guidance notes. However, the fact that the guidance notes are 78 pages long does rather illustrate just how complicated the rules are.

Nevertheless, anybody with a mixed fund will be grateful for this guidance particularly as there is not long left to complete the arrangements.

Directors: Employees or Consultants

It is often the case that a professional person in practice on their own account will be appointed a director of a client company. The question arises whether the payment he receives for his professional services should be treated as employment income, subject to PAYE and NIC, or as part of his professional income.

It would seem reasonable for his earnings to continue to be treated as part of his professional income, even though there is a strong technical case that they should be subject to PAYE.

HMRC recognise this in their Manuals at ESM 4022:

> "It is perfectly possible for an employee or a director of a company to provide services quite legitimately to that company in a separate capacity. For example, the individual could be carrying on an established business as a solicitor, estate agent, accountant or some sort of consultant whereby services are supplied to the company on terms similar to those given to other customers. In these cases, the payment for the services would not be income for an office or employment assessable under Schedule E or chargeable as employment income or subject to Class 1 NIC".

The limits of this practice were examined in the recent case of *Petrol Services Limited v HMRC TC 6907.*

The directors of the company were the only employees of the company and they conducted all the activities of the company. They were not paid any remuneration, but payments were made to their consultancy companies which had contracts with Petrol Services Ltd.

The Tribunal was not impressed and found that neither of the directors really had an independent consultancy business. They held that the payments should properly be regarded as the reward for their services as directors.

This decision does not undermine the HMRC practice in ESM 4022 but it does indicate that if you push the envelope too far, you might find the payments chargeable to income tax under PAYE with the associated NIC liabilities – and it might be too late to recover any corporation tax paid by the company.

Peter Vaines
Field Court Tax Chambers
31st March 2019

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