UK Tax Bulletin

March 2022

FIELD COURT TAX CHAMBERS

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: February 2022	320.2
January 2022	317.7
Inflation Rate: February 2022	8.2%
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 3.25% from 5th April 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.75% from 28th March 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 %

New Taxes

I could not help noticing the proposal for a new On Line Sales Tax. This is hot on the heels of the Plastic Packaging Tax (which comes into force on 1st April), the Digital Services Tax and the suggestion of a Windfall Tax. And the idea of a Wealth Tax is still lurking.

Have they gone completely mad? Don't they think we have enough taxes? I am sure that Mr Sunak is sincere when he says he is committed to cutting taxes …….. but this may soon become a minority view.

Anyway, not wishing to look a gift horse in the mouth, I naturally welcome all these proposals.

There is some suggestion that an On Line Sales Tax would be prohibited as being too similar to the Digital Services Tax. I do hope not.

Professional Negligence

The recent case of *McLean and others v Thornhill [2022] EWHC 457 (Ch)* involved a negligence action against an eminent QC concerning his advice to the promoters on the efficacy of a film scheme.

When the scheme failed to deliver the intended tax advantages, the participants in the scheme claimed that Mr Thornhill's advice was negligent on the grounds that no reasonably competent tax QC could have advised that the scheme would be effective. Pretty strong stuff – and of course a subject of keen interest to professional advisers.

The High Court rejected their claim and although such claims are always highly dependent on the precise facts, the reasoning of the court is both interesting and welcome.

Naturally, any claimant would need to demonstrate that Mr Thornhill owed them a duty of care; that this duty had been breached; and their loss had been

caused by that breach. In addition, the claimant would have to show that it was reasonable and foreseeable that they would rely on Mr Thornhill's advice.

The Court said that Mr Thornhill owed no duty of care to the claimants in respect of the advice he gave in relation to the schemes. The investors were not his clients and his advice was never communicated to them. In particular:

> "No reasonable investor could have understood that Mr Thornhill was making any statement or providing any advice to them at all. An implicit statement by [the promotors] that the tax analysis in the IM was consistent with Mr Thornhill's advice to [the promotors] is insufficient, in my judgment, to amount to the provision of advice *by* Mr Thornhill to any potential investor."

Furthermore (and possibly as important as anything in the whole case), each of the claimants had warranted that they had taken, and relied only on, their own professions advice. They also warranted that they had read and understood the terms of the Information Memorandum and were aware of the risks involved.

It is difficult to see how this could have ended any other way – but it is not difficult to see that with a comparatively modest change to the fact pattern, the outcome would be less secure.

Dwellings: CGT and SDLT

The well known rules relating to the capital gains tax exemption for the only or main residence under section 222 TCGA 1992 resonate with their sister provisions for Stamp Duty Land Tax in section 116 FA 2003.

This has given rise to a curious (or maybe not so curious) switching of sides by the taxpayer and HMRC.

It is not unusual that when a dwelling house is sold including adjoining or nearby buildings (within the same curtilage of course) the taxpayer will

claim the main residence exemption on the whole lot, no matter how separate or distant they are from the main house.

However, it is often the case that HMRC will challenge the exemption on the grounds that the adjoining or outbuildings are not part of the residence qualifying for the relief.

When it comes to SDLT the purchaser of a residential dwelling with adjoining and other buildings, the purchaser is likely to claim that the adjoining and other buildings are not part of the residence. This is because if the property purchased is "mixed use", it would not be residential property and would be subject to SDLT at only 5% instead of the much higher rates (up to 17%) which apply to residential property.

So now HMRC will tend to argue that all the different parts or the property form part of the residence so that the higher rate of SDLT applies.

This looks as though it provides an opportunity to use the arguments deployed by HMRC for SDLT purposes when there is a dispute over the principal private residence exemption.

However, as ever, it is not as simple as that.

Section 222 TCGA 1992 provides that:

> (1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> > (*a*) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence, or
> > (*b*) land **which he has for his own occupation and enjoyment with that residence** as its garden or grounds up to the permitted area.
>
> ….
>
> (3) Where the area **required for the reasonable enjoyment of the dwelling-house** (or of the part in question) as a residence, having regard to the size and character of the dwelling-house, is larger than 0.5 of a hectare, that larger area shall be the permitted area.

Section 116 FA 2003 provides that:

(1) In this Part "residential property" means—

(*a*) a building that is used or suitable for use as a dwelling, or is in the process of being constructed or adapted for such use, and

(*b*) **land that is or forms part of the garden or grounds** of a building within paragraph (*a*) (including any building or structure on such land), or

(*c*) an interest in or right over land that subsists for the benefit of a building within paragraph (*a*) or of land within paragraph (*b*);

and "non-residential property" means any property that is not residential property.

In the recent case of *Hyman v HMRC [2022] EWCA Civ 185* the taxpayer argued that the property was mixed use for the purposes of SDLT. His reasoning was that the surrounding land was not part of the garden or grounds because it was not needed for the reasonable enjoyment of the house as a residence – the parts which are highlighted above.

The Court of Appeal observed that these words of qualification contained in section 222(2) and (3) relating to the use and enjoyment of the land, do not appear in section 116. Whether the garden or grounds were used or reasonably required for the enjoyment of the dwelling house is not a condition for SDLT purposes. The definitions are different and they perform a different function. Section 222 imposes a limit on the land qualifying for relief whereas section 116 is concerned with categorisation of the property as residential or non residential.

EBT: Share Options

Hot off the press – like last week – is the decision of the Supreme Court in the case of *HMRC v NCL Investments Ltd [2022] UKSC 9.* This was all about whether the company was entitled to a tax deduction as a result of the grant of share options to employees of the Smith and Williamson group.

There was an Employee Benefit Trust established and funded by the holding company SWHL which used its money to acquire shares in SWHL. When share options were granted to the employees of group companies, these obligations were satisfied by the EBT. Under International Reporting Standard IFRS2 company was obliged to recognise an expense in their income statements an amount equal to the fair value of the options.

The issue was (of course) whether this expense was deductible for tax purposes.

Section 46(1) CTA 2009 says that the profits of a trade must be calculated in accordance with generally accepted accounting principles. The Supreme Court held that there was no good reason to suggest that this should not be applicable in these circumstances.

HMRC argued that the expense should be disallowed by section 54 as being an expense not incurred wholly and exclusively for the purposes of the trade because it had not been "incurred" as required by section 54. This looked like a good argument because the accounting debits required by IFRS2 did not require any outlay – they were just stand alone debits required to be made for accounting purposes – so there was no expense actually incurred.

However, the Supreme Court held that the debits were treated by IFRS2 as an expense and the debits were incurred because the debits were:

> “intended, as an accounting matter, to represent a measure of the value of employees’ services that the Appellants consume in return for the grant of share options. The Appellants consume those services in the course of the trades that they conduct."

(No - me neither)

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Another promising argument related to section 1290 CTA 2009 which deals specifically with deductions in respect of employee benefit contributions. Essentially this denies a deduction unless the amount is taxable on the employees within 9 months of the end of the accounting period.

The Supreme Court held that the debits were not "employee benefit contributions" within the meaning of section 1290 and were not disallowable on that ground.

It is rare these days to have good news about anything involving EBTs so the decision of the Supreme Court that the amounts were deductible is obviously extremely welcome.

Third Party Disclosure

The recent case of *Gunfleet Sands Ltd v HMRC and KPMG TC8424* is another case on the ability of third parties (like you and me) to get hold of really interesting documents like skeleton arguments, statements of case, replies etc in a case which has nothing to do with us – but might be helpful in connection with a dispute we may have with HMRC. You bet.

I am naturally a bit reluctant to say so, but the idea of getting hold of the skeleton arguments of the best advocates in the land, setting out the detailed arguments of the taxpayer and HMRC, would obviously be of enormous value if you have a case involving similar issues.

In the August 2019 Bulletin I mentioned the case of *Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38* where the Supreme Court explained that third party has no right to access such documents, but the court has power to grant access if the applicant has a legitimate interest and if it would advance the open justice principle. Lady Hale suggested that a clean copy of the trial bundle may be the most practical way of providing access to third parties – but it is entirely a matter for the court to decide what if any access should be permitted.

This was followed by *Fastklean Limited v HMRC and Keith Gordon [2020] UK FTT 511* where an application was made for the disclosure of a particular email which had been presented in evidence. Mr Gordon claimed a legitimate interest in this email on the grounds that he was interested in related litigation and more generally as a barrister practising frequently in the Tribunal. The Tribunal agreed.

We now have _Gunfleet Sands_ where the applicant said:

> "the Applicant is currently instructed in another, unrelated, dispute with HMRC in which the same points of law have arisen: it is the Applicant's understanding that one of the points in issue in the Appellants' appeal is the question and extent of whether qualifying expenditure for capital allowances purposes should be determined by reference to assets which, when taken together, form a "single entity". This is a live issue in a matter in which the Applicant is currently instructed and the Respondents' legal arguments in these proceedings are of obvious relevance and interest to that matter".

The Tribunal was satisfied that a legitimate interest existed and allowed access to the statement of case, the skeleton arguments of both parties and various other documents.

This sounds as though this issue has now been well settled, but unfortunately not. A recent application by EY for similar disclosure was refused by the FTT, despite a clear and acknowledged legitimate interest, on the grounds that the case in which EY was interested was at an early stage (not yet listed for hearing): _Cider of Sweden Ltd v HMRC TC 8407_.

It is difficult to reconcile this with earlier cases, particularly the decision in _Fastclean_ where access was granted merely on the grounds that he was a "*barrister practising frequently in the Tribunal with a particular interest in the TMA 1970*".

I am not sure when we are on this now – but clearly there are interesting possibilities here.

[This _Gunfleet_ case was reported on 11th March and - just to confuse things – Gunfleet Sands had another FTT decision reported on 3rd February on a completely different subject; a claim for capital allowances on the construction of wind farms. Just in case you are interested, the Tribunal (TC 8387) decided that some of the costs qualified for capital allowances – including the project management costs relating to the metocean geophysical and geotechnical studies. I feel the interest waning …..]

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31st March 2022

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