UK Tax Bulletin

February 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
January 2022	317.7
Inflation Rate: December 2021	7.5%
January 2022	7.8%
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 3% from 21st February 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.5% from 14th February 2022.

Repayment supplement

Interest on overpaid tax has been 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 %

IR 35: Personal Service Companies

I promise I won't dwell on this – at least not much. There is serious frustration regarding the chaos which exists with the tax treatment of TV presenters and their companies. HMRC seems to challenge every case it can find where the services of a TV presenter are provided by a personal service company. HMRC wins some – and the taxpayer wins some. Which means that both HMRC and the taxpayer have good reason to take or fight every case.

The latest in this series is *Basic Broadcasting Ltd v HMRC TC 8400* which concerned the provision of the services of the well known broadcaster Adrian Chiles by his personal service company. HMRC said that if Mr Chiles had been engaged directly by the TV company, under the hypothetical contract envisaged by section 49 ITEPA 2003, he would have been an employee of the TV company. All the familiar arguments arose – and Mr Chiles won.

Of course each case is decided on its own facts but it is fair to say that this decision is entirely consistent with a number of other similar cases. Unfortunately it is equally fair to say that it is entirely contrary to a number of other similar cases. This inconsistency is a colossal waste of time and, more importantly, it undermines the authority of the Tribunals to have so many cases which are in direct conflict with each other. It is also frustrating for taxpayers and their advisers who do not know where they are – quite apart from the significant question of costs, not least from the public purse.

We deserve to have a proper, high level, authoritative decision setting out the law in this area so that (whether we like it or not) we all know where we stand.

CGT: Main Residence Exemption

There are loads of cases relating to the only or main residence exemption for capital gains tax in section 222 TCGA 1992. That is no surprise; it is an important and valuable exemption.

One aspect which attracts very little attention (and is widely ignored) is section

224(3) which denies the relief if:

> "the acquisition of …the dwelling house or part of the dwelling house was made wholly or partly for the purpose of realising a gains from the disposal of it"

It is self evident that everybody who buys a house to live in expects to make a profit when he comes to sell it. It is not just an accidental or incidental benefit – it is positive intention. It is also quite conventional (not to say invariable) that the purchaser makes improvements to the property during his period of ownership with the intention not only of increasing his enjoyment but with the intention of adding value to the property.

It is therefore a bit of a surprise that HMRC is not more aggressive about this but we should be grateful for their rather generous approach – see CG65200:

> "Anyone who buys a dwelling house is likely to hope that, in the fullness of time, they will make a gain on its disposal. One house may be chosen over another because its value is more likely to appreciate over time. These cases could be said to fall within the words of the statute but relief should not be restricted.
>
> It would be unreasonable and restrictive to apply the legislation in this way. The subsection should only be taken to apply when the primary purpose of the acquisition, or of the expenditure, was an early disposal at a profit."

Not wishing to look a gift horse in the mouth, I hesitate even to suggest that this seems to be in direct conflict with the legislation. Section 224(3) applies where the acquisition is made wholly or partly for the purposes of realising a gain, whereas HMRC say only it applies where the *primary* purpose is an *early* disposal at a profit. Perhaps this is an example of how flexible HMRC can be and could be cited as a reason why they should be equally flexible in other circumstances.

Anyway the reason I mention all this is the case of *Campbell v HMRC TC 8398* where the taxpayer bought and sold a series of houses. His claim for CGT exemption was denied by HMRC on the grounds that he was trading – with section 224(3) being a second string argument.

The FTT went through all the badges of trade, (most of which seemed to be satisfied) and whilst acknowledging that only a single badge of trade would be sufficient to find trading, somehow concluded that Mr Campbell was not trading. All his transactions generated gains subject to capital gains tax.

However Mr Campbell was unable to show that any of the properties was his main residence and he was therefore liable to capital gains tax on the whole of his gains - which meant that section 224(3) did not need to operate after all.

Company Purchase of Own Shares

I note that there has been a change in HMRC practice relating to companies purchasing their own shares where the transaction is undertaken by a single contract with multiple completions.

This arrangement is useful where the company does not have sufficient funds to pay the whole of the consideration immediately. The shares cannot be sold in stages because that would disqualify the transaction as the company would remain connected with the purchaser until most or all the shares are paid for. A single sale involving multiple completions gives rise to an immediate disposal of all the shares with payment being made in stages – but without any loan indebtedness arising.

HMRC no longer accept this analysis. In future they will take the view that the shareholder will continue to be connected with the company within the meaning of section 1062 CTA 2010:

> "A person is connected with a company if the person directly or in directly possesses, or is entitled to acquire more than 30% of the issued ordinary share capital of the company"

HMRC say that this test will be satisfied because, although as a result of the sale contract the company will be the beneficial owner of all the shares, the shareholder will still be the legal owner of the shares until completion – and HMRC interpret "possesses" in this context as meaning legal rather than beneficial ownership.

One can understand the point of view, even though it seems a little extreme, and it is certainly a matter which deserves some judicial examination; whether it gets any remains to be seen.

It is however interesting to contemplate the wider implications which might not be so helpful to HMRC.

One example would be the definition of control for the purposes of section 755D ITA 2007. This requires the same test of possession – and on the above analysis would be easily avoided by changing the legal ownership and not the beneficial ownership. There are loads of other examples. This could be fun.

CGT on Foreign Property

The recent case of *Rawlings v HMRC TC4128* highlights a regular misunderstanding about the calculation of capital gains on this disposal of a foreign assets – in this case a property in Switzerland.

It is tempting to conclude that if you buy a property for CHF 500,000 and some years later sell it for CHF 450,000 you will not be liable to capital gains tax because you have made a loss. Unfortunately it is not so simple.

If the exchange rate at the date of acquisition was (say) 1.40 and at the date of sale it was (say) 1.20 you end up with a gain. This is because in sterling terms the property cost £357,000 and it was sold for £375,000; a gain of £18,000.

Bentley v Pike 53 TC 590 and the Court of Appeal in *Capcount v Evans 65 TC 545* make the position and the correct analysis completely clear, which left the FTT no alternative but to disappoint Mr and Mrs Rawlings.

Interpretation

Forgive my little indulgence but I found the recent decision in the Property Trust and Probate List of the High Court fascinating: *Goodrich and Other v AB-MN [2022] EWHC 81 Ch.*

The case concerned the Walker Books Employee Trust which was established in 1990. The meaning of some of the terms in the Trust Deed came to be considered in in 2022 – such as "spouse". Does the term *spouse* include civil partners and does it include same sex spouses? Of course the deed did not say because these concepts did not exist when the deed was drafted.

One might have thought that the meaning of the word *spouse* would have been the meaning which represented the objective intention of the settlor. That would necessarily exclude civil partnerships and same sex marriages as they could not possibly have been in the mind of the settlor at the time, or formed part of his intention.

Nevertheless, Chief Master Shuman concluded that references to a spouse in the Walker Books Employee Trust should be construed as including civil partnerships and same sex marriages. The reasoning may be obscure, but the precedent is clear.

When it came to considering the meaning of *children* and whether this term included step children, Chief Master Shuman concluded that step children were excluded because they were not expressly provided for in the Trust Deed; there was nothing to indicate that they were to be included.

The apparent conflict with the analysis regarding *spouses* might perhaps be reconciled by the fact that in 1990 the concept of step children was well known and if they were to be included one would have expected specific provision. Maybe.

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28th February 2022

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Important Note