UK Tax Bulletin

October 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: August 2021	307.4
September 2021	308.6
Inflation Rate: August 2021	4.8%
September 2021	4.9%
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 %

The Budget

Well, Mr Sunak did not even hint of any tax changes – not even generically – but as always, a mini-mountain of press releases eventually appeared. It is a bit early to go into heavy analysis (although we will all have received lots of summaries from sources divers) but you might like to clock the following:

Redomiciliation: It is proposed that the UK introduces redomiciliation rules so that companies can change their place of incorporation to the UK, and with it the governing law of the company. It is just a plan for the moment – but it is surely coming, and would correspond to the rules in many other countries. More on this welcome proposal in due course.

Clamping: There are new rules to "clamp down on the promoters of tax avoidance." Serious and complicated.

CGT Reporting: The deadline for the reporting of capital gains on UK residential property (and paying the CGT of course) has been increased to 60 days after completion. This applies to disposals after Budget day.

Discovery Assessments: A change is made to the rules to nullify an adverse FTT decision relating to discovery assessments so that assessments can be raised where there has been a failure to notify certain sources of income and failure to file a tax return. It will apply retrospectively. However sensible this change may be, the explanation makes you want to scream. Apparently, it will "maintain the widely accepted and understood position that existed until recent litigation called this into question". Translation: (1) We are right – whatever the Court says, and (2) Our view = the widely accepted and understood position. Humpty Dumpty rides again.

There are lots of other things like changes to cross border group relief, Diverted Profits Tax, the new Residential Property Tax and Asset Holding Companies - as well as amending the rules relating to the notification of uncertain tax treatments (abandoning the test that there is a "substantial possibility" of the courts disagreeing with the company's tax treatment). I think that's enough for the moment.

Cryptocurrencies

The tax position of cryptocurrencies (and a lot else I think) is shrouded in uncertainty but one important issue has recently emerged.

People invest in cryptocurrencies and make profits or losses like any other investment – although there is always the worry about the investment disappearing without trace to an alien wallet on the planet Klaxon. Anyway HMRC is trying to get to grips with it so that the profits can be taxed. (Careful what you wish for here –taxing the profits has a corollary; relief for losses. It might not turn out to be such a smart move.)

Anyway, HMRC have published their view about where the Bitcoin (or whatever) is situated – which is crucial because the location of the source is often determinative of the liability to income tax, CGT and IHT.

HMRC say that the cryptocurrency is situated where the holder is resident – but unfortunately their view is not widely shared and STEP (of all people) have issued an authoritative alternative view. So it will need to be determined by the Courts. That's fine – that is how we resolve these things.

But before you can get to Court you need to identify the person who has made the profit – and there is a widespread belief that the holdings are completely untraceable (except by the teenage criminal hackers of course) so HMRC will never know.

But not so, it seems. I have been reading that HMRC apparently have the ability to get a full list of cryptocurrency holders by making a data request to UK-based exchanges and other financial institutions. I do hope so. For people to be able to operate outside the law must be a Bad Thing for everybody.

Expenses in Employment

The rules relating to the deduction of expenses from employment income are almost too well known to be worth repetition. They have been around forever - the latest incarnation being in section 336 ITEPA 2003 which sets out the general rule that a deduction from earnings is allowed for an amount if:

a) The employee is obliged to incur and pay it as a holder of the employment and,

b) The amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment".

The first point is that the employee must be obliged to incur and pay the amount as a holder of the employment. That is a very strict test. It must be necessary for the employment and not merely necessary for the particular employee. So where every employee must incur the expenditure to do his job then this element would be satisfied. That is obvious very difficult – but even if you can satisfy this test, it is still not enough, because you also need to satisfy for second condition.

The second condition is equally demanding. The expenditure must be incurred wholly, exclusively and necessarily in the performance of the duties. The House of Lords decision in *Fitzpatrick v IRC 66 TC 407* explained that doing something preparatory to the work is not enough; it has to be "in the performance of the duties".

The taxpayer was a journalist who worked for a newspaper. He purchased and studied other newspapers as an essential part of his job. Lord Templeman explained the test:

> "The question … is whether when a journalist reads newspapers he is performing his duties of his employment".

His Lordship said that he was not, because the journalist did not read the newspapers in the performance of his duties, but to enable his duties to be performed.

Lord Browne-Wilkinson expressed the test similarly, that it was necessary to consider:

> "whether such reading was done in the actual performance of the duties or was merely preparatory and done in order to qualify him, by obtaining background information, to do his job more effectively".

There are many other authorities on the point.

However, I would respectfully suggest that the wrong target is in the judicial sights here. Whether or not the reading of the newspapers was done in preparation for, or in the performance of, the duties has nothing to do with the entitlement to the deduction. It is the act of incurring the expense (and paying the money) which must be done in the performance of the duties of the employment. Mr Fitzpatrick did not expend money by reading the newspapers; he spent the money when he bought the newspapers. If he calls into the newsagents on his way to work and buys a newspaper, the expenditure is incurred at or around the time he picks up the newspaper and pays the money to the shopkeeper. When he spent the money, was he performing the duties of his employment? Clearly not – unless his job was for example to observe the behaviour of shopkeepers at the point of sale of their product.

There are loads of cases on this point – and travelling is another favourite. Although it may seem obvious that the cost of travelling to work is necessary to be able to do the work, not only is the travelling only preparatory, the expense is actually incurred to enable the employee to live elsewhere.

This is all very unhelpful and just goes to demonstrate what a strict test is imposed by the legislation. The fact that the test is virtually impossible to satisfy has not (unfortunately) caused any judicial flexibility in its interpretation. There are almost endless authorities on this subject – and in virtually every one, the taxpayer has failed to satisfy the tests for a deduction.

It is with this background that I read the case this month of *Kunjur v HMRC TC 8296* concerning a claim for the cost of accommodation incurred by a dental surgeon.

Mr Kunjur was a dental surgeon and he practised in Southampton where his family lived. He wished to become a maxillofacial surgeon and accepted a position in St George's Hospital in London. He found the commuting unacceptable and he also

had on-call responsibilities where he was required to have accommodation within 30 minutes from the hospital to discharge his on-call duties. Accordingly, he rented modest accommodation in London where he stayed during the week to discharge his on-call duties.

HMRC refused a deduction for this expenditure. Given the terms of the legislation, and the wealth of authorities, that is hardly surprising.

However, the Tribunal found that Mr Kunjur was entitled to a deduction for at least some of the accommodation costs. The reasoning deserves some examination.

The Tribunal said that Mr Kunjur's duties required him to be able to treat patients within 30 minutes. He could not perform his duties from Southampton and it was unreasonable to expect him to use undergraduate accommodation or to uproot his family. It was therefore necessary for him to rent accommodation in London.

There is so much authority against this proposition it is difficult to know where to start. The first point is perhaps that Mr Kunjur was not obliged to incur this expenditure because of his employment but because he wished to live an inconvenient distance away from his place of work. Whether it was reasonable or not to expect him to use undergraduate accommodation is not a relevant test – reasonableness has never been a criterion. Mr Kunjur may have thought it necessary for his own personal purposes to rent accommodation in London, but that is not a test either. Mr Kunjur had an obligation to be within 30 minutes when he was on call, as required by his employer, but that is no different from his employer requiring him to wear particular clothing to perform his duties or to have a home telephone or to undertake professional reading and study to keep himself up to date with his subject – or masses of other things – none of which represent an allowable deduction.

Accordingly, there is reason to doubt the Tribunal's conclusion that "Mr Kunjur was obliged to incur the expenditure on accommodation in Colliers Wood as the holder of an employment".

The Tribunal went on to consider the wholly and exclusively test and whether he obtained any personal benefit from the accommodation at times when he was not on call. They concluded that he did not. But this surely cannot be right. Mr Kunjur was not on call 24 hours a day so at the times when he was not on call, he was benefitting from the use of the accommodation.

The Tribunal recognised that there was no requirement for Mr Kunjur to be so close to the hospital on nights when he was not on call, saying that "therefore it was impossible to say that he did not obtain a private benefit" during those times. Bang goes the wholly and exclusively test.

The conclusion of the Tribunal that the accommodation was only partly used in the performance of the duties must have disqualified the expenditure, even if the necessary condition was satisfied. But they decided to allow a proportion of the expenditure by reference to the amount of time Mr Kunjur spent giving advice while on-call. The reasoning was as follows:

> "We note that the expression wholly and exclusively is used in the computation of business profits in which context relief is allowed for a proportionate amount of expenditure that is, in fact, used for business purposes. We see no reason to adopt a different approach in the context of section 336".

I would respectfully suggest that there is every reason to consider a different approach in connection with section 336. The statutory test for business profits is different. It is also in a different (and later) statute. And it is also in a profoundly different context – being the famously different rules which apply to the self employed. Section 334 ITTOIA 2005 does allow a proportion of an expense in certain circumstances – but that statutory apportionment is conspicuously absent in section 336 ITEPA 2003 in connection with employments – which reflects the much stricter test which applies to employees.

Whilst one can have every sympathy with Mr Kunjur and his situation, he is no different position from countless other taxpayers whose expenditure has not been allowed and even more taxpayers who, knowing the terms of section 336, have been advised not to claim such expenses.

If this decision were to represent the modern interpretation of section 336 I would be the first to rejoice – but I fear this is not the case. I cannot imagine that HMRC will allow this decision to stand and Mr Kunjur will be exposed to the costs of an appeal to the Upper Tribunal.

One might hope that this decision may be a catalyst for a review of the rules for the deduction for expenses in employment, but I am not holding my breath.

Property Ownership: Scotland

At the risk of exposing my considerable ignorance I was interested and surprised to read the decision of Judge John Brooks in the recent case of *Crippin v HMRC TC 8285*

The case concerned a property owned by Mr Crippin and whether it was his only or main residence for the purpose of the exemption in section 222 TCGA 1992.

Leaving that issue aside, Mr Crippin argued that although the legal title was in his sole name, his cohabitee Ms McKean had a beneficial interest in the property by reason of her contribution and their relationship. This argument will be familiar.

However, the property was in Scotland. Drawing on the authority of Lord Hope in *Stack v Dowden [2007]2 AC 432*, Judge Brooks explained the positon as follows:

> "It is not disputed in the present case that [the property] which is in Scotland and therefore subject to Scots property law, is in the sole name of Mr Crippin and that there has been no formal declaration of trust. As Scots law does not distinguish between legal and beneficial interests in heritable property it must follow that Ms McKean who did not hold legal title to the property could not have held any beneficial interest in it"

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Important Note