UK Tax Bulletin

December 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: October 2020	294.3
November 2020	293.5
Inflation Rate: October 2020	1.3%
November 2020	0.9%
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%

Business Property Relief

It is never easy to obtain business property relief for inheritance tax where the business includes letting property.

Business property relief will be denied by section 105(3) IHTA 1984 if the business:

> "consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments".

HMRC have consistently taken the view (and have had significant success before the Tribunals) that the letting of property is a business which consists wholly or mainly of making or holding investments, no matter how extensive the services which are provided.

The case of *Margorie Ross v HMRC TC 5959* was a rare exception because the Tribunal held that the services were sufficient to allow the relief to be given. However, there is a whole string of cases where relief in somewhat similar (some would say virtually identical) circumstances has been denied.

The latest in this series is the *Executors of the Late Sheriff Graham Lowden Cox v HMRC 2020 UK FTT 442* in which the services provided by the deceased were held to be insufficient for the business to be anything other than the making or holding of an investment.

Although these cases all turn to a large extent on their own facts, a clear theme has emerged – and persuading HMRC or the Tribunals that a letting business qualifies for business property relief is always going to be an uphill struggle.

However, the decision in *Sheriff Cox* raises a most interesting issue. In their submission of the legal principles involved, the executors drew attention to the passage in *HMRC v Pawson [2013] (UKUT) 050* where the Upper Tribunal said:

> "I take as my starting point the proposition that the only and holding of land in order to obtain an income from it is generally to be categorised as an investment activity."

The executors argued that this was not the correct statutory test. It started from the preconceived idea that a business which holds land is mainly making or holding investments – and it should then be asked whether there are any factors indicating to the contrary. They argued that the proper starting point is to make no assumption one way or the other but to establish the facts and determine whether the business is wholly or mainly one of making or holding investments.

The Tribunal in *Sherriff Cox* dismissed this criticism as follows:

> "I understand Henderson J as merely making a proposition to be *his* starting point in considering the rival submissions. I do not propose to repeat a similar review of the authorities to follow the debate which seems to have been engendered by the (mis) interpretation that Henderson J's "proposition" has in effect set up a legal presumption to be rebutted by the taxpayer appellant."

It is difficult to see how this view is consistent with judgment of the Upper Tribunal in *The Executors of M W Vigne [2018] UKUT 357* who referred specifically to "the presumption of investment activity referred to in the comments of Henderson J".

Furthermore it was revealed that the Court of Appeal, when refusing permission to appeal in *Pawson* said:

> "There is no presumption that requires to be rebutted as a business which consists of the exploitation of land for profit is an investment business. Of course, it must be looked at in the round".

The Tribunal in *Sherriff Cox* was no doubt correct in saying that there is no *legal* presumption to be rebutted by the taxpayer – but that is not what was being argued. The taxpayer was merely saying that if you start from an assumption that the view of one of the parties is right, then you do not address the issues fairly.

I am sure we will hear more about this in due course.

ATED Penalties

'Tis clearly the season for odd things. The recent case of *Heacham Holidays Limited v HMRC TC 7883* shows how important it is not to assume anything.

Where a company fails to comply with its ATED obligations, HMRC can impose a penalty. That is no surprise – although this does include failing to make an ATED return to claim a relief (such as the lettings relief) because it is relief rather than an exemption.

What happened in *Heacham Holidays* is that they submitted their ATED returns extremely late and HMRC imposed penalties. This included the daily penalty of £10 per day which can apply when the return is three months late. No dispute here, surely.

However, *Heacham Holidays* drew attention to the requirement that before HMRC can issue a daily penalty, they have to issue a notice to the taxpayer to tell them that if the failure to submit a return continues, a daily penalty will arise. This is a statutory requirement under Schedule 55(4) Finance Act 2009. HMRC had not done so and the Tribunal agreed that the daily penalties were therefore invalid.

This legislation puts HMRC in an impossible position. They will (almost) never know that a company has failed to file their first ATED return until the company actually does so. And HMRC cannot then issue a penalty notice for daily penalties because the return has already been submitted.

I suppose we can reasonably expect a change in the law pretty soon – and possibly a few claims for a refund of daily penalties.

Company Residence

The Court of Appeal have handed down an important judgment in the appeal of *HMRC v Development Securities Plc [2020] EWCA Civ 1705.* This is the latest case in a long line of cases on the issue of corporate residence.

The taxpayer was involved in various transactions and the key element in the case was whether the relevant subsidiary of Development Securities Plc was resident in Jersey or in the UK. The First Tier Tribunal found that it was resident in the UK;

the Upper Tribunal found that it was not, and now the Court of Appeal has found that the FTT was right after all and the subsidiary was UK resident.

The facts are complex and the judgment covers 44 pages. I hope that I will be forgiven for not attempting to summarise the decision – which is essential reading for anybody concerned with identifying where a company is resident.

The Court of Appeal examined the major authorities on the subject setting out the key principles of the residence of a company – being broadly where the real business of the company is carried on, which is where the central management and control actually abides. These phrases have of course been the subject of a huge amount of judicial interpretation since 1906 when it all started with the decision in *De Beers Consolidated Mines Ltd v Howe [1906] AC 455.*

(This test of residence does not of course apply to a company which is incorporated in the UK as such a company is automatically UK resident by virtue of section 14 Corporation Tax Act 2009).

The Court of Appeal explained the importance of the directors of the company making their own decisions and not having their authority usurped by others.

In the end, the decision depended on the facts. Did the directors of the Jersey company make their own decisions or were they directed or ordered to make decisions directed by the parent. The FTT said that they did not make their own decisions, they just did what they were told, and the Court of Appeal agreed with this conclusion. Reference is made to the line having been crossed from the parent influencing and giving strategic or policy direction, to the parent giving an instruction.

The fact that the Upper Tribunal and the Court of Appeal came to different conclusions on the same facts shows how difficult it is to stay the right side of the line – or even understand where the line actually is.

In some ways the decision in *Development Securities*, and those of *Untelrab* and *Wood v Holden* are helpful in providing a modus operandi which needs to be followed (or avoided) when seeking to establish that a company is resident in a particular jurisdiction.

Given the importance of the matter it may be that we will in due course receive definitive guidance on the subject from the Supreme Court.

Offshore Receipts: Intangible Property

On 6th April 2019 the Offshore Receipts in Respect of Intangible Property (ORIP) rules came into force. They can be found at Section 608A ITTOIA 2005.

I do not imagine that (even during lockdowns) many readers are going to be eager to learn all about this – it is all about discouraging multinational groups from placing intangible property in low tax jurisdictions. I wonder who they can possibly have in mind.

I thought I would mention it just in case. It would be as well to know that ORIP exists because it would be a pity to bump into it unexpectedly.

The rules will apply to a company or other entity which:

- Is not UK resident
- Is not resident in a full treaty territory with a non-discrimination article
- Has a UK turnover of more than £10 million
- The foreign tax is at least 50% of the ORIP charge.

The ORIP charge will arise on the UK derived amounts – capital or revenue – in respect of IP rights which enable, facilitate or promote UK sales.

There is, of course, loads of stuff about all of this (including exemptions and anti avoidance rules) but clearly only of comparatively specialised interest.

Happy New Year

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