UK Tax Bulletin

January 2022

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: December 2021	317.7
November 2021	314.3
Inflation Rate: December 2021	7.5%
November 2021	7.1%
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 2.75% from 4th January 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25%.

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 %

HMRC Reliance Statement

STEP has recently published a formal note on the HMRC Reliance Statement - which sets out the extent to which taxpayers can rely on statements made by HMRC.

STEP draw particular attention to the Tax Law Review Committee who are seeking views on the subject, noting that the HMRC statement has not been updated since March 2009. Various developments have taken place since 2009, not least the occasions when taxpayers have been subject to penalties as a result of following HMRC guidance.

They highlight the case of *Aozora GMAC Investment Ltd v HMRC [2019]* where the Court of Appeal held that it would require a very high threshold before the Courts would intervene and prevent HMRC resiling from its published guidance.

The STEP Note warns members of the risk of relying on HMRC's published guidance. Specifically they say that members should refer to the HMRC guidance as evidence of their likely practice but should remain alert because, except in rare circumstances, you cannot rely on HMRC's guidance.

Under these circumstances it is difficult to see the justification for the decision in the case of *CF Day v HMRC TC 6999* in which the Tribunal said that the taxpayer was careless because:

> "he failed to understand what was simply explained in HMRC's guidance…. If he did not in fact consider HMRC's guidance then for the reasons given below he should have done."

The Office of Tax Simplification have called upon HMRC to undertake a consultation on the circumstances in which their word can be relied on. I can hardly believe that these words need to be said. Any professional person (including those in HMRC) would surely be ashamed to be referred to in such terms, especially by such prestigious bodies as STEP and the OTS. A review and a change cannot come quickly enough.

Expenses: Wholly and Exclusively

Everybody knows that to obtain a tax deduction for an item of expenditure, it has to be incurred wholly and exclusively for the purposes of the trade: section 34 ITTOIA 2005.

These words have given rise to an enormous amount of argument (and cases) and will continue to do so. A problem with such claims is often the concept of duality of purpose. If the expenditure has more than one purpose, none of it is allowable. (Although interestingly if the expenditure is incurred by a company, an apportionment is allowed under section 54(2) CTA 2009)

The classic case on the subject is *Mallalieu v Drummond [1983] 57 TC 330* where a barrister claimed the cost of her court clothing as a business expense. The House of Lords said this was not incurred wholly and exclusively for the purposes of her profession because one of her objects was to serve her needs as a human being. The fact that the clothes were only for the purposes of wearing in Court and would never have been used for any private purpose, was not enough to displace the duality purpose.

The test is not the use made of the clothing but the purpose for which they were purchased. She only had one purpose in mind – that was her professional purpose because she would not have been allowed to appear in Court in other clothing. Still not good enough. The House of Lords said that she must have had a subconscious purpose of meeting her needs as a human being and that subconscious purpose was enough to disallow the expenditure.

This is the law, and it has caused decades of disappointed taxpayers who simply cannot understand why they are not allowed a deduction for what is quite obviously a genuine business expense.

This makes life rather difficult. If when redecorating my office I decide that I would like the walls painted white because I prefer it to any other colour, why is that not disqualified from relief? Similarly, if I buy a computer to work from in my office with a huge screen because I (perhaps subconsciously) want to feel important, my personal purpose clearly disqualifies the expenditure from relief. Indeed, it is virtually (if not completely) impossible to imagine incurring any expenditure which does not have some element of personal purpose. You turn the heating on -

because you want to be warm. That is a basic human need …… and so it goes on.

In the recent case of *Rogers v HMRC TC 8342A* a partner in a partnership was facing a criminal charge and sought a deduction from the partnership profits for the legal cost of his defence. Why am I even mentioning this? Spoiler alert.

There can be no doubt, and there was plenty of evidence, that if Mr Rogers had been convicted it would have been very damaging to the business. Everybody agreed - but that is not the point. The point is whether Mr Rogers had a conscious (or subconscious) personal purpose for the expenditure. HMRC said he did. They said that the costs of his defence were incurred to avoid a criminal penalty, to defend his personal reputation and for the benefit of the trade.

The Tribunal was extremely sympathetic. The Tribunal acknowledged that a conviction would have had an effect on the personal reputation of Mr Rogers but it was important to distinguish whether this was a reason for the expenditure or was just a lucky incidental effect. They concluded that Mr Rogers was not concerned about his personal reputation or anything other than the business when he decided to incur the legal fees.

The FTT completely disregarded the fact that the criminal charge facing Mr Rogers carried a prison sentence. That might have been thought to be something which would have concentrated the mind. The FTT said that the nature of the alleged crime was that it was unlikely that he would go to prison. Oh yes. How many defendants have been told that? Personally, I would find it absolutely impossible to put out of my mind (let alone my subconscious) that if I were convicted I could go to prison. I don't think I would be very comforted by somebody saying it is unlikely so don't even think about it.

Mr Rogers represented himself before the FTT and clearly did a cracking job in persuading the Tribunal to his point of view. It would be a pity if HMRC were to appeal successfully and expose him to a liability for costs.

Embiricos: Partial Closure Notices

The eagerly awaited decision in *Embiricos v HMRC [2022] EWCA Civ 3* was published earlier this month. The Court of Appeal upheld the argument of HMRC that they had no power to issue a partial closure notice in respect of the taxpayer's remittance basis claim without specifying the tax payable on that basis.

Having regard to the High Court decision in *R (Archer) v HMRC [2016] EWHC 296* the Court of Appeal held that a final closure notice was not valid unless it stated the amount of tax due and that this principle applied equally to partial closure notices.

Section 28A(1A) TMA 1970 provides that:

> "Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a partial closure notice) that the officer has completed his enquiries into that matter".

In the case of *Embiricos*, the question was essentially whether the taxpayer's claim for the remittance basis was a matter to which HMRC's enquiry related.

HMRC argued that this must mean a matter in respect of which HMRC could issue a final closure notice – and that the rejection of the remittance basis claim by HMRC would inevitably lead to an assessment to tax on the arising basis. A valid PCN would therefore have to state the conclusion that the remittance basis was disallowed and make the amendments to the self-assessment to bring into charge the relevant foreign income.

For this reason Mr Embiricos had to provide all the details of his worldwide income and gains – even though none of it would be taxable unless and until it had been established that he had acquired a UK domicile.

So the essential conclusion here is that when issuing a partial closure notice or a final closure notice, it is necessary for the tax payable as a result of those closure notices to be included in the notice. In the case of a foreign domiciled individual, that means that full details of his worldwide income and gains have to be provided to HMRC so that the PCN or FCN can be issued even before it has been established that such income or gains are within the scope of UK tax.

The decision of the Court of Appeal probably concludes this issue – although it does cast serious doubt on whether a PCN serves any practical purpose at all.

The underlying problem here for non doms starts with the issue of a statutory information notice by HMRC for the individual's worldwide income. In the case of *Kotton*, the High Court said that the test for an information notice is whether it is "rational" to consider that the information is reasonably required for the purpose of checking the taxpayer's tax position. Can it be rational for HMRC to issue an information notice requiring the taxpayer to say whether they prefer tea or coffee? Clearly not. But why not? It is because whether they like tea or coffee has absolutely nothing to do with their tax position. So where does one draw the line?

If the information sought by HMRC can have no bearing on the tax position of the taxpayer, one might say that it cannot be rational or reasonable for such information to be within the scope of the information notice under Schedule 36(1).

In the context of a domicile enquiry, is it rational for HMRC to seek details of the unremitted foreign income and gains of a taxpayer who is not UK domiciled? How can it be? Whether they are £0, £1 or £1 million – it makes no difference to the taxpayer's tax position. The information cannot be saved by HMRC assuming facts which would make it reasonable – or alleging facts which they are obliged to prove. That would be ridiculous. It would mean that the whole of Schedule 36 would be otiose. HMRC would merely have to assume or allege some facts which would justify the information and then it would be permitted. That surely cannot be right.

I would seem to be rational for HMRC to be required to establish the facts demonstrating the reasonableness of the enquiry - but if you put the cart before the horse, we are in the fantasy world of the Queen of Hearts – sentence first, decision afterwards – or the ancient practices (perhaps not so ancient in some places) where you reach a conclusion without worrying whether the facts support it.

It can hardly be irrational to say that you need to establish the facts first before you can say that the enquiries are reasonable or rational. There is nothing objectionable in that. The whole basis of our jurisprudence is that you establish the facts and then apply the law.

Our system does not (at least not usually) allow a person to be pronounced guilty without the authorities having to go through the tedious exercise of proving the facts. So it is with domicile and some other enquiries. Simply assuming or alleging

facts to justify an enquiry undermines or eliminates any safeguards for the taxpayer.

However, having regard to the decisions in *Levy*, *Henkes* and *Perlman*, this is an argument for another day.

Employment Related Securities

The time when a taxpayer acquires employee-related securities or options will always be important in determining the amount and timing of the charge to tax. The point recently arose in the case of *Charman v HMRC [2021] EWCA 1804* who had been granted a series of employee-related securities options.

Section 420(8) ITEPA 2003 provides that a:

> "securities option means a right to acquire securities"

And section 471(5) ITEPA 2003 goes on to provide that:

> "The acquisition in relation to an employment-related securities option means the acquisition of the employment-related securities option pursuant to the right or opportunity available by reason of the employment".

Did this mean that the right or opportunity provided by the options was acquired at the time when the options were granted or when they became exercisable?

HMRC argued that the taxpayer acquired the securities option when the options were granted. Mr Charman said that he acquired a right to acquire securities when the options vested and were exercisable. This was important because Mr Charman was not UK resident when some of the options vested.

This gave rise to some interesting and persuasive arguments on both sides but ultimately the Court of Appeal held that a right to acquire securities is no less a right even if the ability to exercise that right does not vest for a period of time. The legislation does not require the right to be immediately exercisable – all that is required is that the employee's option provides a contractual or other legal right to acquire securities.

So, despite the valiant efforts by the taxpayer, the Court of Appeal were not persuaded that a right to acquire shares is a right that is immediately exercisable, and Mr Charman was therefore treated as acquiring the rights under the securities options when they were granted.

Company Formalities

I was interested to read the recent case of *Centrica Overseas Holdings Limited v HMRC [2021] UKUT 0200* as it may have an a bearing on the operations of more modest companies.

Family owned companies are famous for being a little inattentive to formalities in the operations of the business and sometimes this gives rise to difficulties where the interests of the company and the shareholders get confused. The directors/shareholders meet all the time but they do not always record their numerous decisions in formal minutes or resolutions. This can sometimes lead to difficulties with transactions being void (or voidable) in the absence of any record of shareholder approval. Tax issues can also arise where HMRC takes an unfavourable view and there is nothing to show that they are wrong.

COHL was an intermediate holding company in the Centrica Plc group of companies. The assets of two of its subsidiaries and the shares in a third subsidiary were sold and the professional fees paid in connection with the transactions were claimed as expenses of management of its investment business under section 1219 Corporation Tax Act 2009.

The FTT denied relief on the grounds that COHL did not itself carry out management activities in relation to the transactions saying that group companies must be conscious of the need for proper "corporate plumbing". They must ensure that the relevant investment company manages its own investment business, even if strategic decisions are taken elsewhere in the group.

The Upper Tribunal took a different view. They said that the reference to "corporate plumbing" was to a perceived need for board minutes or resolutions of COHL relating to the management of COHL's affairs. It was wrong for the FTT to consider that it was necessary to have a minimum degree of formality as to decision-making in relation to the transaction, before the fees could be treated as expenses of management of COHL. Apparently the FTT was looking for an outward expression

that the directors of COHL were making decisions with their COHL hats on rather than their Centrica group hats on - and that there was no evidence to show that they "changed hats and took decisions in their capacity as directors of COHL". In the view of the Upper Tribunal, no such formality was required.

It is not entirely clear what degree of formality ***is*** required (there must surely be some) but this decision might prove very helpful when faced with HMRC challenges on the basis of inadequate formal documentation.

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