UK Tax Bulletin

January 2021

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

Contents

January 2021

Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: December 2020	295.4
November 2020	293.5
Inflation Rate: December 2020	1.2%
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%

DAC 6

Well that's a relief. The spectre of DAC6 has been removed – at least for the moment. This has been a source of great anxiety, not least for those who are having to advise on it.

DAC6 was all about the obligation to report to HMRC details of cross border transactions where certain hallmarks existed – mainly involving transactions giving rise to a tax advantage. The obligations apply to intermediaries (widely defined) with only limited protection from legal professional privilege.

DAC6 was shorthand for the EU Council Directive 2011/16 and reporting was due to start on 1st January 2021, with retrospective reporting in respect of transactions going back to June 2018. So as a Brexit casualty, it went away just in time, ceasing to apply from 31st December.

Well nearly, because reporting obligations continue in respect of transactions within hallmarks D1 and D2, which concern arrangements involving the concealment of income or assets or of beneficial ownership. (I think this is because they are OECD and not EU requirements). And, if there are any reportable transactions which involve EU states, there can be still be an obligation to report in those jurisdictions.

This relief may only be temporary because the government are apparently consulting on the subject and some equally irritating notification imposition will assuredly be introduced in due course. But at least we do not have to worry about it for the moment.

Business Asset Disposal Relief

This is the new name for Entrepreneurs Relief – a rose by any other name – which continues to exercise the minds of HMRC and taxpayers alike. It is a very difficult relief because an endless stream of arguments have advanced to deny relief to the taxpayer. Some win, some don't, but the complexity has become unimaginable.

In the recent case of *Warshaw v HMRC [2020] UKUT 0366U* the issue was whether preference shares were ordinary share capital. In this case, the taxpayer was rather keen for them to qualify as ordinary share capital as he needed them to meet the 5% test for entrepreneur's relief.

Section 989 Income Tax Act 2007 defines ordinary share capital as all the issued share capital other than capital the holders of which "have a right to dividend at a fixed rate but have no other right to share in the company's profits".

Mr Warshaw's preference shares carried no rights to participate in the profits or assets of the company apart from a right to a 10% cumulative preference dividend on the following terms:

> "In priority to any other class of shares, each preference share shall have the right to a fixed cumulative preferential dividend (the preference dividend) which shall accrue on a daily basis from the dividend commencement date at a rate of 10% per annum…"

HMRC claimed that these preference shares were not ordinary shares within Section 989 CTA 2010 because they were entitled to a dividend at a fixed rate.

Well yes – how do you get out of that?

Mr Warshaw said that the preference shares did not have a right to a dividend at a fixed rate because the right to dividends was not only cumulative but it was calculated on a compound basis. So if there were insufficient profits to pay the dividend in one year, it was deferred until the following year. In that case, the Articles provided that the fixed dividends would be calculated on an amount which included the unpaid dividends.

The FTT agreed that this meant the preference shares were not entitled to a dividend at a fixed rate because it had the capability of variation. Accordingly, they were ordinary share capital and Mr Warshaw was entitled to his relief. The Upper Tribunal agreed.

In essence, the point is that the dividend was fixed at 10% of the profits but included a compounding element so that in year 2 the entitlement was still for 10% of the profits but 110% of the unpaid dividend for the previous year.

I rejoice for Mr Warshaw but cannot avoid feeling that he has been fortunate. It could so easily have gone the other way. Section 989 refers to shares which have "a right to a dividend at a fixed rate". The additional condition referred to by the Upper Tribunal that the rate must not only be fixed as a percentage but also as an amount, is not the only interpretation. After all, if you have a loan at a fixed rate of 5% per annum (with compound rather than simple interest) would you really say that this was not a fixed rate?

Fortunate or not, this ingenious argument (or brilliant advocacy) may well have been overlooked by many taxpayers. I expect that many people (including me) would have looked at the terms of the shares and finding they were entitled to a fixed cumulative preference dividend would have dismissed the possibility that they might qualify as ordinary shares by reason of a compounding provision. I am sure this will be added to everybody's checklists now.

Another aspect of entrepreneur's relief was examined in the more recent case of *Peter Kennedy v HMRC TC 7990* where the issue was whether Mr Kennedy met the condition of being an employee of the company at the time he made his disposal of the shares.

Mr Kennedy held more than 5% of the shares the company and satisfied all the other conditions for the relief - except that one. The facts were difficult and confused but there seemed to be plenty of grounds for the Tribunal to find that his employment had ceased before the date of disposal in September 2014. He did not work for the company and was not paid by the company after August 2013 and in fact, the Tribunal found that he had not been an employee of the company since 2010. (That was a difficult conclusion to understand as the Tribunal set out his remuneration as an employee of the company in a table showing remuneration as an employee up to 2013/14. But never mind; that was still not enough to get him to the date of disposal).

Mr Kennedy may have taken some comfort from the case of *Hirst v HMRC TC 4038* because although Mr Hirst had not been paid by the company since he ceased to be a director and although he did various helpful things for the benefit of the company, all he got from the company was a mobile phone, a laptop and an internet connection. That was enough for Mr Hirst, but Mr Kennedy was clearly too far away.

Partial Closure Notices

The Finance (No 2) Act 2017 introduced a new concept – the Partial Closure Notice - as a way of concluding particular issues in advance of a final closure notice.

Where there is an enquiry under Section 9A TMA 1970, HMRC can issue a partial closure notice on "any matter to which the enquiry relates" when they have completed their enquiries into a particular matter. That does not conclude the enquiry but it enables early resolution of discrete matters so that if necessary, the conclusion on that matter can be dealt with by way of an appeal while other matters continue to be investigated.

The subject came to be examined in the case of *Epaminondas Embiricos v HMRC [2020] UKUT 370*. Mr Embiricos sought a partial closure notice on his entitlement to the remittance basis which had been challenged by HMRC and which was fundamental to the overall appeal.

The argument in *Embiricos* was whether his claim to the remittance basis was "a matter" which could be determined by a PCN. The FTT said that it was. The Upper Tribunal accepted that as a matter of language this was the case – but then reached the opposite conclusion for another reason.

They concluded that a PCN could only be issued if it can result in a quantifiable charge to tax – following the case of *Archer v HMRC [2017] EWCA Civ* 1962 (although that case had been decided before PCNs had even been invented). That seems odd because not every matter will have an immediate and quantifiable tax liability – a conclusion recognised by section 50(7A) TMA 1970. The most obvious reason is that the liability could be affected by others matters arising in the enquiry, yet to be concluded. The whole point of a PCN would seem to be to conclude certain issues – so that the liability can then go on to be considered. That was certainly the view of the First Tier Tribunal.

The Upper Tribunal held that the FTT's reasoning was flawed and explained their conclusion in the following terms:

> "Viewed in isolation, the word "matter" is undoubtedly protean in nature. However, even Proteas yielded up his secrets when he was captured and held fast [By Menelaus according to Homer and by Aristaeus according

> to Virgil] so it is necessary to fasten down the legislation and determine whether the FTT's wide construction of it was correct. This requires a purposive construction of Section 28A as a whole in its statutory context taking account of the manner of implementation of the PCN code and the consequential weight to be afforded to *Archer*".

Well that's clear then.

It is possibly relevant that the Upper Tribunal made reference to the FTT decision in *Levy v HMRC TC7233* which disagreed with the decision in *Embiricos*. Strangely the Upper Tribunal did not refer to the case of *Henkes v HMRC TC7645* which set out in detail why *Levy* was wrong. The Upper Tribunal is a superior court which makes its own decisions but if they were going to have regard to the FTT you would have thought that *Levy* – which was held to be wrong in two other cases – would hardly be the decision they would choose to cite in support.

It is not at all clear what purpose is served by a PCN on this analysis – other than to enable HMRC to accelerate the charging of tax before an enquiry is concluded.

Deemed Domicile: Trust Protections

Some helpful notes have been published jointly by STEP, the ICAEW and the CIOT on the trust protections under the new deemed domicile regime.

It will be remembered that where a trust has been established before 6th April 2017 by a person who was not UK domiciled but who became deemed domiciled on that date under the Finance (No. 2) Act 2017, the trust benefits from a number of protections. These were mainly a freedom from the transparency rules for income tax and CGT; but this freedom is subject to a number of special tainting conditions.

This sounds good (and the protections are extremely valuable) but the number and complexity of the conditions are breathtaking. They are seriously difficult even for experienced professionals – the poor client has no chance.

These notes examine a number of matters of key interest under these provisions and although the notes and the commentaries have not yet been agreed by HMRC, the experience of the series of notes emerging from the professional bodies following the Finance (No. 2) Act 2017, indicates that much of it can be expected to be agreed by HMRC in due course.

However, no reliance can be placed on that possibility because you never know which bits will be agreed and which will not. Nevertheless, the analysis is interesting and helpful. The notes cover a number of difficult points such as the meaning of "provided for the purposes of the settlement" in connection with the tainting rules, whether ongoing work or employment by the settlor, the provision of guarantees, property management and the amendment of existing loans, can give rise to tainting.

It will be interesting to see HMRC's reaction to these points – but highlighting various areas which may not previously have been appreciated has a value all of its own.

Third Party Access to Information

In the August 2019 Bulletin I drew attention to the case of *Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38* where the Supreme Court explained how much of the written material placed before a court in a civil action should be accessible to people who were not party to the proceedings.

Lady Hale said that the issue was all about the fundamental constitutional principle of open justice. A third party has no right to such access, but the court has power to grant access if the applicant has a legitimate interest and if it would advance the open justice principle. Her Ladyship suggested that a clean copy of the trial bundle may be the most practical way of providing access to third parties – but it is entirely a matter for the court to decide what if any access should be permitted.

With this background, it is interesting to read the details of the application in the case of *Fastklean Limited v HMRC and Keith Gordon [2020] UK FTT 511.*

Mr Gordon had noticed that in a Tribunal decision last year concerning Fastklean, reference was made to a particular email which had been presented in evidence.

He claimed a legitimate interest in this email on the grounds that he was interested in related litigation and more generally as a barrister practising frequently in the Tribunal. The Tribunal agreed that he had a legitimate interest in obtaining access to this document and granted access on the grounds that it would advance the open justice principle without any risk of harm which its disclosure may cause to the maintenance of an effective judicial process.

All very technical – but could prove extremely valuable if things appear in reported cases which might be of interest.

Peter Vaines
Field Court Tax Chambers
31st January 2021

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