UK Tax Bulletin

May 2021

Field Court Tax Chambers

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: April 2001	301.1
March 2021	296.9
Inflation Rate: April 2021	2.9%
March 2021	1.5%
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 7th 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

From 6th April 2020 2.25%

From 6th April 2021 2 %

Discovery Assessments: Staleness

Barely a month goes by without some reference to discovery assessments such is the complexity of the subject. Last month I mentioned one aspect which is particular hot – whether a discovery can become "stale" thereby precluding a discovery assessment under Section 29 TMA 1970.

There have been a number of cases which have held that once a discovery has been made, inaction on the part of HMRC may cause it to lose its newness - and once it is no longer fresh, it will become stale and a discovery assessment cannot be made.

I need not go through any of these authorities because the Supreme Court has now laid down the law (literally) on this subject in the case of *Tooth v HMRC [2021] UKSC 17.* The Supreme Court said:

> "There is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time. That is unsustainable as a matter of ordinary language and further, to import such a notion of staleness would conflict with the statutory scheme. That sets out a series of limitation periods for the making of assessments to tax, each of them expressed in positive terms than an assessment may be made at any time up to the stated time limit".

That clearly settles the point. There is no concept of staleness. Accordingly, an assessment on the grounds of discovery may be made at any time up to the relevant time limit – which is generally four years, although this is extended to six years in the case of the careless conduct and to 20 years in the case of deliberate conduct. (More about deliberate conduct later).

Another aspect of discovery is the suggestion that, once a discovery is made by one tax officer, it cannot be made again by another. The Supreme Court rejected this proposition. It is perfectly possible to speak of someone making a discovery for himself even if it is something already known to others.

As a discovery includes merely a change of mind or the taking of a different view, this means that there is nothing to prevent the same, or a different, tax officer from making a discovery assessment within the four year (or extended) period.

On the same theme, the Supreme Court said that there is no principle of collective knowledge within HMRC. It is necessary to look at the individual officer to determine whether he had made a discovery. They specifically rejected the idea that whether a discovery had been made was to be tested by reference to the collective knowledge of HMRC.

Whether or not the outcome is to our liking, this clarity is to be welcomed, and it is to be hoped that other unsatisfactory features of the discovery assessment regime will be given the same treatment in due course.

Deliberate Conduct

The Supreme Court in *Tooth* also dealt with another very important subject which is the meaning of deliberate conduct.

Again, this refers to discovery assessments but is of much wider application. The standard time limit for the making of an assessment by HMRC is four years from the end of the year of assessment to which it relates. But if the insufficiency is brought about by carelessness, the time limit is extended to six years and if it is brought about by the deliberate conduct of the taxpayer, it is extended to 20 years.

It is necessary to start with section 118(7) TMA 1970 which provides as follows:

> "In this Act references to a loss of tax or situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to HMRC by or on behalf of that person".

HMRC argued that if you submit a tax return deliberately (that is to say, not by accident) and it contains an error, that is a deliberate inaccuracy even if it is done innocently with no intention to mislead, and indeed, even if there is no carelessness.

This proposition was challenged by Mr Tooth who said that a deliberate accuracy in a return arises where the return containing the error is submitted with the intention of misleading HMRC.

The Supreme Court firmly rejected the approach of HMRC and summarised their conclusion as follows:

> "It may be convenient to encapsulate [our] conclusion by stating that, for there to be a deliberate accuracy in a document within the meaning of Section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps (although it need not be decided on this appeal) recklessness as to whether it would do so".

Mr Tooth succeeded in his appeal because the Supreme Court decided that he had not made a deliberate inaccuracy in his return. The facts were interesting, but the crucial element was the decision that a deliberate inaccuracy requires an intention on the part of the taxpayer to mislead HMRC.

This too is a welcome clarification not least because of the absurdity (pointed out by their Lordships) that on the argument of HMRC even a taxpayer who had not been careless, and would not therefore have been exposed to the six year extended time limit, could still be regarded as having acted deliberately and been subject to the 20 year time limit – and with serious consequences regarding penalties.

(I wonder what would have happened to a taxpayer who had not been careless (and therefore not liable to penalties) but who was considered to have acted deliberately by HMRC and subject to the swingeing penalties which are reserved for taxpayers who act in a manner "tantamount to fraud". Fortunately the point no longer needs to be considered.)

Information Notices

There is an increasing number of cases on the validity of information notices which are issued by HMRC under Schedule 36(1) Finance Act 2008.

The primary condition for the validity of an information notice is that the information or document sought by the tax officer must be:

> "reasonably required for the purpose of checking the taxpayer's tax position."

The recent case of *Perring v HMRC TC 8091* covered a number of important issues on this point. As a decision of the First Tier Tribunal, it is not of binding authority but being the latest in the series, and therefore having the benefit of consideration of earlier judgments and detailed submissions on all the arguments, it carries a degree of persuasive authority.

The Tribunal Judge made the following determinations

a) The burden of proof lies with HMRC that the information notice satisfies schedule 36.

b) It is well established that HMRC may not issue information notices for the purpose of a fishing expedition.

c) Information and documents are not reasonably required to check a taxpayer's tax position where they relate to a tax year which is out of time, unless there is evidence of dishonesty.

d) "All correspondence between the Appellant and their solicitor in connection with the purchase of property and the fact that legal advice has been taken in that connection is protected by legal professional privilege."

Some of these points are in direct conflict with the approach of HMRC.

Judge Gething analysed the burden of proof at great length (nearly two pages) and concluded that HMRC have the burden of proof. Furthermore that there is no question that HMRC merely have to make out a prima facie case following which the burden of proof passes to the taxpayer. HMRC must satisfy the Tribunal that the relevant provisions of Schedule 36 are satisfied. This is important having regard to various other FTT decisions which do not all coincide.

The fishing expedition point is explained in more detail as follows:

> "The requirement that an Officer has reasonable grounds to suspect that an assessment has become deficient requires not only that the Officer to have formed that view but in addition that it must also be objectively reasonable to hold that view and that means that there must be some evidence to indicate a deficiency in relation to each year in respect of which the notice has been issued."

A detailed explanation is also given regarding statutory records which is of considerable importance because there is no appeal against an information notice in respect of statutory records.

Business Asset Disposal Relief (ER)

Entrepreneurs' relief continues to be a source of complication and controversy. (It needs more than a change of name I am afraid).

Two more arguments have surfaced, and although the circumstances are unusual, they contain interesting features – and also illustrate that nothing can ever be taken for granted with this relief.

One of the conditions for BAD relief is that there must be a disposal of an asset consisting of (or an interest in) shares or securities of company which is the individual's personal company.

In the case of *Tenconi v HMRC TC 8088* Mr Tenconi was a member of a company which had two classes of members; shareholder members (who held shares) and investor members (who just had distribution rights). It was not possible for the same person to be both a shareholder member and an investor member. Mr Tenconi was an investor member.

The tribunal found that these rights were assets for capital gains tax purposes but they were not shares - sill less were they ordinary shares capital. Indeed, the company's articles specifically provided that the investor rights were not shares. That would not necessarily be conclusive because there are various extensions to the meaning of "shares" within the legislation - but nothing which could go so far as to include the rights possessed by Mr Tenconi. So no BAD relief for him.

The case of *Wardle v HMRC TC 8105* was not concerned with a company but with a partnership where (or course) the rules are different. A partnership can form the basis of a claim to BAD relief on the disposal of the whole of part of a business under section 169I(2)(a) TCGA 1992.

A business for this purpose means a trade which is conducted on a commercial basis and with a view to the realisation of profits: section 169S(1).

The problem facing Mr Wardle was that the partnership had not started to trade; it was just preparing to trade. There are some special provisions within the TCGA to extend the meaning of trading to include a trade that a company is intending to carry on, but this definition applies only to companies and not partnerships.

Despite valiant (and impressive) efforts by Mr Wardle to show that the legislation did encompass pre-trading activities of a partnership, the Tribunal was not persuaded. For the relief to apply, a partnership has to be conducting a trade at the time the disposal takes place.

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