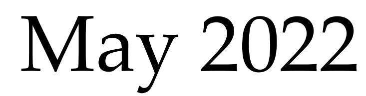

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: May 2022

Current Rates		
Retail Price Index:	April 2022	334.6
	March 2022	323.5
Inflation Rate:	April 2022	11.1%
	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 3.5% from 24th May 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 2% from 16th May 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 %

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Statutory Residence Test: Exceptional Days

In 2020 at the height of the lockdown there was a great deal of concern about the tax position of people who got stranded in the UK, and the effect that the extra number of days which they spent in the UK could have on their residence status under the statutory residence test.

There was a hope or expectation that their concerns would be alleviated by the relief for exceptional days under the SRT legislation in Schedule 45(22) FA 2013.

The law on the subject is brief. Paragraph 22(4) provides that a day will not be counted as a day spent in the UK if:

a) The taxpayer would not have been present in the UK at the end of that day but for exceptional circumstances beyond his control that prevent him from leaving the UK, and

b) He intends to leave the UK as soon as those circumstances permit.

Paragraph 22(5) gives examples of such exceptional circumstances:

a) National or local emergencies such as war, civil unrest or natural disasters, and
b) A sudden or life-threatening illness or injury

That is all it says.

In earlier Tax Bulletins I analysed these rules, which on a plain reading of the legislation are extremely difficult to satisfy. However, HMRC did announce some important relaxations - or at least sympathetic interpretations – which were widely welcomed.

Two years on from the onset of these difficulties, the first case on the meaning of exceptional days has now reached the Tribunal (TC 8464) and provides the first judicial guidance about how paragraph 22 should be interpreted.

The judgment is helpful in many ways – certainly to the taxpayer – but personally I have my doubts. It may be too helpful. It may be that the Tribunal was so sympathetic to the taxpayer that the decision might not be allowed to stand.

The case reveals the (excessively) strict approach HMRC have taken to the meaning of exceptional circumstances, so we know what to expect when any dispute arises – even though their interpretations were given the thumbs down by the Tribunal.

The judge explained that the SRT is prescriptive and that Parliament acknowledged the need for some flexibility – and it did so by providing these rules for exceptional circumstances. He went on to say that the words in paragraph 22(4) are clear and non technical; they are not ambiguous or obscure. They are ordinary English words which do not need the deployment of synonyms or a thesaurus. He referred to the judgment of Lord Bingham in *R v Kelly [2000]:*

> "We must construe "exceptional" as an ordinary familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception which is out of the ordinary course, or unusual or special, or uncommon. To be exceptional, a circumstance need not be unique or unprecedented or very rare; but it cannot be one that is regularly or routinely or normally encountered"

The facts were complicated and as always the decision will be based very heavily on the facts – with little application to any other case. However there were some important points made by the Tribunal which will be of wide application.

HMRC claimed that to be exceptional circumstances, the events which prevented the taxpayer from leaving the UK had to be unforeseeable. Otherwise the taxpayer could plan ahead and avoid being prevented from leaving the UK. Furthermore, if they were foreseeable they were not outside his control.

Not so, said the Tribunal. Foreseeability could be relevant but it certainly not the determining factor as suggested by HMRC.

HMRC argued (and it is in their guidance) that you have to be in the UK when the relevant event occurred. If you come to the UK for example for medical treatment – no deal. The Tribunal said this was wrong. What you have to do is to look at the position at the end of each day and see whether or not the taxpayer is prevented from leaving the UK.

The Tribunal further explained that the events preventing the taxpayer from leaving the UK need not be just physical - like the closing of borders or lockdown restrictions; it included moral obligations and matters of conscience, such as being at the bedside of a sick relative (not just the limited group of persons set out in the HMRC guidance). That is clearly sensible – but it must have a limit. If we interpret *prevent* widely, it could encompass many things - from a shutdown at the airport preventing any flight departures, to "my new glasses were not yet ready for collection" or "I could not possibly leave because my maid was off sick and there was nobody to feed the cat". It is clearly a question of degree, but we do not have any help in determining where events are on the spectrum from *Obviously Exceptional*, to *Don't Be So Silly*.

The Tribunal seemed not to be concerned about the obvious point that, short of physical restraint, there is little that actually prevents somebody from leaving the UK. They may not be able to get home but they can certainly leave the UK. Plane, train, ferry – one of them would nearly always be working. That is a really tough rule but if the words used are clear and non technical, how are you going to get past them. There are endless examples of the courts saying that the law may be strict (and harsh) but the words are clear and unambiguous. (Er, like here) You can't just add in words of relaxation because you feel it is too strict, any more than HMRC can add words of restriction of their own choosing– which they even tried to do in this case – as if the rules weren't already hard enough. The only way it seems is the give a wide and clearly defined meaning to "prevent".

It is clear that the highly restrictive interpretation that HMRC are giving to the concept of exceptional circumstances is unwarranted, and it will be interesting to

see whether their approach will change in the future as a result of this case. I would suggest that this is too important a matter to be left at the First Tier level and hope that further and more specific judicial guidance will be forthcoming.

Information Notices

There are lots of arguments going on about Information Notices under Schedule 36 Finance Act 2008 where HMRC seek information about a taxpayer's circumstances to check their tax position.

Schedule 36(1) authorises HMRC to require the taxpayer to provide information or produce a document if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.

Where the taxpayer has filed his tax returns for the periods covered by the HMRC enquiry, paragraph 21 imposes an additional requirement that HMRC must have "reason to suspect" that there has been an under assessment to tax.

It has been difficult to argue successfully that the information requested by HMRC is not reasonably required for the purposes of checking the tax position of the taxpayer. The Courts have been pretty unsympathetic to taxpayers who appeal against such notices.

The HMRC response when asked how the requested information is relevant is that we will not know how relevant it is until you give us the information. Circularity does not seem to be a problem here. And what about, for example, we want details of all the assets you have ever owned anywhere in the world and what happened to them because they might have been sold at a capital gain which has not been properly disclosed. Many readers will recognise variations on this theme. (Actually it is called fishing and is not allowed – but never mind that.)

The latest case on the subject is *Hackmey v HMRC TC 8487* which contains some interesting judicial guidance on this subject. In this case, HMRC sought 11 items of information and documentation and the FTT upheld only one of these requests.

The judge confirmed (agreeing with the decision in *Perring*) that the purpose of the information powers under schedule 36 is to enable HMRC to raise assessments to

collect tax. It cannot be reasonable for HMRC to seek information for periods which are out of time for assessment.

(One might say that seeking details of unremitted foreign income for somebody claiming the remittance basis, where such income is not assessable to tax, is equally unreasonable – but the Tribunal did not see it that way in *Perlman v HMRC TC 8168).*

Also, in dealing with a favourite reason for HMRC seeking information, the judge said that a mere desire for background information is insufficient to justify the issue of a notice; it would amount to fishing.

The judge expressed a firm view about HMRC's request for unredacted bank statements and credit cards. He said that HMRC had to show how the further information would assist in checking the taxpayer's tax position. Just because it was HMRC's usual practice to require these items was not a reasonable basis for seeking the document. HMRC's submissions are not evidence and they needed evidence to demonstrate why they were needed.

Similarly, when it comes to paragraph 21 and the requirement for the tax officer to have a "reason to suspect" that there is an under assessment, such suspicion must be based on reasonable grounds and there must be some evidence to indicate a deficiency.

I would respectfully suggest that these judicial constraints are long overdue and will be widely welcomed by taxpayers. It is a case well worth reading.

One part of the decision is of particular interest – which is who has the burden of proof in showing that the requirements of Schedule 36 are satisfied. It was said to be common ground that the burden was on HMRC; this was supported by the judge. That is a bit odd because in earlier cases HMRC have argued strongly (and the Tribunal has agreed) that the burden of proof is on the taxpayer: see for example *Joshy Mathew v HMRC TC 4342.* Let us hope that this is no longer a matter of uncertainty.

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Employee Benefit Trusts

For some time there was a general understanding that payments made by a company to or for the benefit of an employee would necessarily be deductible for corporation tax purposes. After all, benefiting the employees is an obvious business purpose and there was a sort of symmetry (and dare I say it, equity) about it.

You only have to say those words to realise that symmetry is no guide to a tax deduction – and this has been shown very clearly by a series of recent cases, the latest being *CIA Insurance Services Ltd v HMRC TC 8475.*

Inevitably, the facts and the issues were complex; they involved the payment of contributions by the company to an EBT, and loans by the EBT to the employees. In a "lose/lose" decision (at least on this aspect) the FTT found that the company was not entitled to a deduction and the employees were taxable on the loans.

The judge held that the contributions to the EBT were made for the purpose of obtaining a tax deduction without the employees having to pay tax on the loans – and were therefore not expenses incurred wholly and exclusively for the purposes of the trade.

[That seems a bit tough. One might say that the purpose was to benefit the employees by getting them a tax free benefit – the company would have got a tax deduction whatever they did. So it was the way the purpose was effected that was the problem. That creates a much wider test for a deduction; not only do you have to satisfy the wholly and exclusively test, you have to do it in an "acceptable" manner - whatever that may be.]

The judge also concluded that the loans to the employees from the EBT fell within Part 7A ITEPA 2003 and were taxable as earnings on the employees. The detailed analysis is mind-bendingly complicated and I will not even try to go through it here – not least because I am hoping to sell a detailed summary to the EasySleep organisation to help their insomniac patients.

This was clearly a very important case – HMRC being represented at the hearing by six barristers - two distinguished QCs and four junior counsel. I suppose the prospect of getting money to your employees tax free and generating a tax deduction at the same time (which in the world of tax represents the Holy Grail)

was always likely to encounter some stiff opposition from HMRC.

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