UK Tax Bulletin

July 2020

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: July 2020

Current Rates	
Retail Price Index: June 2020	292.7
May 2020	292.2
Inflation Rate: June 2020	1.1%
May 2020	1.0%
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 rate of 2.6% from 9th April 2020.

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% from 23rd March 2020

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.

Official rate of interest

To 6th April 2015: 3.25%

To 6th April 2017: 3%

To 6th April 2017: 2.5%

From 6th April 2020 2.25%

IR 35: Intermediaries Legislation

I have made frequent references to the endless stream of cases concerning TV presenters and their service companies and whether the intermediaries legislation has caused the earnings of the presenter to be chargeable to tax on the basis of a notional contract between themselves and the TV company. This applies, broadly, if the contract between the service company and the TV company would have been an employment if a similar contract had been entered into by the individual directly.

HMRC and the taxpayer have each had mixed success. The result of the conflicting cases is that the whole subject is entirely confused, and nobody really knows where they are. Both sides will often have solid support for their view – but the outcome will always be uncertain.

With all those cases clearly in mind, I was interested to read the Employment Appeal Tribunal case *Jessica Varnish v British Cycling Federation UKEAT/0022/20/LAV.* The question was whether Jessica Varnish, a professional cyclist with the GB Cycling Team, was an employee of the British Cycling Federation, or a worker within the meaning of the Employment Rights Act 1996. The Tribunal concluded that she was neither, and so did the Employment Appeal Tribunal.

One can see the difficulty establishing an employment relationship here because Jessica Varnish did not do very much for the British Cycling Federation; she was mainly training in the hope of achieving success in international competitions. She received a non-repayable means-tested grant from UK Sport, a public body which provided funding for the British Cycling Federation.

However, the analysis is not so clear when you look further into the facts. It was established that a high degree of control was exercised over her activities by the British Cycling Federation – which is a classic pointer to an employment. It was said that she received no money from the British Cycling Federation. However, that would seem to be equivocal because the British Cycling Federation paid for her travel and accommodation expenses, provided coaching, equipment, facilities and medical services, and provided her with the opportunity to go to a training camp in Perth, Australia in 2012. To say that she did not receive any money from the British Cycling Federation is perhaps an oversimplification.

The Tribunal also said that her agreement with the British Cycling Federation was a contract where services were provided to Jessica Varnish, not the other way round. Again this seems arguable because she had clear responsibilities under the agreement to train with the British team, enter specific competitions, wear team clothing, follow all reasonable directions of the British Cycling Federation and not engage in any personal commercial work or media appearances their without written consent. She was also subject to disciplinary procedures.

The arguments were not straightforward but there was a good deal in this case which under other circumstances would have resulted in a finding of an employment. However, the Employment Appeal Tribunal said that the facts were "*wholly inconsistent with the contract of employment*."

It is going to be interesting to see what the Tax Tribunals do with this reasoning in due course when it is inevitably cited in an IR35 case.

Informal HMRC Enquiries

The Court of Appeal recently confirmed in the case *of JJ Management Consulting LLP v HMRC [2020] EWCA Civ 784* that HMRC can conduct informal enquiries without the need to open a formal enquiry under Section 9A TMA 1970.

At first sight, this does seem odd. Section 9A provides specific power for HMRC to enquire into a tax return by giving notice to the taxpayer and which is subject to various statutory conditions. What is the purpose of having this statutory power with its various restrictions if HMRC can simply make informal enquiries anyway?

One might say that informal enquiries can be quite helpful in enabling minor issues to be clarified without the need to open a formal enquiry; after all that is what always used to happen and it is obviously an efficient way to carry on. However, there is now a much stricter regime for enquiries, with very harsh consequences as well as the extensive powers provided by HMRC to obtain information about a taxpayers' affairs. This might be thought to be a way for HMRC to conduct an investigation without any of the safeguards which had been provided to the taxpayer to balance the severity of the regime.

When HMRC open an enquiry, the taxpayer may apply to the Tribunal for a closure notice to ask the Tribunal to direct HMRC to terminate their enquiries unless there is good reason for them to continue; no such safeguards exists with informal enquiries. Similar protections exist within Schedule 36 FA 2008 in connection with Information Notices; those safeguards would also be circumvented.

However, such criticisms may be a bit overstated. If HMRC makes informal enquiries there is no obligation on the taxpayer to respond; his response (if any) is purely voluntary. Accordingly, the taxpayer can effectively insist that HMRC opens an enquiry under Section 9A (assuming the enquiry window remains open) if they wish to do so. Similarly, they could insist that HMRC issues a formal Information Notice under Schedule 36 with the attendant safeguards including the (limited) right of appeal. The fact that the taxpayer's response to such informal enquiries is entirely voluntary was specifically highlighted by the Court of Appeal.

An interesting feature of the case was the basis on which it was said that HMRC can make their informal enquiries. Reference was made to section 9 Commissioners for Revenue & Customs Act 2005 which says:

> "The Commissioners may do anything which they think:
>
> (a) Necessary or expedient in connection with the exercise of their functions; or
> (b) Incidental or conducive to the exercise of their functions."

This is an awesome power: HMRC can do ANYTHING they THINK is EXPEDIENT.

Who in their right mind (outside China, Russia and North Korea) could possibly have thought that this is a power which should be given to any organ of government in a free society. I would like to ask any of the MPs who voted for it to explain what they were thinking.

The efficient collection of taxes is important but there are no such powers to deal with murderers, rapists and armed robbers which may be a tad more important.

I am sure that we are going to see a lot more of Section 9 CRCA 2005 in the future and some people will wonder whether we need the Yellow and Orange books any more. It is going to be interesting to see how this power fits in with all the safeguards which have been provided for the taxpayer by Parliament in other statutes. There must be at least a possibility that they are all overridden by the authority of HMRC to do anything which they think expedient in connection with the exercise of their functions.

Reasonable Excuse

A review of the decided cases before the First Tier Tribunal reveals that by far the largest category are appeals against penalties. Many conclusions are able to be drawn from this sad statistic – but one of them is not that this indicates a culture of non compliance by taxpayers.

However, a conclusion which can be drawn is that there are a lot of people who are seriously aggrieved – and you have to be seriously aggrieved to take a (often modest) penalty to the Tribunal. Most people, despite their dissatisfaction would just let it go.

Some people seek to defend the penalty on the grounds that they have a reasonable excuse. We have no data for the reasonable excuses which are accepted by HMRC but we can see the reasonable excuses which they reject – and which come to court. The excuses are many and various (some are utterly hopeless) but one of the recurring themes is that the taxpayer was relying on professional advice.

I have often made reference to the long string of cases confirming that the taking of professional advice is a demonstration of taking reasonable care, although you cannot hide behind the advice if you know - or ought to know – that the advice is questionable.

The latest case in the series is *Fastklean Ltd v HMRC TC 7773* and it is instructive, not only of the approach of HMRC but also of the Tribunal.

The taxpayer was an employment intermediary and did not file a relevant return on time, and this resulted in a penalty.

The Tribunal noted that the appellant had sought professional tax advice in advance and sought Counsel's advice during HMRC's check, cooperating fully with HMRC. The advice proved to be incorrect but there were no warnings signs that should have caused her to question that advice.

HMRC did not see any reasonable excuse here:

> "the Appellant ought to have taken greater steps than it did to ascertain the extent of their filing obligations. HMRC expect a person who encounters a transaction or other event which they are not familiar with to take care to find out about the correct tax treatment or seek appropriate advice."

She should have taken greater steps! What? More than taking professional tax advice and Counsels Opinion to find out the correct tax treatment. HMRC declined to say what further steps she should have taken. And as for the suggestion that she should have sought "appropriate advice", that was plainly ridiculous under the circumstances.

The Tribunal reviewed the facts objectively and it is no surprise that they held that there was a reasonable excuse and cancelled the penalty.

When I said that this case is instructive not only of the approach of HMRC but also of the Tribunal, I expect you will see what I mean.

Goodwill and Discovery

I have mentioned a number of times (for example in connection with the decisions in *Richard Villar v HMRC TC 6893*, *Leeds Cricket Football and Athletic Company Limited v HMRC TC 7362*, and *Neill Dyer v HMRC TC 7567*) that HMRC have continued to argue – unsuccessfully - that the goodwill of a person in professional practice does not exist, or if it does, it is incapable of being transferred.

The recent case of *Armstrong and Haire Ltd v HMRC TC 7780* therefore assumes some significance. This case involved the incorporation of two dentistry businesses and the transfer of the goodwill to the company at a price of £1.4million. The issue concerned a deduction for corporation tax for the amortisation of the goodwill. HMRC did not challenge the validity of the transfer of the goodwill; their argument was that the goodwill had been created prior to 1st April 2002 and a tax deduction under the intangible's regime was therefore prohibited.

The Tribunal held that the goodwill could not be separated from the businesses. In 2010 the company had acquired the businesses and the associated goodwill which had been created in 1996; the company had not created the goodwill and could not be treated as having done so when it acquired the businesses.

A second issue arose which is whether the discovery assessments raised by HMRC were stale and therefore invalid. This is another controversial topic. In this case HMRC became aware of the relevant facts and made their discovery in June 2015 but did not make their discovery assessment until 15 months later.

In making a discovery assessment HMRC must act expeditiously following their discovery and 15 months could well have been long enough for the discovery to have become stale.

However, in the circumstances of this case, the Tribunal did not consider that the discovery had lost its "essential newness". HMRC had not just sat on it and done nothing. Having made their discovery HMRC and had been working on the matter including making enquiries of the taxpayer, and their continued attention meant that it had not become stale.

Financial Institution Notices

The Finance Act 2020 received Royal Assent on 22nd July.

It seems a little hasty for the next one – the Finance Bill 2020/21 – to have been published already, but clearly there are lots of things to be done. One of these things is a proposal to give HMRC some significant new powers to obtain information.

A Financial Institution Notice will allow HMRC to require banks and other financial institutions to provide documents and information about a taxpayer. Such a notice will not need the approval of the Tribunal which is the case under the present position with a third party notice under Schedule 36(3) FA 2008.

There are various safeguards – although I wonder how strong those safeguards are in the context of Section 9 above.

Following the case of *Jimenez* where the Court of Appeal held that third party notices could be issued to persons outside the jurisdiction, this will probably also apply to these new notices. It will be interesting to see whether the Supreme Court has anything to say on that matter when the *Jimenez* appeal comes to be heard – although I expect if they find that the notices do not have extra territorial jurisdiction, the law will swiftly be changed to accord with the view of the Court of Appeal.

But standing back, having regard to the extensive powers which already exist for HMRC to obtain information from financial institutions under the various international agreements and CRS, (quite apart from the existing law) this may not

come as a great surprise, or perhaps cause any (additional) anxiety.

Peter Vaines
Field Court Tax Chambers
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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