UK Tax Bulletin

August 2019

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at July 2019

Current Rates	
Retail Price Index: June 2019	289.6
July 2019	289.5
Inflation Rate: June 2019	2.9%
July 2019	2.8%
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 0.50%

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%

IR35: Personal Service Companies

It will not have escaped anybody's attention that HMRC are seeking to crack down on the use of personal service companies and to extend the reach of the well-known IR35 rules.

HMRC have had mixed success in the Courts in seeking to apply these rules against people in the media, particularly TV presenters. The cases of *Christa Ackroyd* (the decision of the Upper Tribunal is awaited) and *Lorraine Kelly* spring immediately to mind. However there are many others, the latest of which is the decision in *Kickabout Productions Ltd v HMRC TC 7230* involving a Mr Paul Hawksbee who broadcasted on TalkSport, where the arrangements were found not to be within IR35.

We are now all trying to get to grips with the draft legislation intended to be introduced from April 2020 which proposes to switch the responsibility onto the client for determining whether the hypothetical contract with the contractor would have been a contract of employment if the individual had been engaged directly and not by a personal service company. A difficult judgement – as clearly demonstrated by the courts – and the penalty for getting it wrong (or it seems, somebody else getting it wrong) will be pretty serious.

This is not a satisfactory trend. There is surely something not quite right for the Government to say that they are not very keen on the bona fide contract you have entered into with an independent third party, so they will pretend that you have entered into a different contract, and charge you (more) tax on that basis.

(For anybody who thinks this is an overstatement, this is already what happens with Stamp Duty Land Tax. You just have to look at section 75A Finance Act 2003 – and the litigation to which it has given rise – to see that it operates exactly in this way).

It is clear that HMRC regard personal service companies as some kind of abuse which deserves draconian counteraction because the people who are involved with them are clearly Very Bad People – or at least they are doing a Very Bad Thing.

With this mind I could not help laughing at the recent announcement that some NHS Trusts are planning to arrange for their consultants to be paid via LLPs to get round the tax issues arising on their pay and pensions.

I cannot imagine they will ever be allowed to do this, but it is instructive that the NHS are even thinking that it would be a good idea. I suppose it is a classic example of, if we do something it is "proper financial management" which is entirely sensible, but if you do it, then it is "unacceptable tax avoidance" and completely repugnant.

Once upon a time, we had a Rule of Law which applied to everybody, and attempts by the State (i.e. the Crown) to suspend or dispense with laws in its own interests caused a bit of a problem before it was put right in 1689.

I hope we don't have to go through all that again before we get our Rule of Law back.

Claims for Loss Relief

Have you ever made a claim (or advised on a claim) for a relief only to find that there is an obscure provision in some other Act which says that it does not apply in your circumstances? Um.

Of course, it is always necessary to read to the end of the section – and indeed to the end of the Part – because there could well be something there which says that the provisions are subject to (say) Schedule 56B paragraph 43(9)(d) Finance Act 19XX.

But what if it doesn't say anything to give you a clue. How are you ever going to know that Schedule 56B paragraph 43(9)(d) Finance Act 19XX deprives you of the relief?

The Supreme Court has been asked to consider a problem of this nature in connection with a claim to loss relief on shares – and their judgment is very helpful.

Derry [2019] UKSC 19 was a Judicial Review case where the taxpayer made a loss relief claim under section 132 ITA 2007 which contained a clear and unambiguous entitlement to the loss relief for the particular year. Unfortunately for Mr Derry, HMRC were able to point to Schedule 1B(2)(3) TMA 1970 which said that the relief could only apply for a different year. Fair enough you might say, if that is the law. But how was the taxpayer supposed to know that this provision existed; there was nothing saying so, nor anything to point him in that direction.

The Supreme Court had sympathy with this position:

> "Taken together section 23 and sections 131-132 appear to constitute a clear and self-contained code for the treatment of a claim to share-loss relief such as that of Mr Derry. Sections 132-133 in terms give him an "entitlement" to make the claim, to specify the tax year to which it is to be applied, and to do so by deducting it in the calculation of his "net income"……
>
> Having taken such care to walk the taxpayer through the process of giving effect to his entitlement as part of his tax liability for the year specified by him, it would seem extraordinary for that to be taken away, without any direct reference or signpost, by a provision in a relatively obscure Schedule of another statute concerned principally, not with liability, but with management of the tax".

This is not a get out of jail free card because Mr Derry really succeeded because HMRC were constrained by failing to make a section 9A enquiry in time, but I can imagine it might be very helpful in other circumstances.

Entrepreneurs Relief

There seem to be never-ending problems with claims for Entrepreneurs Relief and the latest case on the subject is more obscure than usual: *Quentin Skinner Settlements v HMRC TC 7312.*

The trustees of these settlements disposed of shares in a company DPAS Ltd and claimed entrepreneurs relief on the grounds that their disposals satisfied the provisions of section 169J(4) TCGA 1992:

> "In relation to a disposal of settlement business assets within paragraph (a) of subsection (2) the relevant condition is that, throughout a period of 1 year ending not earlier than 3 years before the date of the disposal:
>
> (a) the company is the qualifying beneficiary's personal company and is either a trading company or the holding company of a trading group, and

> (b) the qualifying beneficiary is an officer or employee of the company or (if the company is a member of a group of companies) of one or more companies which are members of the trading group."

There was no dispute that beneficiaries were qualifying beneficiaries and the company was the personal company of each of them by reason of their individual shareholdings.

However, the argument of HMRC was that the beneficiary (or in this case, at least one beneficiary) must have been a qualifying beneficiary throughout a period of 1 year ending not earlier than 3 years before the date of the disposal.

The Tribunal drew attention to the fact that this was not the relevant requirement. Paragraph 4(a) says that the company has to be the personal company of the beneficiary for that period. It was accepted that this was the position and the trustees were therefore entitled to their entrepreneurs' relief.

HMRC Enquiries

It may not really matter very much but it was interesting to read the recent case of *McCabe v HMRC TC 7145* where the taxpayer was seeking the disclosure of information from HMRC in connection with the mutual agreement procedure under the Double Taxation Agreement with Belgium.

The taxpayer wanted to know the real reasons for the decision which was agreed between the two countries because it had a significant effect on his tax position.

HMRC did not want to provide the information and refused to do so on the grounds that the documents would not be of any material relevance. They said that the taxpayer hoped that the documents would reveal things which would be supportive of his case (Well, yes. I suppose he did) and that the request was a "fishing expedition".

I guess this will sound kind of familiar.

The Tribunal agreed with HMRC that the information did not have to be provided - which will clearly have been a disappointment to Mr McCabe. However, I expect that the reasoning of the Tribunal will be helpful to other taxpayers in more prosaic circumstances when HMRC request information "that they hope will be supportive of their position". (In my experience they seem to do that rather a lot).

Disclosure of Information

On the same theme the Supreme Court has recently expressed their view about how much of the written material placed before a court in a civil action should be accessible to people who are not party to the proceedings.

It may be remembered that this point came up last year in *Hastings Insurance Services Limited v HMRC and KPMG TC 6656.* KPMG had applied to the First Tier Tribunal for copies of HMRC's Statement of Case and both parties' skeletons. KPMG had a different case, but they thought that it would be useful to have sight of these documents. I bet they did.

The Tribunal said that the test is whether the non-party had a legitimate interest in the documents. This is a broad test and it was enough that KPMG was seeking access to the documents to improve their understanding of HMRC's arguments in the appeal which were relevant to their arguments in a different case.

A similar request for access to documents recently arose in the case of *Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38* where the Supreme Court said that the issue was all about the principle of open justice. Lady Hale said a great deal about this principle explaining that the applicant has no right to such access, but the court has power to grant access if the applicant has a legitimate interest and if it would advance the open justice principle. Her Ladyship suggested that a clean copy of the trial bundle may be the most practical way of providing access to third parties – but it is entirely a matter for the court to decide what if any access should be permitted.

In this case, The Supreme Court concluded that there was such a legitimate interest and ordered a substantial degree of disclosure of the documents before the court.

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Damages for Tax Office Negligence?

Last year The Quebec Superior Court held in the case of *Ludmer v AG of Canada*, that the Canada Revenue Agency (the Canadian equivalent of HMRC) could be liable in damages for negligence if their actions caused measurable harm to the taxpayer.

The Court held that the Canada Revenue Agency was negligent (and awarded big damages) on the grounds that they had improperly conducted a tax audit by:

- Creating and refusing to abandon clearly untenable tax assessment positions.
- Acting improperly in attempting to railroad through a settlement.
- The failure to properly disclose information to the taxpayers.

Anybody recognise any of this?

A similar approach does not seem to be a realistic possibility here – but maybe it is getting closer. I read that the Australian Federal Court in the case of *Farah Custodians Pty Ltd v Commissioner of Taxation (No 2) [2019] FCA 1076* has allowed a taxpayer to proceed with a negligence action against the Australia Tax Office. It will be interesting to see how this develops.

The law requires taxpayers to act with reasonable care and to suffer a penalty if they do not. If the tax authority acts negligently and causes harm to a taxpayer, why should they be immune from the consequences of their negligence? Or, to put it another way – be above the law.

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