UK Tax Bulletin

September 2021

FIELD COURT TAX CHAMBERS

FIELD COURT TAX CHAMBERS

Contents

September 2021

FIELD COURT TAX CHAMBERS

Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: August 2021	307.4
July 2021	305.5
Inflation Rate: August 2021	4.8%
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 %

ATED Penalties

There have been a number of Tribunal cases about the power of HMRC to impose daily penalties where a company fails to comply with its ATED obligations.

One such case was *Heacham Holidays Limited v HMRC TC 7883* where the taxpayer submitted their ATED return late and HMRC imposed penalties. This included the daily penalty which arises when the return is three months late.

However, in *Heacham Holidays* the Tribunal drew attention to section 55(4) Finance Act 2009 which requires HMRC to issue a notice to the taxpayer specifying the date from which the penalty is payable. This places HMRC in a difficult position because they will almost never know that a company has failed to file their first ATED return until they actually do so. HMRC cannot then issue a penalty notice for daily penalties because the return has already been submitted.

For these reasons the FTT held that the daily penalties were not validly charged.

This decision followed the case of *Advantage Business Finance Limited v HMRC TC 6926* which had held that the daily penalties were invalid for the same reason.

HMRC did not appeal against either of these decisions but issued a statement saying they did not agree and that the Tribunal in both cases were wrong.

OK, it's a point of view – but if they were wrong, why not appeal?

It seems that HMRC took the view that the cases were only decisions of the First-Tier Tribunal and were not binding – so they could be ignored - and HMRC could carry on charging daily penalties in the face of these decisions – and continuing to seek enforcement of such penalties which had already been imposed.

It is beyond unsatisfactory for a taxpayer to be charged penalties by HMRC on a basis which the Tribunal has said (more than once) is wrong. The taxpayer might reasonably expect that if a number of decisions of the Tribunal are wholly and indisputably in his favour, this ought to be respected – and not ignored - by HMRC. Otherwise, the publishing of the decisions of the FTT serves only to mislead the taxpayer.

The issue has now been thrown into confusion by the decision in the case of *Priory London Limited v HMRC TC 8225*. In *Priory London* the Tribunal considered the earlier cases and the extensive and authoritative analysis which they contained, but just said they were wrong. The daily penalties were therefore upheld.

One might reasonably ask two questions:

a) Do HMRC have the power to issue a daily penalty in these circumstances? Not a clue. The cases are totally contradictory. Which is right? Who knows.

b) Do the decisions of the Tribunal on this matter assist the taxpayer (or anybody else) in understanding what the is law on this issue? No. They are of absolutely no assistance to anybody.

We need a decision from the Upper Tribunal to provide a binding authority to resolve this issue. It is regrettable that HMRC chose not to appeal against the decisions where they lost and have taken another case to the Tribunal, presumably in the hope that they might have better luck next time – which they did. But what purpose does that achieve?

I think that taxpayers are entitled to better than this.

Loans to Participators

HMRC have issued some interesting new guidance on the repayment rules relating to loans to participators. Well, it is not guidance really but an explanation about how they plan to proceed in future regarding loans to participators.

Everybody knows about loans to participators. If a company makes a loan to a participator which is outstanding for more than nine months after the end of the company's accounting period, the company must make a payment equal to 32.5% of the loan until the loan is repaid: section 455 CTA 2010.

HMRC point to "an increasing number of cases" where repayments of loans and overdrawn directors' loan accounts are said to have been repaid but all that has happened is that debtor balances have been moved around a series of associated companies.

HMRC say (on the authority of *Collins v Addies TC 65 190*) that:

> "the substitution of a fresh debtor (for the original debtor) does not constitute repayment."

This may have been good authority in 1980 under the provisions of section 286 TA 1970 – but not now under the CTA 2010.

Collins v Addies explains that you cannot just transfer liabilities around; liabilities have to be novated which is a tripartite contract whereby the existing debt is released and substituted by another. HMRC say that this does not represent repayment, so no relief is allowed under section 458. That is because *Collins v Addies* says that a release of a loan by way of novation does not represent repayment. Fair enough – that makes sense. Except that section 458 now specifically refers to the repayment **or release** of the loan. So a release by way of a novation does entitle the company to relief.

HMRC also express their concern (with some justification), that repayments are said to have been effected by circular or recycling transactions.

They specifically highlight the position where a shareholder borrows £2 million from company A and just before the repayment deadline, he borrows from company B to repay company A. When the deadline for repayment to company B is approaching, he borrows (again) from company A to clear his debt in company B – and so on every year. On each relevant date (nine months from the end of the accounting period) the loan has been repaid and no section 455 arises.

These arrangements clearly deserve to be challenged because the reality of the situation is clear. However, the reason given by HMRC for challenging such arrangements is that "looking at the legislation as a whole and its purpose there is no repayment and section 455 should apply to the amounts withdrawn from the companies". This hardly seems to be adequate as a technical challenge. And it is difficult to say that the loan from company A has not been repaid if a genuine repayment has been made. And the same goes for company B.

In due course, these chickens are bound to come home to roost – but anything could happen to prevent proper recovery by HMRC. There seems to be a good case for a change in the law here.

By Reason of the Employment: Deeming

Purposive interpretations are all the rage and sometime ago there was an interesting decision concerning deeming provisions in the case of *Vermilion Holdings Limited v HMRC TC 7077*. This case concerned the grant of a share option to an employee and whether it should be taxed as earnings as having been made available by reason of his employment.

The relevant provision is 471(1) ITEPA 2003 which applies

> "to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment"

The Tribunal found that as a question of fact, the option had been granted to him by his employer. The Tribunal also found as a fact that it was not granted to him by reason of his employment.

That is all very well but there is a deeming provision in Section 471(3) which says that where the right or opportunity to acquire an option is made available by a person's employer, it is deemed to have been made available by reason of the employment.

HMRC argued that this was exactly the case here. The option had been provided by the employer and it was therefore deemed to have been made by reason of his employment. That looks like game, set and match to me.

Well, the Tribunal said not. The Judge said that she had decided as a question of fact that the employment was not the reason for the grant of the option. She referred to Section 471(3) as a statutory fiction and that its scope "should be limited where the artificial assumption from deeming is at variance with the factual reason that gave the right to acquire the option". She adopted a purposive interpretation to the effect that the deeming provision did not apply.

This seems a generous interpretation because the whole point of a deeming provision is to do exactly that – to override the factual position and to ensure that

the option is taxed even when the real facts are otherwise. Indeed, a deeming provision would never have any effect if it has to give way to the facts.

On appeal, the Upper Tribunal decided that the option was granted by reason of the employee's employment, and it was therefore taxable.

This meant that the Upper Tribunal did not have to consider the issues surrounding the deeming provision which was frustrating for the rest of us who would have welcomed the views of the Upper Tribunal on that analysis.

However, the appeal has gone further to the Court of Session: [2021] CSIH 45. The Court brought the issues together by explaining that if the option had not been within section 471(1) then the deeming provision in section 471(3) could not operate. They concluded that 471(1) did not apply and that was the end of it.

This was a difficult point to grasp in the circumstances of this case. Just to recap:

a) Section 471(1) provides that the Chapter applies where the right to acquire the option is available by reason of an employment.

   (FTT found that the right had not been made available by reason of his employment; even though it had been granted by the employer).

b) Section 471(3) says that an option is deemed to be made available by reason of the employment if it is made available by a person's employer.

No light amid the darkness … yet.

The key point is that the Court of Session concluded that in fact, the option was not made available to him by the company – so we dont fall within section 471(1) at all – so the decision of the FTT (that section 471 did not impose a charge) was right.

The uncertainty surrounding the deeming provision was clarified by the Court of Session which set out at length the principles to be applied in interpreting deeming provisions; HMRC were spot on.

But before the deeming provision can apply, the employee's circumstances must fall within section 471 – and they found that they didn't.

The legislation is wide, and the consequences are serious, so it is interesting to see some limit to its application.

Presumption of Continuity

I suppose I should not get so excited, but it is surely unsatisfactory for HMRC to continue advancing an argument in support of a charge to tax which the Courts keep telling them is wrong.

It undermines the whole Tribunal system for taxpayers to conduct themselves in accordance with a series of Tribunal decisions only to find that HMRC ignores them and charges them tax anyway.

I have made reference to the presumption of continuity before, and I make no apology for mentioning it again. It is simply wrong for HMRC to raise assessments for earlier years on the grounds that if a taxpayer has made an error in one year, then it may be presumed that he had made a similar error in earlier years.

The presumption of continuity does **not** allow them to do this.

The authority for the presumption of continuity is *Jonas v Bamford 1973 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 words "the usual presumption of continuity" appear in other cases as well. This usual presumption of continuity is that the situation will be presumed to continue 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 is hardly controversial. In *Syed v HMRC TC 1176* HMRC argued that the

presumption of continuity applied for earlier years and the Tribunal said the argument was wrong. HMRC tried again in *William Chapman v HMRC TC 1593* and their arguments were again rejected becasue the presumption does not apply to earlier years. And so we go on. In *Aero Assistance Logistics Limited v HMRC TC 2628* the Tribunal again told them that the argument was wrong. This is in addition to *Jonas v Bamford* which is a decision of the High Court of binding authority.

So here we go again. In August the case of *Mariam Amini v HMRC TC 8231* was released in which HMRC advanced the argument again. They raised assessments for earlier years relying specifically on the presumption of continuity. Who is going to tell them that they should not be doing this. The Tribunals tell them over and over again that they are wrong – but it makes no difference.

Unfortunately, the cases on these matters are invariably unsympathetic. Indeed, Mariam Amini accepted that she carelessly understated her liability to tax and one can therefore make no criticism to HMRC for raising the assessments. Miss Amini had explanations why the assessments were overstated – grounds which the Tribunal accepted. They must have been very good grounds having regard to the burden of proof on taxpayers for displacing assessments and she secured a reduction in those assessments along with the corresponding penalties.

This would seem to be a perfectly reasonable outcome with the proper amount of tax being payable, and I have no doubt that HMRC were justified in raising the assessments. But it was wrong for them to pray in aid the presumption of continuity.

Peter Vaines
Field Court Tax Chambers
30th September 2021

FIELD COURT TAX CHAMBERS

Contact
Peter Vaines
Field Court Tax Chambers
3 Field Court
Gray's Inn
London WC1R 5EP
Tel: 020 3693 3700
pv@fieldtax.com
www.fieldtax.com

Important Note