UK Tax Bulletin

July 2021

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

Contents   July 2021

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Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: June 2021	304.0
May 2021	301.9
Inflation Rate: June 2021	3.9%
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

I am grateful to everybody who emailed me (and those who did not) to assist my understanding of Beethoven's Fifth Symphony.

The compelling (I thought) example of the concert pianist and the inadequacy of the tests used for determining employment and self-employment fell rather flat – because Beethoven's Fifth Symphony does not have a piano. Er Whoops. I am undone.

I could pretend that I really meant the Fifth Piano Concerto ….

Remittances and Collateral

HMRC have changed their guidance regarding their view of the rules relating to remittances where foreign income and gains are used as collateral for loans. (Whether their views relating to the existence of collateral are correct is a matter yet to be tested.)

Previously HMRC had treated foreign income and gains as remitted if they were used as collateral for a relevant debt (that is one which relates directly or indirectly to money, property or services brought into the UK). The amount of the remittance was capped at the amount of the relevant debt.

However, HMRC no longer consider that any cap exists. In the view of HMRC where foreign income and gains are used as collateral for a relevant debt, the whole of the foreign income and gains used are treated as remitted, even if the relevant debt is smaller than the amount of the security.

In addition, HMRC take the view that where the provision of the loan is conditional on the availability of foreign income and gains to be used as collateral (such as any kind of general pledge), that will be enough to cause it all to be regarded as remitted.

This could (and obviously will) give rise to extraordinary harsh and unexpected results. An example recently mentioned in the Tax Journal is of a UK individual whose UK bank account went into overdraft under circumstances in which the bank has security over his assets generally including his £5m of unremitted foreign income and gains. An overdrawing of £1 could bring a deemed remittance of £5 million of foreign income and gains. Bonkers would perhaps be the kindest description of this situation.

(HMRC take the view that a cap does exist if only part of the loan is brought to the UK and this adds a whole extra layer of complication – and absurdity.)

This is all quite extraordinary bearing in mind the frequent mantra of HMRC that legislation should not be interpreted in a manner which is obviously contrary to the intention of Parliament.

The CIOT and other professional bodies are on the case and let us hope they are successful in bringing this issue to a swift conclusion.

Extra-Statutory Concession B18

Extra Statutory Concessions have traditionally fulfilled a useful purpose in enabling HMRC to mitigate the harshness of legislation where its effect could clearly not have been intended.

Concessions cannot be enforced (otherwise than by Judicial Review) but they do not need to be. They are a manifestation of a commitment by HMRC to fairness in the operation of the tax code.

Regrettably they have fallen from grace following the Supreme Court's decision in *Wilkinson* in 2011 which explained that HMRC has only limited authority to depart from the terms of the legislation. In other words their powers of care and management under the TMA 1970 do not extend as far as was thought. Many concessions have been withdrawn or converted into statutory reliefs. A pity, because I am not sure that this is an improvement.

Where a taxpayer feels that he is being denied the benefit of a Concession his only remedy is an application for Judicial Review – to seek a decision from the Court that he has been unfairly deprived of a relief to which he had a legitimate expectation. The crucial test is that the concession or practice must be "clear, unambiguous and devoid of any relevant qualification"

This subject was considered recently in the case of *Murphy v HMRC [2021] EWHC 1914* and in particular, the application of ESC B18. This deals with the amount of credit which can be claimed by a UK beneficiary of a non resident discretionary trust for UK tax paid on the trust income which is distributed to him.

The legislation provides for a credit to be given (to avoid the income effectively being taxed twice) but it does not apply in all circumstances – and that is what ESC B18 sought to address. HMRC argued that the amount of credit under the Concession was limited; the taxpayer said that there was no such limit.

The Court held that a true construction of the concession did impose a 6 year time limit in respect of non resident trusts – despite the fact that credit for tax paid by a UK resident trust is not so limited.

Of more general interest perhaps is the lengthy explanation by the Court of the current position of ESCs; how they work, the authority for their existence and how they should be operated. If you have a problem with an ESC, this would be a good place to start.

Assessments: The Burden of Proof

It is well-known, and beyond doubt, that where an assessment is raised, the burden of proof in displacing that assessment is squarely on the taxpayer. He must show that the assessment is excessive "otherwise the assessment shall stand good": Section 50(6) TMA 1970

The test is the civil standard of proof – that is, on the balance of probabilities.

The Upper Tribunal recently had occasion to consider the precise application of the burden of proof in relation to an assessment: *Qolaminejite v HMRC [2021] UKUT 118.* The Tribunal explained that in reaching their decision the task of the Court is not to choose whether the version put forward by the taxpayer or the version put forward by HMRC, was the most probable version.

HMRC are not obliged to put forward any case at all. It is necessary for the Tribunal to determine solely whether the taxpayer has met his burden of proof that the assessment is excessive. Any other formulation would require HMRC to advance evidence in support of their case when it is clear that they have no obligation to do so.

Security for Tax

This may seem a subject of limited interest. However, the reason why it is important is because of the unbelievable penalties which arise if security demanded by HMRC is not provided.

HMRC are entitled to seek security from the taxpayer if they consider that it is necessary for the protection of the public revenue – for example if he has failed to comply with his tax obligations in the past or there is reason to believe that he might fail to do so in the future. It is extremely serious because it is a criminal offence to continue to make taxable supplies for VAT if you have not provided the security demanded by HMRC. This means that you must cease to trade if you want to avoid committing a criminal offence.

This is generous compared with the rules for PAYE and NIC. You don't get out of this penalty by ceasing to trade. It is a strict liability offence. Not paying the amount of security demanded by HMRC is a criminal offence and carries an unlimited fine.

There are very few protections given to the taxpayer in this area and although the decisions in *Tower Hire and Sales Ltd v HMRC TC 7423* and *D-Media Communications Ltd v HMRC* are helpful, they were contradicted by *Blue Chip World Sales and Marketing Ltd v HMRC TC 7477* which makes for very uncomfortable reading for anybody interested in safeguards for taxpayers. It is obviously right that HMRC must have power to protect the public revenue where there is danger of loss to the Crown but for HMRC to be able to make a taxpayer guilty of a criminal offence without any right of appeal must surely be unacceptable.

At least in connection with VAT the taxpayer can simply stop trading. But this is not a defence to a notice for security for PAYE where the employer and the directors of the employee company are liable. This is fantastically serious for the directors.

Two more decisions on this subject were published last month: *FMC Ltd v HMRC TC 8182* and *Southend United Football Club Ltd v HMRC TC 8178.*

The essential point in these cases was to explain that the Tribunal is not permitted to confirm, vary or set aside a security notice as they can in a normal appeal. They are only able to consider whether the decision by HMRC to demand security was properly made as a question of procedure.

In essence, the Tribunal had to determine whether there had been an error of law in the procedure or it was one that no reasonable panel of commissioners could have reached. Having regard to the history of tax defaults of both taxpayers, the Tribunals had no hesitation in confirming that the decisions satisfied these criteria.

One additional point of significance emerged from the case of *FMC* where the judge criticised HMRC's assertion that "there is no right of appeal against quantum". Judge Beare said that he regarded this statement as being profoundly misleading and as it seemed to be standard wording adopted by HMRC, he urged them to change their practice.

He said that HMRC cannot just decide that security would be reasonable and then impose any level of security they wish. If the quantum is excessive the decision as a whole can be unreasonable and susceptible to a successful challenge. Accordingly, he considered that the right to challenge the reasonableness of the decision encompasses both the decision to require security and the amount of the security demanded.

Capital Allowances

You wait for years for an interesting capital allowances case and then three turn up almost at once. I recently made reference to the case of *Cheshire Cavity Storage Ltd v HMRC* which concerned a claim for capital allowances for the cost of creating a cavity for the storage of gas. The function of the cavity was to store gas so that it could be safely held and released to the National Grid when required.

The Tribunal went through all the old cases including *Schofield v Hall 1975 STC 353* where grain silos were held to be plant; *Cooke v Beach Station Caravans 1974 STC 402* where swimming pools were held to be plant and the celebrated House of Lords decision in *IRC v Barclay Curle 1969 1 All ER 732* concerning a dry dock which also qualified as plant.

The Upper Tribunal explained that where something functioned as premises and as plant you have to identify which is the more appropriate description. Is it "apparatus with which the business was carried out or premises in which the business was carried out"?

They held that the expenditure on the cavities was on premises and not on plant and the claim failed.

This month we have the case of *JRO Griffiths Ltd v HMRC TC 8203* which concerned a claim for capital allowances on a potato storage facility. (The facts were very interesting. These were special crisping potatoes which were sold to crisp manufacturers. The potatoes must be stored in a controlled environment otherwise they will only last a few weeks and quickly become unsaleable. There were lots more details – but I need to move on).

Legislation has overtaken some of the above decisions and in particular the Capital Allowances Act 2001which includes specific provision in respect of expenditure on cold stores and on silos which provide for temporary storage. There was a good deal of discussion about whether the potato storage facility could be described as a silo for this purpose. HMRC drew attention to the Oxford English Dictionary definition of silo and suggested that it was:

1. "A pit or underground chamber used for storage of grain, roots etc
2. A pit or air and water tight chamber in which green food is preserved for fodder for ensilage."

(It is not clear to me why this did not apply to gas cavities – but never mind.)

The Tribunal held that the potato storage facility was both a silo and a cold store and therefore qualified as plant for capital allowance purposes.

This must have been a welcome result for the taxpayer but it leaves the rest of us no further forward in respect of how similar expenditure will be treated in the future.

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