UK Tax Bulletin

September 2020

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: August 2020	293.3
July 2020	294.2
Inflation Rate: August 2020	0.5%
July 2020	1.6%
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%

The Budget

We were going to have a Budget quite soon – but it has been cancelled.

There were worries about what action the Chancellor might take to find the money to pay for all the expenditure this year. However, we do not have to worry for the moment because apparently this is not the time to damage the economy and stifle growth by raising taxes.

This leads me to wonder: When **will** it be a good time to damage the economy and stifle growth?

Information Reasonably Required

It is the nature (and the duty) of HMRC to make enquiries to ensure that a person's tax returns are correct. This is an important part of the system under self-assessment where the default position is that everything in the tax return is correct, subject to any checks HMRC may choose to make.

Taxpayers generally do not like enquiries from HMRC (which is hardly a surprise) but it must be right for HMRC to have the necessary powers to check that everything they have been told, the calculations of the tax, and all other matters relevant to the accuracy of the tax returns are correct. It is probably fair to say that not everybody gets their tax return right (and calculates their tax liability accurately) every single time.

However, sometimes, HMRC does not get the information they require to satisfy themselves that everything is in order, despite making enquiries in the normal way. They may have to resort to an information notice under Schedule 36(1) Finance Act 2008. This is a statutory notice giving rise to penalties if it is not complied with.

Schedule 36(1) permits HMRC to issue an information notice for "information which is reasonably required for the purposes of checking the tax position" of the taxpayer.

Of course, the taxpayer may think that the enquiries are unreasonable or wrong or generally not in accordance with Schedule 36(1), perhaps because the information requested is not reasonably required for the purpose of checking their tax return. They may say that HMRC are just on a fishing expedition, hoping that something will turn up to their advantage.

The taxpayer's remedy is to appeal to the Tribunal where HMRC will be obliged to show that the information they have requested is reasonably required for this purpose. However, it should be noted that there is no right of appeal where the information notice is issued with the prior approval of the Tribunal under Schedule 36(3).

It was therefore interesting to read the recent case of *McCabe v HMRC [2202] UKUT 266* where the taxpayer was seeking the disclosure of information from HMRC in connection with the mutual agreement procedure under a double taxation agreement. 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 refused to provide the information on the grounds that the documents would not be of any material relevance. HMRC said that the taxpayer hoped that the documents would reveal things which would be supportive of his case and that the request was a fishing expedition. The First Tier Tribunal refused to order the disclosure and the Upper Tribunal has upheld that decision.

It is therefore relevant to read the recent case of *Perfectos Printing Inks Co Ltd v HMRC (2019) UK FTT 388* where the taxpayer said that the information being sought by HMRC was simply based on a fishing expedition. (I see a selection of geese and ganders here – and some sauce.)

The FTT said:

> "The test that is to be applied is whether or not the items sought are "reasonably required" for the purpose of checking the taxpayers' tax position."

The Tribunal found it helpful to refer to a dividing line between cases where the tax officer could show a reason for the information, and cases where the tax officer was simply on a fishing expedition. The Tribunal concluded that the information sought by HMRC was not reasonably required.

Although a great deal of fishing seems to be going on all the time, these two cases give some weight to the proposition that both HMRC and the taxpayer should put their rods away.

Residence and COVID

HMRC have published some FAQs on the subject of the Statutory Residence Test: International Tax Clarifications due to Coronavirus. They are frustratingly unhelpful as they nearly all say that the answer depends on the specific facts and circumstances of the case. Well, yes. Or they just paraphrase the rules and leave you to deduce the answer.

One question (and answer) relating to the Family Tie looked interesting. Will my children be treated as being in full time education even though the schools were shut? The answer was that:

> "there was a clear expectation that children's full time education would continue albeit in a different environment"

That would be a Yes, I think.

However it went on to say that if the child spends more than 20 days in the UK outside term time during the year because of travel restrictions, they cannot be treated as non resident because these days are not covered by the exceptional circumstances exception.

So that would be a No then.

Another question was whether the exceptional days rules apply to days that you are in self isolation. This answer was very clear:

> "If you are self isolating in line with government advice the period of self isolation will be covered by exceptional circumstances"

IR35 and Mutuality of Obligation

This subject seems to be cropping up with increasing regularity these days. It has a long history. At one time mutuality of obligation was an important element in determining whether there was a contract of employment (a contract of service) or a contract for services, which is a self-employment. There are of course numerous factors to be considered in determining employed or self employed status and this was one of them.

HMRC have increasingly sought to suggest otherwise. Their view, now enshrined in their Employment Status Manual is that mutuality of obligation is not a relevant consideration at all. They regard mutuality of obligation as the essential foundation of any contract and nothing more. In the context of an employment they say that the mutual obligations are as under:

a) The engager must be obliged to pay a wage or other remuneration, and
b) The worker must be obliged to provide his own work or skill.

However, this does not get us anywhere. They are two sides of the same coin. If I am obliged to provide services then it follows that the person to whom I am obliged to provide the services is obliged to pay for them. This is the offer and acceptance of a contract. I agree to do one thing in return for you agreeing to do another.

For this reason I would suggest that the HMRC analysis of mutuality of obligation is not the right analysis when considering the existence of a contract for services or a contract of service. The whole point of the test of mutuality of obligation is not to identify whether there is a contract – it is to identify which type of contract it is.

This view was expressed by the Court of Appeal in *Cotswold Developments Construction Ltd v Williams [2008] ICR 545* as follows:

> "The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other contract."

This whole issue recently came to be considered again by the FTT and the Upper Tribunal in the case of *HMRC v Professional Game Match Officials Ltd [2020] UKUT 0147* in which the Upper Tribunal held that the minimum requirement on an employer is an obligation to provide work or, in the alternative, a retainer or some form of consideration (which need not necessarily be pecuniary) in the absence of work. (The presence of such obligations was later described by the FTT in the more recent case of *Kickabout Productions Ltd* as a "touchstone of employment status").

The view of the Upper Tribunal was that:

> "it is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work if and when it is actually done."

This followed the decision in Usetech v Young [2004] STC 1671, that the employer's obligation, necessary to found an employment contract, must be either to provide work or to pay for it in lieu.

This point was also more colourfully made in a case in 1940 as follows:

> "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out"

There is no indication that HMRC are going to change their view, or the guidance in their Employment Status Manual, despite it being in plain conflict with decisions of the First Tier and Upper Tier Tribunals, the High Court and the Court of Appeal. It is difficult to see why this should be an issue which deserves still further litigation.

Settlements Legislation and TOAA

The recent case of *Dunsby v HMRC TC 775* involved some arrangements, referred to by the Tribunal as a tax avoidance scheme. In essence, some shares in a company controlled by Mr Dunsby were issued to a Mrs Gower who was not resident; she settled them on a trust under which she and Mr Dunsby could benefit; and a dividend was paid on those shares.

The argument was that the settlements legislation in Part 5 ITTOIA 2005 – and specifically section 620 – caused the dividend to be treated as the income of Mrs Gower and nobody else, even though it was actually paid to Mr Dunsby. Mrs Gower was UK resident so no tax arose.

The case turned on the meaning of "settlement" for the purposes of section 620 and who was the settlor of that settlement. The Tribunal held that the arrangements as a whole were a settlement and that Mr Dunsby was a settlor of that settlement. Mrs Gower may have been settlor too – but that did not affect anything because in reality she did not contribute anything to the settlement; she was a mere functionary in the creation of the settlement by Mr Dunsby.

The Tribunal discussed the very broad scope of "settlement" and "settlor" for income tax purposes and demonstrated how difficult it is to overcome them.

I think this is what Macbeth must have had in mind when he said:

> "That is a step on which I must fall down, or else o'erleap, For in my way it lies."

I think he had other issues to worry about. But as so often, he had something to say which resonates today on the much more important issue of who is liable to tax on a certain source of income.

It was also interesting to read the discussion regarding the interaction of the settlements legislation with the Transfer of Assets Abroad rules. Section 721 ITA 2007 (and its predecessors) provided for decades that the charge under the TOAA provisions applied irrespective of whether the income was otherwise chargeable to income tax.

However this was mercifully amended in 2013 by a new subsection 721(3C) to provide that income on which the transferor is taxed under other parts of the tax code, cannot also be charged under section 720.

This lead to the conclusion of the Tribunal that the settlements legislation takes priority over the TOAA provisions.

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