UK Tax Bulletin

February 2021

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

Contents

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Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: December 2020	295.4
January 2021	294.1
Inflation Rate: December 2020	1.2%
January 2021	1.4%
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%

Workers and Employees

On 19th February the Supreme Court released their decision that Uber drivers are workers for the purposes of the Employment Rights Act 1996 and are therefore entitled to holiday pay, the national minimum wage and associated benefits.

The Supreme Court did not make any reference to income tax or the tax status of the drivers and of course the legislation relating to employment rights is not the same as the legislation relating to taxes. However, the distinction between an employee and a self-employed person – being the difference between a contract of service and a contract for services – is not derived from any provision of the Taxes Acts. Indeed, many of the authorities relied on for tax purposes are based on employment law and it is apparent that the tests adopted by the Supreme Court in concluding that the drivers were workers for employment law purpose are similar to those used by the courts for tax purposes.

Leaving aside any worrying thoughts about the possible application of PAYE and NIC, the Supreme Court judgment provides a very important analysis (if only indirectly) of the circumstances in which an individual should be regarded as employed or self-employed.

How far we can take the comparison is uncertain, but I think we ignore the reasoning of the Supreme Court at our peril in considering this question.

IR 35: Intermediaries Legislation

The latest IR35 case has recently been decided by the Upper Tribunal: *HMRC v Atholl House Production Ltd [2021] UKUT 0037.*

This concerned the personal service company of Kaye Adams, the TV presenter. The question was (as it has been in so many cases) whether the contract between her company and the BBC fell within the intermediaries legislation in Chapter 8 ITEPA 2003 – that is to say, if there had been a contract between Miss Adams and the BBC on similar terms would she have been an employee.

The FTT held that she would have been self-employed, and the Upper Tribunal has confirmed the position.

I cannot resist the observation that section 49 ITEPA 2003 starts by saying that Chapter 8 applies where:

> "an individual ("**the worker**") personally performs or is under an obligation personally to perform, services for another person".

The issues with Atholl House Productions were (as always) related to control, mutuality, whether Miss Adams was in business on her own account or part and parcel of the organisation of the BBC - and the traditional cases of Ready Mixed Concrete, Autoclenz, Bank Voor Handel, Weight Watchers, Hall v Lorimer to name a few, were all considered.

I will not go through all, the facts of this case as it is all very similar to the numerous TV presenter cases, some of which have been won by the taxpayer and some of which have been won by HMRC. This case was obviously one for the taxpayer but there are equally authoritative cases in favour of HMRC.

The shades of difference in the interpretation of facts which place cases on different sides of the employment/self-employment line are almost impossible to predict.

It will be interesting to see how (if at all) it is affected by the recent decision of the Supreme Court.

ATED Penalties

In the December Bulletin I made reference to the case of *Heacham Holidays v HMRC TC 7883* in which it was held that the daily penalties for the failure to submit an ATED return were invalid.

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 case followed *Advantage Business Finance Ltd v HMRC TC 6926* which had confirmed that the daily penalties were invalid for the same reason.

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.

We might therefore confidently expect a change in the law.

That might happen of course but in the meantime, we have the response of HMRC in their Stamp Taxes Newsletter January 2021 where they say:

> "In both cases the First-tier Tribunal concluded that notice of daily penalties must be given prospectively (for example, prior to the period during which the daily penalties are incurred). As the notices given by HMRC were retrospective in timing, the legislative requirements had not been met and the tribunal therefore cancelled the daily penalties.
>
> Although HMRC has not appealed the decisions of the First-tier Tribunal in Advantage Business Finance Ltd and Heacham Holidays Ltd, HMRC does not agree with the conclusions reached by the tribunal. There is no statutory requirement for the notice to be prospective in timing and the legislation expressly provides that the date from which the penalty is payable can be given retrospectively."

It is not clear what this means. It sounds like they are just saying they disagree with the FTT decisions. That is what every losing litigant says; the Court got it wrong because they did not agree with my view.

(A bit like a batsman who gets clean bowled and does not want to accept that he is out).

I do hope that it is no more than a demonstration that they are bad losers. However, if it means that they are going to continue charging daily penalties when the court has twice said that such penalties are invalid, that would be deeply shocking.

I wonder what they are going to say about the further recent cases of *Jocuguma Properties Ltd v HMRC TC 8007* and *Bennedy's Developments Ltd v HMRC TC 8007* on exactly the same point where HMRC were also clean bowled.

IHT: Spouse Exemption

STEP and the other professional bodies have published a note on their discussions with HMRC on the application of the spouse exemption. They highlight a problem in connection with settled property where there is a reservation of a benefit.

The spouse exemption in section 18 IHTA 1984 applies where the value transferred is attributable to property which becomes compromised in the estate of the transferor's spouse.

So, the relief will apply to settled property which is subject to a reservation if on the death of the settlor, the spouse becomes beneficially entitled to it – for example under the terms of the settlement.

However, the exemption would not apply if the transferor were to exclude himself from benefit under the settlement during his lifetime. That would be treated as a PET by section 102(4) Finance Act 1986 – but it would not cause the settled property to become comprised in the estate of his spouse.

OK – it would not be a chargeable transfer, it would still be a PET and no immediate charge to IHT would arise, but he might not expect to have to survive seven years for it to be completely exempt.

Entrepreneurs Relief

There seems to be something to say about BADR every month. This time it relates to the application of the relief to trustees and the Upper Tribunal's decision in the case of the case of *The Quentin Skinner Settlements [2021] UKUT 0029.*

The trustees of these settlements disposed of shares in a company and claimed entrepreneurs' relief on the grounds that their disposals satisfied the provisions of section 169J(4) TCGA 1992:

> "In relation to a disposal of settlement business assets within paragraph (a) of subsection (2) the relevant condition is that, throughout a period of 1 year ending not earlier than 3 years before the date of the disposal:
>
> (a) the company is the qualifying beneficiary's personal company and is either a trading company or the holding company of a trading group, and
>
> (b) the qualifying beneficiary is an officer or employee of the company or (if the company is a member of a group of companies) of one or more companies which are members of the trading group."

There was no dispute that beneficiaries were qualifying beneficiaries, and the company was the personal company of each of them by reason of their individual shareholdings.

HMRC argued that was necessary for the beneficiary to have been a qualifying beneficiary throughout a period of 1 year ending not earlier than 3 years before the date of the disposal.

The FTT said this was not a requirement of paragraph 4(a) which just requires the company to be the personal company of the beneficiary for that period. It was.

However, the Upper Tribunal did not agree. They said that the only tenable construction (strong words!) of section 169J(4) was that the beneficiary had to be a qualifying beneficiary throughout a period.

In other words, if the beneficiary was not a qualifying beneficiary throughout the period, the company could not have been the personal company of the qualifying beneficiary for that period.

A New Concept

With a little more time that usual to read tax cases I chanced upon the case of *Foundation Partners v HMRC TC 8005*. If was all to do with loss relief arising from a property development in Montenegro. I am not sure why I persevered with this case – although it seemed to be relevant to the meaning of a trade.

However, it unexpectedly exposed me to the new (at least to me) concept of a "tax shagger".

I refrain from making any comment but here are a couple of extracts from the judgment of Judge Aleksander on the subject:

> "we are left with a tax shagger or a so called investment product….The reference to a "tax shagger" is, according to Mr Levy, a reference to something at the lower end of pricing, where there is no real commercial involvement.
>
> The fact that Project Adriatic may be a "tax shagger" does not, of itself, prevent Foundation from trading. The fact that tax avoidance may have been a motive for Foundation (or its partners) entering into various contracts and transactions does not prevent Foundation's activities from being treated as a trade."

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28th February 2021

I am looking forward to speaking at the FCTC virtual conference on Offshore Tax on 27th April and hope to see you there. You can find registration details and the agenda at https://www.fctcconferences.com "

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