UK Tax Bulletin

December 2019

Field Court Tax Chambers

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Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: October 2019 November 2019	290.4 291.0
Inflation Rate: October 2019 November 2019	2.1% 2..2%
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%

Loan Charge

There are some good tidings of comfort and joy on this subject which are extremely welcome.

It may be remembered that in September, Sir Amyas Morse was appointed by the Treasury to conduct an independent review into the highly controversial Loan Charge which came into force on 6th April 2019. This imposed a charge on loans to employees which had been made during the previous 20 years. This was quite clearly retrospective taxation; if the loans were taxable when they were made then they would (or should) have been taxed at the time.

The Report was published last week and Sir Amyas confirmed that HMRC had gone overboard in overriding taxpayers' statutory protections, and gave a list of recommendations.

As a result, HMRC have announced a number of measures, principally that the loan charge will not apply to loans taken out before 9th December 2010. Nor will it apply to loans between 9th December 2010 and 5th April 2016 which had been fully disclosed and which HMRC had failed to challenge.

This is obviously welcome but the question still arises why there should be any retrospection at all. If a retrospective charge back to 1999 overrode taxpayers' statutory protections, why does it not do so back to 2010, or even 2016.

It is a pity that the next World Cup is not going to be in the UK. After every game the Government could retrospectively change the rules to disallow all our opponents goals and a glorious victory would be ours.

IHT: Interests in Possession

The case of *Margaret Vincent v HMRC TC 7432* examined an interesting and frequently recurring point about whether the wording in a Will created an interest in possession.

The issue was whether the drafting of the Will of Mrs Vincent's mother, Mary Hadden, conferred a life interest in her share of the family home on her brother, Ian Thom. Mrs Hadden was beneficially entitled to three eighths of the property and

Ian Thom owned the other five eighths

Mrs Hadden's Will gave her share in the property to Margaret Vincent subject to the following provision:

> "to permit [Ian Thom] to reside therein for as long as he shall desire free of rent but he being responsible for general rates, water rates, insurance and maintenance repairs of an income nature"

HMRC said that these words conferred an interest in possession in the three eighth's share of the property on Mr Thom so that it formed part of his estate on his death for the purposes of inheritance tax.

Everybody is familiar with the relevant test from *Pearson* that an interest in possession means having the present right of present enjoyment of the settled property. These words would generally be accepted as conferring such a right and therefore an interest in possession – except that in this case, Mr Thom already owned five eighths of the property so he already had a present right of present enjoyment; he did not need the other three eighths to give him that right.

Nevertheless, the FTT decided that these words did create an interest in possession in Mr Thom's favour on the grounds that they must have been intended to protect Mr Thom from a forced sale instigated by the residuary beneficiary Mrs Vincent.

One can understand the point, but with respect to the Tribunal they would seem to have overlooked the terms of Section 11 Trusts of Land and Appointment of Trustees Act 1976. Before any sale could take place, section 11 would have required the beneficiaries to be consulted – and for effect to have been given to the wishes of the majority by value. So Mrs Vincent could not have forced a sale without the consent of Mr Thom anyway.

There is no indication in the judgment that this point was raised (by Mrs Vincent or HMRC) which is a shame (at least for Mrs Vincent as she effectively had to bear the resultant inheritance tax), as it would seem to undermines the whole basis for the decision.

Concession D49

There is an interesting disparity of views on the ability of the First Tier Tribunal to give effect to extra statutory concessions. The particular concession under consideration was Extra Statutory Concession D49 which relates to the main residence exemption for capital gains tax. It allows a period of grace of a year or so before a person takes up occupation in a property, without prejudicing their entitlement to the exemption.

ESC D49 reads as follows:

> "where an individual acquires land on which he has a house built which he then uses as his only or main residence, or where an individual purchases an existing house and before using it as his only or main residence arranges for alterations or redecorations or completes the necessary steps for disposing of his previous residence".

In these circumstances, the period before the individual uses the house as his only or main residence is treated by concession as a period in which he did so.

In the case of *White v HMRC TC 7434*, the taxpayer complained that HMRC had restricted the period for which they were entitled to the exemption by not allowing them the period of grace provided by concession D49.

The Tribunal explained the traditional view that there is nothing in the legislation which permits or requires the Tribunal to consider an extra statutory concession and the appeal was struck out on the grounds that the Tribunal simply did not have jurisdiction to deal with the appeal.

However, in the case of *McHugh v HMRC TC 6605* the Tribunal reached the opposite conclusion. An assessment to capital gains tax was made by HMRC on Mr and Mrs McHugh on the basis that were not entitled to the main residence relief prior to actually moving into the relevant property.

The Tribunal not only considered the terms of the concession in the context of this case, but concluded that Mr and Mrs McHugh were entitled to have their gain calculated with the benefit of concession D49. There was no suggestion that the Tribunal lacked jurisdiction to enforce the concession and the point was not argued.

It has been announced that the terms of concession D49 are to be incorporated into the capital gains tax legislation in April 2020 (in apparently more generous form), allowing 24 months from the date of acquisition in all cases. That is very welcome, but it is difficult to see how the First Tier Tribunal reached the conclusion that they were entitled to enforce the application of an extra statutory concession. It would be interesting to know their reasoning.

Discovery Assessments: Staleness

I hesitate to return to this subject as I thought it had been pretty much established that a discovery assessment cannot be issued if it is stale – that is to say if the discovery supporting the assessment has lost its essential newness.

This has been confirmed so often that one would have thought it is now beyond argument – although there may be appeals pending which could affect the position.

It is therefore very surprising that in the recent case of *Jafari v HMRC TC 7465,* HMRC did not even mention the point (the taxpayer was unrepresented). When challenged by the Tribunal, they said that the very idea of "staleness" was unsound and devoid of statutory authority. That is an extraordinary statement in the face of decisions to the contrary from, inter alia, the Upper Tribunal (*Beagles*) and the Court of Appeal (*Tooth*).

The Tribunal was fiercely critical that HMRC made no attempt to bring to the Tribunal's attention the relevant jurisprudence on discovery assessments which undoubtedly does incorporate the concept of staleness. HMRC must have been aware that the 30 month delay between the discovery and the assessment would (probably) have led the Tribunal to conclude that the discovery was stale, and that the assessment was invalid. HMRC cannot ignore decisions they dislike and simply proceed as if they do not exist.

I would observe that the Bar Standards Board's Code of Conduct Rule C-3 includes the following regarding counsel's duty to the court:

> "You must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions"

I understand that the Law Society has a similar rule of ethical conduct required by solicitors.

It will be very interesting to see what happens next as a result of this case.

VAT Input Tax

The recent case of *Taylor Pearson (Construction) Ltd v HMRC TC 7464* was concerned with whether the VAT on the cost of tax advice relating to a tax scheme for directors' bonuses was eligible for relief as input tax.

Section 26 VAT Act 1994 provides that input tax is deductible in respect of supplies which are made in the course or furtherance of the business.

HMRC argued that just because a supply is for the purpose of incentivising employees that does not make it deductible because this did not have any direct or immediate link with the company's economic activities and the purposes of the business. They made no acknowledgement of any of the numerous authorities which supported the view that incentivising employees is for the purposes of the business. (Do we detect a theme here?)

The Tribunal expressed surprise at this argument and rejected it completely saying that it had no merit whatsoever; furthermore, they could not understand why HMRC put it forward. It was obvious that tax advice for the incentivisation of employees in a tax-free manner was in relation to the provision of employment rewards. Accordingly the VAT on the tax advice for this purpose was properly deductible as input tax.

Agricultural Property Relief

Another recurring issue is whether a farmhouse qualifies for agricultural property relief for IHT purposes.

The relief is given under Section 115 IHTA 1984 which defines agricultural property to include cottages, farm buildings and farmhouses together with the land occupied with them which are of a character appropriate to the property. So clearly a farmhouse can qualify – but it also needs to satisfy the terms of section 117 and be occupied by the transferor for the purposes of agriculture throughout the relevant period.

These conditions were recently examined by the Tribunal in the case of *Executors of Thomas Gill Deceased v HMRC TC 7425.*

HMRC denied the relief on the grounds that the farmhouse did not constitute agricultural property because it was not "occupied by Mr Gill for the purposes of agriculture".

HMRC argued that there was no sufficient connection between the residential use of the property and an agricultural purpose; Mr Gill did not carry on any agricultural activity because he rented his agricultural land to somebody else. The land was permanent pasture and his income was only from grazing licences and single farm payments. All he did was general maintenance and management of the land which was merely the action of a prudent landowner keeping his land in good condition in order to generate an income. He lived in the house as a residence; it was not a dwelling from which the farm was managed and neither was he farming on a day to day basis.

There was also the possibility of business property relief under section 105 IHTA 1984. It was accepted that Mr Gill was carrying on a business for the purposes of business property relief but HMRC argued that the business carried on by Mr Gill was wholly or mainly the making or holding of investments and therefore disqualified under section 105(3) IHTA 1984.

Subject only to the final paragraph below, these facts are not altogether unusual and therefore this case may be of significant application.

The Tribunal took the view that the activities carried out by Mr Gill were those of a farmer, working an active farm. He undertook substantial work which could not be accurately described as limited to the provision of land for grazing. It was not just done in order to let the land. He could be found at dawn in the outbuildings with livestock ready to start vaccinations. He also carried out works such as fencing drainage ditches and harrowing. Mr Gill was the person who checked on the livestock each day. As far as the cultivated crops are concerned, HMRC argued that this was no more than a vegetable patch. The Tribunal did not agree. They considered that an acre of crops farmed using tractors and similar machinery and sold at a local shop was beyond a hobby gardener.

Under the circumstances the Tribunal found that Mr Gill did run a farming business and his occupation of the farmhouse was for the purposes of agriculture, thereby qualifying for agricultural property relief.

As far as business property relief was concerned, it was important to determine whether the services provided by Mr Gill were incidental to a business which was wholly or mainly the making or holding of investments. Having regard to their decision concerning the farming activities, the Tribunal was satisfied that the business was not wholly or mainly making or holding investments. Accordingly, the business carried on by Mr Gill was relevant business property qualifying for business property relief.

One feature not mentioned in the case was that one of the barns at the farm seems to have been used as a makeshift maternity ward for a young couple who were in need of some accommodation. It sounds a bit unsanitary as there were loads of sheep and oxen always sniffing around a manger. However they were kept in check by a group of passing shepherds and a few royals on a baby visit. Mr Gill clearly deserved his relief for this reason alone.

Happy New Year

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29th December 2019

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