UK Tax Bulletin

June 2021

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
May 2021	301.9
Inflation Rate: April 2021	2.9%
May 2021	3.3%
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 %

IR35 – Personal Service Companies

We have yet another decision on IR35 on the intermediaries legislation – this one from the Upper Tribunal: *Northern Lights Solutions Ltd v HMRC [2021] UKUT 134.*

This concerned the provision of the services of Mr Lee by his personal service company to the Nationwide Building Society. The scenario will be familiar.

The First Tier Tribunal had decided that under the terms of the hypothetical contract envisaged by Section 49 ITEPA 2003, Mr Lee would have been an employee of the Nationwide Building Society. The Upper Tribunal agreed but their reasoning gives rise to further questions.

The Upper Tribunal examined the various tests including mutuality of obligation, the right of substitution and control.

They acknowledged that mutuality of obligation requires as a minimum that there is a contractual relationship between the parties. Yes – but that does not get the argument anywhere. The purpose of considering mutuality of obligation in this context is to indicate whether a contract of employment exists – not just a contract of unspecified nature. I have a contract with the local florist to deliver flowers on a specific day each week. There is mutuality there – they are obliged to deliver the flowers and I am obliged to pay for them. This does not make me an employee of the florist – or vice versa. It is just a contract. It says nothing about our relationship which has to be determined by other facts.

Indeed, this was the substance of the decision of the Upper Tribunal *in Professional Game Match Officials Ltd v HMRC [2020] STC 1077* in which they said that:

> "The minimum requirement is an obligation to perform at least some work and an obligation to do so personally. It is consistent with such an obligation that the employee can in some circumstances refuse to work without breaching the contract. It is inconsistent with that obligation, however, if the employee can, without breaching the contract, decide never to turn up for work. Second, 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".

In this case, Mr Lee was not obliged to do the work personally nor did the Building Society have an obligation to provide work. However, the Tribunal decided that this principle should not be followed and concluded that the circumstances did not compel the conclusion that the contract was a contract for services rather than a contract of employment. They went on to say that the lack of obligation to provide Mr Lee with work was not particularly relevant either.

A good deal was said about substitution which, if genuine, is inconsistent with an employment – and particularly with the provision of personal services. It is not necessary for the right of substitution actually to be exercised, but it needs to be a genuine right. However, the FTT considered that as there was no substantive prospect of Mr Lee asking to send a substitute, or the Building Society agreeing to it (as they were obliged to do if it was reasonable) it should therefore be disregarded. The Upper Tribunal concluded that the FTT were entitled to reach this conclusion.

In *Express & Echo Publications Ltd v Tanton (1999)* the Court of Appeal held that a genuine entitlement to send a substitute was incompatible with the contract of employment:

> "Where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer".

The Upper Tribunal considered that this decision has been overtaken by the decision in *Pimlico Plumbers v Smith [2018] UKSC 29* in which the Supreme Court considered the boundaries of a right of substitution which was consistent with personal performance. They concluded that a right of substitution needs to be considered by reference to whether the dominant feature of the contract was personal performance on his part.

Accordingly, as the personal performance of Mr Lee (even though he may be substituted) was the dominant feature of the hypothetical contract, the right of substitution was not conclusive in excluding a contract of employment.

The reasoning on both mutuality and substitution was merely that they were not conclusive in excluding a contract of employment. But that does not make it a contract of employment. A table has four legs, but so does my dog – but that does not make my dog a table just because having four legs is consistent with being a table.

And there is *control* which is always a matter of degree and dispute – and has been decisive (both ways) in the cases on this subject. This is despite the injunction in the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB* (on which much reliance is placed by HMRC and the Courts) that "control is not everything".

I have given the following example before, but it deserves to be made again.

Let us assume that a famous concert pianist is engaged to play Beethoven's Fifth Symphony at the Albert Hall. He turns up and they pay him – so there is your mutuality of obligation. Do they have control over his services? Of course. He must attend at the Albert Hall on a specific day, at a specific time and will play a specific piece on a specific instrument. We can be even more precise. The piece he is being paid to play has certain specific notes and he will be told that he must play every one of them the right number of times and in exactly the right order. At all times he will be under the express direction of a man with a stick. He would not be permitted to send a substitute, nor will he provide his own equipment; the piano will be provided and all the supporting people in the orchestra will also be provided so he will not hire his own helpers.

On all the tests we are required to consider from Northern Light (and the other personal services company cases) the pianist would with absolute certainty be regarded as an employee. However, we know with equal certainty that he is not – and that will be the case whether he was directly engaged or whether he provided his services through his personal service company.

This is not a bizarre or contrived set of circumstances; it is an everyday situation which the principles which are said to be relevant ought to provide the answer. They demonstrably do not – or more accurately the way that they are applied do not. There are many more factors which ought to be considered so that the right answer can be found.

I fear there will be a lot more (conflicting) cases before this is sorted out.

Exchange of Shares

Everybody reading this bulletin will be (at least broadly) familiar with the share for share rules which apply for capital gains tax – that is to say where shares in one company are exchanged for another on a sale or reconstruction.

Under section 135 TCGA 1992, the transaction is not treated as giving rise to a disposal but the new shares and the old shares are treated as being the same asset, acquired when the original shares were acquired – subject to numerous conditions of course.

One of those condition is the tax motive test in section 137 which will not allow this roll over unless:

> "the exchange or scheme of reconstruction in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangement for which the main purpose, or one of the main purposes, is the avoidance of liability to corporation tax or capital gains tax."

An opportunity is provided to the taxpayer by section 138 to seek confirmation from HMRC that this test is satisfied, and the drafting of such clearances is a regular feature of professional practice.

This is always a difficult matter because tax will nearly always be one of the motives for such an exchange or reconstruction – and tax advice will invariably be sought to ensure that the conditions for the relief are satisfied. One might say that this is no more than necessary prudence. The crucial issue is of course that the tax considerations must be subordinate to the main commercial purposes of the arrangements.

This issue was examined recently by the Tribunal in *Euromoney Institutional Investor Plc v HMRC TC 8046.* Euromoney sold its shares in another company for a combination of ordinary shares and redeemable preference shares. There was originally a cash element but this was substituted by prefs so that when they were redeemed the proceeds would qualify for the Substantial Shareholders Exemption. It was acknowledged by the company that the switch to preference shares was intended to secure a tax advantage – but it was not important. If the purchaser had

not agreed to the switch the deal would have proceeded anyway.

HMRC said that because of this clear tax motive, the company failed the test in section 137. However, the company argued that it was too narrow an approach to take just one (clearly insignificant) element of the arrangements for the sale instead of looking at the arrangements as a whole. On this basis there would be little doubt that the tax saving arising from the prefs was not a main purpose of the arrangements.

The FTT agreed that it was right to consider the whole arrangement when determining whether the bona fide commercial test was satisfied – and allowed the relief.

One can never be sure of such a result these days but I would respectfully suggest that this surely must be the right approach. HMRC and the courts are forever telling us that you cannot pick and choose the good bits out of a deal (or a statute) but have to look at the transaction or arrangement as a whole.

It is long overdue for the Gander to be treated as well as the Goose.

Information Notices

HMRC are issuing increasing numbers of taxpayer information notices under Schedule 36(1) Finance Act 2008, seeking information which is reasonably required for the purpose of checking the tax positon of the taxpayer.

The meaning of what is "reasonably required" for the purpose of checking a person's tax position is very wide (and includes any penalties which may arise) and this frequently gives rise to arguments and appeals.

(However, arguments and appeals are pointless where the information notice has been issued with the prior approval of the Tribunal under paragraph 3(2) – to which approval process the taxpayer has no right to appear – because there is then no right of appeal: per paragraph 29).

The reasonableness test was recently considered by the First Tier Tribunal in the case of *Avonside Roofing Ltd v HMRC TC 8127*. HMRC sought information relating to the behaviour of the taxpayer in connection with a tax scheme see whether they had been careless and therefore liable to a penalty. This was all to do with whether the taxpayer had reasonably followed professional advice (which is one of the grounds for a reasonable excuse) or whether they had not taken reasonable care when implementing the scheme.

That seems fair enough and HMRC had seven grounds for their requests for information. However, the Tribunal said that the alleged careless behaviour was not an abstract concept. It was necessary to show that an inaccuracy in each of the documents requested was due to a failure by the taxpayer to take reasonable care. HMRC had not established this linkage in any of their grounds and the information notices were therefore invalid.

It is a welcome relief to find that there is some limitation on the scope of an information notice – even though this one was confined to the specific issue of penalties.

It is not known whether this will be enough to protect the taxpayer from penalties – for example if HMRC have enough information from elsewhere to support an allegation of carelessness.

Presumption of Continuity

This subject has cropped up again in the case of *Roger Whitlock v HMRC TC 8136.* A bit of a puzzle really as I shall explain.

Mr Whitlock had a rather unattractive case. On a challenge from HMRC Mr Whitlock admitted that he did not fully declare all the cash receipts from his business – and furthermore, the Tribunal found that a number of statements made by Mr Whitlock were false. He obviously deserved to lose the case, but the references in the judgment to the presumption of continuity would seem to be rather out of place.

The presumption of continuity derives from the case of *Jonas v Bamford 51 TC 1* in which the High Court said:

> "Once the inspector comes to the conclusion that on the facts which he had discovered that Mr Jonas had additional income beyond that which he had so far declared to the inspector, then the usual presumption of continuity will apply. This situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer".

The usual presumption of continuity is that the situation will be presumed to apply in the future. It is not a presumption that the situation existed in earlier years. This is clear from the High Court decision and it is also clear from the HMRC Manuals.

This conclusion is not controversial. In *Syed v HMRC TC 1176* HMRC suggested that the presumption of continuity could be used to reopen earlier years and the Tribunal said the argument was quite wrong. HMRC tried again in *William Chapman v HMRC TC 1593* but their arguments were again rejected specifically on the basis that the presumption does not apply to earlier years. Again, in *Aero Assistance Logistics Ltd v HMRC TC 2628* the Court told them that the argument was wrong.

It is therefore a disappointment to find that the Tribunal in *Whitlock* referred to the "usual presumption of continuity" and that for this reason:

> "HMRC were entitled to assume that Mr Whitlock had under declared his income in the [previous] five tax years".

This is very regrettable. HMRC may have been entitled to challenge the earlier years – but not on the presumption of continuity. Although the string of Tribunal decisions specifically rejecting this argument were not binding on the Tribunal in *Whitlock*, one would have thought they were deserving of at least some comment if they were thought to be wrong, quite apart the High Court authority in *Jonas v Bamford*, which is binding on the Tribunal.

Some consistency on this subject is clearly necessary. It makes a nonsense of the Tribunal system if a succession of Tribunal decisions (on the basis of High Court authority) can so easily be disregarded when the whole purpose of their publication is to assist the taxpayer.

Mr Whitlock clearly would have had the opportunity to appeal – but having regard to the facts of his case an appeal would probably have had no effect on the outcome – even though he did not deserve lose on this point.

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