UK Tax Bulletin

April 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: February 2022	320.2
March 2022	323.5
Inflation Rate: February 2022	8.2%
March 2022	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 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 %

Non Doms

Goodness me – I do get a bit fed up with all the misinformation in the press and from politicians about domicile.

There is so much about Mr X and Mrs Y who have been living in the UK and should jolly well be electing to be UK domiciled and paying more tax.

The trouble is that domicile is a concept of international law; a complex concept refined over centuries and is not something for which you can "elect". It has a much wider importance than just tax.

Some people will claim to be domiciled in the UK to gain certain benefits – and others will claim to be domiciled in another country (to gain other benefits). But, like it or not, they are bound by the law. Simply asserting what you would like the law to be does not usually get you very far – at least not unless you are President of a distant land.

And now we have a proposal (in some quarters) to abolish non dom status – at least for tax purposes – because then all those rich people who come to the UK will pay lots more tax. I mean, they are bound to. Stands to reason, doesn't it.

I am reminded of the plan to have a toll road in my village. About 100 cars drive though the village every day. If we charge them £100 each time, that will bring in £10,000 a day – that is £70,000 a week. Fantastic. Just think of all the things the parish council could do with that money. Then engage brain. How much money would actually be collected.…….

One more thought and I will stop. Partygate was all about how important it is that the law applies to everybody (including the Prime Minister, Chancellor etc) and there should not be one law for them and one law for everybody else. Quite right. However, this does not seem to apply to Mr Sunak where the protection of the laws about tax and domicile are denied to him. It is beyond ironic that his family are not allowed to benefit from the same rules as everybody else – there seems to be a special rule for them that they should pay lots more tax.

I would like a special rule which says the law does not apply to me so that I pay less tax. That would be equally justifiable (or equally bonkers). Sorry, I mean this argument would have equal merit - that is to say no merit at all.

IR 35

I have frequently commented on the confusing state of the law on the taxation of intermediaries as a result of the conflicting and inconsistent decisions of the Tribunals. We now have the benefit of two cases which have reached he Court of Appeal: *Kickabout Productions Ltd v HMRC [2022] EWCA Civ 501* and *HMRC v Atholl House Productions Ltd [2022] EWCA Civ 502*

This may well be the last judicial word on the subject unless one or both of them proceeds to the Supreme Court – which given the general public importance of the issue involved, would be very welcome.

The facts of these cases were broadly similar in the sense that they concerned TV presenters with personal service companies who provided their services to third parties. The issue in each case was whether, if the services were provided under a contract between the individual and the third party, it would have been a contract of employment: section 49 ITEPA 2003.

In both these cases the FTT decided that the hypothetical contracts would not have been a contract of employment. The Upper Tribunal (rather demonstrating the unsatisfactory state of the law) reversed the decision in *Kickabout* and upheld the decision in *Atholl House*.

The Court of Appeal has upheld the Upper Tribunal's decision in Kickabout, that the hypothetical contract in Kickabout would have been a contract of employment. In *Atholl House* they also considered that the hypothetical contract would have been a contract of employment but remitted the case to the Upper Tribunal to reconsider the matter in the light of their guidance.

Good – but no cigar I think.

Without getting too deeply into all the intricacies, the Court of Appeal in both cases went through a large number of the earlier cases on the subject – although interestingly not some recent decisions – and applied the various tests to the

different facts of each case. Issues of control and mutuality of obligation were clearly important but expressly not decisive; all the relevant factors have to be taken into account.

I was struck by one issue highlighted by the Court which is the significance given to the amount of work undertaken during the period for the particular TV company. There are a number of learned counsel who are instructed by HMRC in tax (and other) cases and may spend most of the year on one or more such cases. The interpretation of control and mutuality could easily extend to them - and other factors like the place of work and *part and parcel* could equally apply; after all, many tribunal cases are conducted by real employees of HMRC. It would not be difficult to construct a good argument that such counsel are employees of HMRC. That would obviously be wrong, just like the concert pianist that I keep going on about, and it demonstrates that there is something wrong with the tests.

A great deal was said about people being in business on their own account (which has been a decisive factor in many cases), but it did not find much support in either of these cases.

Another oddity was the statement by Sir David Richards that:

> "It must of course be remembered that if the hypothetical contracts were held to create an employment relationship, Mr Hawksbee would enjoy the rights conferred by statute on employees"

This conclusion is difficult to follow because we are dealing with a hypothetical contract – not a real one. The real contractual relationships are not affected by these decisions – or by the legislation.

I am not sure that my understanding of this topic is greatly improved by these decisions (I hasten to add that this is entirely the result of my own inadequacy) but these cases may prove to be a blueprint for the interpretation of the law in future.

With so many judges having obviously come to the wrong conclusions, it must surely be a good thing for the authority Court of Appeal to provide a degree of consistency on this subject.

Capital Allowances

The Court of Appeal has upheld the decision of the Upper Tribunal on the issue of whether gas cavities represent plant for the purposes of capital allowances: *Cheshire Cavity Storage 1 Ltd v HMRC [2022] EWCA Civ 305.*

The company had incurred expenditure creating a cavity for the storage of gas. The function of the cavity was to store gas so that it could be safely held and released to the National Grid when required.

The Upper Tribunal had explained that where something functioned as premises and as plant (which the cavities did in this case), you have to identify which is the more appropriate description. Is it "apparatus with which the business was carried out or premises in which the business was carried out"?

They considered all the facts and decided that it was premises. The Court of Appeal agreed essentially on the grounds that this was a value judgment which the FTT and the Upper Tribunal were entitled to make. They had asked themselves the right question and their decision followed a consideration of the facts.

The Court also referred to a more fundamental issue which is that the cavities were essentially land. In their view, whatever the taxpayers did, and whatever costs they incurred, it was difficult to get away from that simple fact.

The Court of Appeal did not consider the case of *JRO Griffiths Ltd v HMRC TC 8203* which concerned a claim for capital allowances on a potato storage facility. Obviously, there was no reason for them to do so being a considerably superior court of record, but it interesting that the decisions are in direct conflict. (I guess we must therefore conclude that *Griffiths* was wrongly decided).

The Tribunal in *Griffiths* referred to the specific provisions of the Capital Allowances Act 2001 relating to expenditure on cold stores and on silos which provide for temporary storage. HMRC suggested that it was:

1. "A pit or underground chamber used for storage of grain, roots etc
2. A pit or air and watertight chamber in which green food is preserved for fodder for ensilage."

The Tribunal held that the potato storage facility was both a silo and a cold store and therefore qualified as plant for capital allowance purposes.

It is difficult to see why these words should not apply to gas cavities – but clearly not.

Valuation of Shares

The valuation of shares in an unquoted private company for fiscal purposes has famously been described as a "dim world peopled by the indeterminate spirits of fictitious or unborn sales". Such valuations are profoundly different from the valuation of shares in the real world.

However, there are some principles which do apply to both, one of which is that when valuing a minority holding, a discount is appropriate to reflect the intrinsic nature of a minority shareholding – not least the lack of influence – with the size of the discount being dependent on the size of the holding. There is scope for some serious argument here.

The court in the case of *Harley* in the *Sheriffdom of Tayside Central and Fife at Perth [2022] SC PER 14* considered this issue, although it did not involve a valuation of shares for tax purposes. It related to a dispute over the claimant's entitlement under the estate of the late James Millar Harley and how a 15% shareholding in a family company should be valued.

The claimant argued that there should be a discount of 75% when valuing this 15% holding (which on the face of it seems not unreasonable in the absence of any special factors); however, this was not agreed by the executors.

Scottish cases have their own terminology which often makes the reasoning a little obscure to English lawyers (or at least to me). In this case the executors claimed the discount was excessive but failed to advance any reasoning in support of a lower discount. (It is not clear why not because there are lots of possible reasons they could have considered). The court therefore held that:

"Accordingly there is no basis upon which the pursuer could offer an alternative valuation at proof. Accordingly I shall not admit the averments anent valuation to probation."

Enough said I think.

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30th April 2022

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