# UK Tax Bulletin

## October 2019

FIELD COURT TAX CHAMBERS

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# Latest Rates of Inflation and Interest

## The following are the current rates:

| Current Rates | |
|---|---|
| Retail Price Index: August 2019 | 291.7 |
| September 2019 | 291.0 |
| Inflation Rate: August 2019 | 2.6% |
| September 2019 | 2.4% |
| 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%

# The (Non) Budget

The Budget was going to be delivered by the Chancellor of the Exchequer on 6th November. But not any more – it has been overtaken by Events.

Mr Javid had admitted that the abolition if IHT is something which was "on his mind". Maybe it will stay there – but I guess that will depend on the Events.

Given that such abolition could not be expected to last, there would certainly have been lots of activity to take advantage of the opportunity. Including perhaps the widespread massacre of the older generation so as to avoid missing out on a tax free inheritance.

I don't think I will be losing much sleep over the prospect – particularly now.

# Reliance on HMRC Manuals

It is a matter of profound importance that taxpayers and professional advisers are able to rely on the published statements of HMRC in connection with their own tax affairs and the affairs of their clients.

The very idea that we might not be able to trust the public statements of one of the most important and prestigious organs of government, must surely be unthinkable.

It is in this context that the recent decision of the Court of Appeal in *Aozora GMAC Investment Ltd v HMRC [2019] EWCA Civ 1643* assumes some importance.

The case was all about whether the company was entitled to double taxation relief which had been refused by HMRC on the authority of section 793A ICTA 1988. The company said that HMRC's interpretation of section 793A was wrong – but crucially, even if HMRC were right, the relief should still be given because the HMRC Manuals said that relief would be available in these circumstances. The company had a legitimate expectation that HMRC would apply the law in accordance with their published guidance on which taxpayers were entitled to rely. That is what Judicial Review is for.

Not so fast Monsieur. You need a bit more than this. It is necessary to consider (and weigh) a number of issues, for example, whether the taxpayer or the persons advising them, relied on the published statements for this purpose; whether the

public explanation published by HMRC was clear, unambiguous and devoid of any relevant qualification; whether the taxpayer had suffered a substantial detriment from relying on it, and whether it would be conspicuously unfair for the relief to be denied. Tough call.

I do not want to dwell on the particular facts of this case which were inevitably complicated but to highlight one of the conclusions of the Court of Appeal which reads as follows:

> "… it is necessary for [the taxpayer] to show a high degree of unfairness arising in its particular circumstances in order to override the public interest in HMRC collecting taxes in accordance with a correct interpretation of the law".

In the current environment, it is difficult to see that such a test would ever be satisfied. It will always be possible to say that the public interest in collecting the right amount of tax according to the law must trump the interests of an individual taxpayer who has been disadvantaged.

However, I would respectfully suggest that this must be the wrong way round. Surely fairness should always prevail. Were we not taught that this is the whole foundation of Equity, and that since 1615, in the event of such a conflict, Equity should prevail.

A suggestion that taxpayers can be misled and disadvantaged (and to bring us completely up to date, might commit suicide), by relying on official statements which the State can disown on the altar of the public interest, is not just the thin end of the wedge, it is the gates of the Kremlin.

## Commercial Realities

A point which often arises in many tax disputes is whether the contractual rights and obligations relating to a transaction should prevail over the commercial realities of the arrangements.

It is tempting to suggest that both the taxpayer and HMRC are likely to take the view which is to their advantage. That is understandable as far as the taxpayer is concerned, but not so much for HMRC. As a public body they ought to be arguing

for the *right* answer (which would happily accord with their mantra that the taxpayer should pay the right amount of tax) rather than seeking an interpretation which gives rise to the largest amount of tax.

However, philosophy aside, this is an issue which has been exercising the Courts recently.

In *HMRC v Hargreaves Lansdown Asset Management Ltd [2019] UKUT 0246* the Upper Tribunal was concerned with the proper tax treatment of certain payments to investors. The Upper Tribunal held that the tax treatment of the payments should follow the contractual arrangements – not the commercial reality behind the payments. The commercial realities were not determinative of the substance of the arrangements and were only relevant if they were reflected in the contracts.

However, in *American Express Services Europe Ltd v HMRC TC 7342*, the FTT held that it was necessary to consider whether the contractual arrangements were consistent with the commercial realities of the situation. They found that as a question of fact, they were consistent – so there was no problem. But they made it clear that if there had been a conflict, the tax treatment would have followed the commercial realities and not the contractual analysis.

The decision of the Upper Tribunal has much greater weight as it represents precedential authority but even so, this conflict is not very helpful in enabling us to understand what is important where the contracts and the commercial realities do not correspond.

The commercial realities can also have a wider significance – for example, in determining whether there is a genuine trade being carried on by the taxpayer – and certainly the commercial realities are something which has been important to the GAAR panel when making their decisions. And of course, there is always Ramsay ….

It might therefore be a bit optimistic to rely too much on the decision in *Hargreaves* at least for the moment and probably best to ensure as far as possible that the contractual arrangements and the commercial realities coincide.

# IHT Charity Exemption

It is well known that there is an exemption for gifts to charities for inheritance tax under Section 23 IHTA 1984. The conditions for relief are fairly straightforward; the property given away has to become the property of a charity or held on trust for charitable purposes only.

This relief has been exhaustively examined in the Courts in the case of *Routier v HMRC* which concerned a bequest in 2007 to a trust for the benefit of a charity in Jersey. There was no dispute that the objects of the trust were charitable purposes under English law. However, the trust was subject to Jersey law.

The claim for relief was rejected on the grounds that the trust did not qualify as a charity for the purposes of section 23 because it was not subject to the jurisdiction of the UK courts. This condition was derived from a decision of the House of Lords in *Camille and Henry Dreyfus Foundation Inc v HMRC (1956) AC 39.*

The Finance Act 2010 introduced a new definition of charity to include charities established in the EU and this is effective for inheritance tax from 1st April 2012 – although naturally, its purposes still have to be exclusively charitable under English law. This new rule did not apply to the case of *Routier* because the trust was not established in the EU and it was established before April 2012.

The High Court and the Court of Appeal rejected the claim for exemption on the grounds of *Dreyfus* (and various other subsidiary arguments) but these have all been blown away by the Supreme Court in their recent judgment [2019] UK SC 43.

Two important conclusions from the Supreme Court judgment are that Jersey may be regarded as a third country for the purposes of the EU rules on the free movement of capital (but wow – is that complicated!) and that the refusal of relief on the reasoning in *Dreyfus* was incompatible with Article 56 of the EC treaty.

The Supreme Court said that Section 23 does not discriminate between gifts to charities governed by the law of the UK and charities governed by the law of other EU member states or a third country. On its face, it is entirely compliant with Article 56.

However, the restriction which was imposed on the application of section 23 by the House of Lords in *Dreyfus* is incompatible with Article 56 and cannot stand.

Accordingly, the Supreme Court held that no such restriction could be imposed on section 23 and the taxpayer was entitled to the relief as the gift satisfied the precise terms of the legislation.

It remains to be seen whether Article 56 will have any continuing application in the light of unfolding political events relating to the EU. If it does not, then section 23 might end up subject to the *Dreyfus* restriction after all.

## Personal Service Companies

A year ago, the case of *Christa Ackroyd* was decided by the First Tier Tribunal. It concerned the use of a personal service company by a TV presenter and whether the income of the company fell within the intermediaries legislation in sections 48 – 61 ITEPA 2003.

Under the intermediaries legislation we have to disregard the real contract between the company and the client (in this and other cases, the TV companies) 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 Miss 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 FTT decided that she would have been so treated.

Since then there have been a number of cases with remarkably similar facts which the Tribunals have found were not within the intermediaries legislation. However, the latest twist in this saga is that the Upper Tribunal have now published their decision in the case of *Christa Ackroyd*.

The Upper Tribunal held that although the FTT made a number of errors in its approach, it reached the same result as if it had taken the right approach and dismissed Miss Ackroyd's appeal.

The judgment of the Upper Tribunal explains that the only issue in the appeal was whether the BBC had a sufficient degree of control over the provision of Miss Ackroyd's services to satisfy the control requirement necessary for an employment relationship. They found that it did.

The decision makes numerous references to the celebrated case of *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2QB 497 but strangely (in this context) there is no reference to the opinion expressed by McKenna J in that case that "control is not everything". Maybe it was in this case.

Having regard to the other cases in the pipeline, it is likely to be some time before we have some real clarity on this subject

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**31st October 2019**

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