UK Tax Bulletin

August 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: June 2021	304.0
July 2021	305.5
Inflation Rate: June 2021	3.9%
July 2021	3.8%
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 %

Family Investment Companies

Last year it was reported that HMRC had set up a specialist team to target Family Investment Companies on the basis that they were thought to be engines of abuse.

Family Investment Companies have increased in popularity since the 2006 changes to the IHT treatment of trusts. They can significantly reduce the amount of tax payable on income and can enable the next generation to be involved, benefiting from the family wealth, while effective control is retained in responsible hands.

Many anxieties and conflicting motives can arise in this area and a Family Investment Company can provide many of the characteristics and protections of a trust structure - but without the IHT disadvantages.

However, FICs are no less complicated than trusts and the documentation (and operations) are not anything like as familiar. As always, danger lurks in the detail and HMRC are naturally vigilant to ensure that the legal procedures and the necessary paperwork have been properly dealt with.

Anyway, it has been announced that the HMRC special team has been wound up on the grounds that they did not find that FICs gave rise to "non- compliant behaviour". There is apparently no intention to introduce any anti-avoidance measures. This looks like a green light – although it seems more like amber watch list to me.

I have no idea how HMRC intend to approach FICs in the future, but I would have thought they have more than enough arrows in their quivver to deal with any aspect of FICs that they wish to challenge. One example would be the possible application of the transactions in securities legislation - and of course there is always the GAAR.

I have to admit to some irritation about this "non-compliant behaviour" reasoning. Of course, the taxpayers were compliant; they would have studiously obeyed all the rules. The very idea that you can organise your affairs in a wholly compliant way and be accused of non-compliant behaviour is a travesty. It really means that they conducted themselves in a way that HMRC don't like.

It would be much better if HMRC concentrated more on taxpayers who break the rules rather than focusing on those who adhere to the tax rules which HMRC don't like. We don't like some of the tax rules either - but we just have to obey them. As do other government departments it seems, if the recent penalties imposed by HMRC on the Home Office and the Department for Work and Pensions is anything to go by.

Discovery Assessments

It may be thought that I am obsessed with the subject of Discovery Assessments as I mention them so often – but the truth is that they are so (unnecessarily) complicated that there is a constant flow of arguments about them which just makes the whole subject more and more impenetrable.

We had the Supreme Court decision in *Tooth* a few weeks ago which clarified the position on staleness. We could do with some more Supreme Court decisions to put other aspects of the regime beyond question.

This month I came across the case of *Loughrey v HMRC TC 8198* which dealt with the information which the hypothetical tax officer could reasonably be expected to be aware, within the meaning of section 29(5) TMA 1970.

HMRC said that the officer should not be treated as being aware of the Real Time PAYE Information provided by the taxpayer's employer to HMRC. This was not information furnished by the taxpayer on or with his tax return. It was therefore not supplied by the taxpayer so could not be counted as information known to the tax officer.

The Tribunal rejected this argument. That is a relief – but we cannot take much comfort from that. The FTT rejected the argument before, and in more strident terms, in *Blum v HMRC TC 6404*. I have little doubt that the argument will need to be rejected again but at least taxpayer has the comfort of another decision on this point – which is also supported by the Upper Tribunal in *Charlton.*

However, this is not a slam dunk because the Court of Appeal in *Langham v Veltema [2004] EWCA Civ 193* held that information on a PIID was not information capable of being taken into account because it had not been provided by the taxpayer himself to the tax officer. Maybe we have moved on a bit from that.

I don't suppose I will ever tire of saying that this legislation is overdue for reform – or at least some more definitive clarification by the Supreme Court.

Validity of Enquiry Notices

Decisions of the Supreme Court do not always have a direct and immediate application to the issues facing advisers at the coal face – but the recent decision in *Tinkler v HMRC [2021] UKSC 39* certainly does.

There were two crucial issues in this case. The first was whether a notice of enquiry under section 9A TMA 1970 must be sent to the taxpayer himself, or whether it is valid if it sent to his accountant or agent.

The Court of Appeal had held that section 9A requires the notice to be given to the taxpayer and is not satisfied by sending it to the agent. That is hardly surprising because section 9A says:

> "An officer of the Board may enquire into a return under section 8 or 8A if he gives notice of his intention to do so… to the person whose return it is (the taxpayer)"

This applies even if the taxpayer has signed a form 64-8 - not least because the form expressly excludes section 9A notices as documents which can be sent to the agent alone.

HMRC seem clearly to accept this position as they did not appeal the point to the Supreme Court.

The issue before the Supreme Court was whether, even if the notice was invalid for the above reason, the taxpayer was estopped from claiming its invalidity on the grounds that he or his advisers accepted it, and did not challenge its validity for too long.

This is where things went south for Mr Tinkler. The conditions for estoppel (known as the *Benchdollar* principles) are:

a) The mistaken assumption must be more than merely a misunderstanding by the parties; they must have manifested their assent to the assumption.

b) The relevant party must have assumed some responsibility for the assumption such that the other party was expected to rely on it.

c) The relevant party must have relied on the common mistaken assumption – not merely have taken a view.

d) Reliance on the assumption must have occurred in connection with some mutual dealings between the parties.

e) The relevant party must have suffered some detriment sufficient to make it unjust to claim that the mistake should be corrected.

The Supreme Court held that all these tests were satisfied in Mr Tinkler's case, mainly because his accountants acknowledged that the enquiry had been opened and corresponded with HMRC about it over an extended period. Mr Tinkler was therefore unable to challenge the validity of the section 9A notice (or its consequences).

This conclusion might be thought a bit tough on taxpayers generally who could be forgiven for believing that HMRC would have made sure they have obeyed the rules when sending out a statutory notice. Or indeed that they had a duty to do so.

However, it is clear from this decision that this cannot be assumed, and it is therefore important to check that HMRC have satisfied all the conditions whenever you receive anything. This is even tougher for the lay taxpayer who may have no real understanding regarding the detailed requirements of a particular notice.

Uncertain Tax Positions

Draft legislation on this new concept has now been published. Their scope is fairly restricted and will have limited application – but it will be pretty serious for those affected.

The new rules apply to tax returns filed after 1st April 2022 where:

a) The accounts of the business reflect the treatment of an event or transaction which does not accord with the way in which it is known that HMRC interpret the tax position, or

b) The accounts (prepared in accordance with GAAP) already contain a provision reflecting the probability that a different tax treatment will be applied to the transaction, or

c) It is reasonable to conclude that there is a substantial possibility that the Tribunal or Court would find that the treatment adopted was materially incorrect.

These are called "uncertain tax treatments" and only apply to businesses with a UK turnover of more than £200m or a UK balance sheet total of more than £2bn – and the tax benefit from the uncertain tax treatment must be more than £5m.

Not exactly your average family company – so the regime will therefore only affect comparatively few companies (or partnerships) – but the thresholds have to be applied on a group basis so much smaller companies will be potentially within its scope.

The company (or partnership) is obliged to make a special notification to HMRC of anything which is covered by any of the above circumstances – and this needs to be done on or before the date of filing the relevant return.

These are difficult tests which raise an enormous number of questions and uncertainties. For example, if your accounts include a provision for the liability which you are claiming does not exist that is rather shooting yourself in the foot.

And what about the "substantial possibility" that the Court will say you are wrong. As everybody knows, HMRC are really keen on "substantial" being defined as 20% - but surely this cannot apply here ….. surely…. I mean, really …. This would cause the rules to apply if there was an 80% chance that the Court would find in your favour. We shall have to see about that.

There is a general exemption from the regime if HMRC already have all, or substantially all, the information relating to the event or transaction. There is a list of the sources of information which can be counted for this purpose. However, we know how difficult that can be from the analogous requirement in the discovery assessment regime.

HMRC have published some guidance notes which set out the position as HMRC see it – which ought to be really helpful in ascertaining the test of what the "known interpretation" of HMRC might be. But (almost unbelievably) this does not include their Explanatory and Technical Notes relating to legislation or any submissions they may make in litigation.

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