UK Tax Bulletin

July 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: June 2022

Current Rates	
Retail Price Index: June 2022	340.0
May 2022	337.1
Inflation Rate: June 2022	11.8%
May 2022	11.7%
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 3.75% from 5th July 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 2.25% from 27th June 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 %

CGT: Divorce and Asset Transfers

It is well known that transfers of assets between spouses who are living together are free of capital gains tax – the transfer being deemed to take place at a value giving rise to no gain and no loss under section 58 TCGA 1992.

This relief continues to apply if the transfer takes place after separation - providing it occurs in the same tax year. Thereafter it is a transfer deemed to take place at market value which could obviously result in a capital gain.

That is very troublesome because when couples separate, they have a lot on their mind – and capital gains tax is not likely to be very high up that list. And if they separate in (say) March, they have no chance of agreeing any sensible arrangements before the end of the tax year. So they have a CGT bill to add to their woes – leaving less money to be divided up.

The position is not quite so bad when the relevant asset is the matrimonial home because the transferor spouse will probably qualify for exemption as their only or main residence for nine months after they cease occupation – and only the proportion of the gain accruing after that period will be chargeable to capital gains tax.

However, for any other asset, there is a real problem.

But not any more it seems. The draft legislation for the Finance Bill 2022 provides that from 6th April 2023 the no gain/no loss rule will continue to apply for three years after separation. That will be widely welcomed – except perhaps by those transferee spouses who are hoping to get their hands on the assets before next April. There is clearly going to be a bit of a pause and then a surge ….

IHT: Business Property Relief

The application of business property relief to a property letting business has again been considered by the Tribunal.

Business property relief at 100% is obviously extremely valuable representing an effective exemption from IHT. However, the relief is denied by section 105(3) IHTA 1984 if the business:

> "consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments".

The case of *Firth v HMRC TC 8742* involved the letting of three properties and the provision of a suite of services – the sort of services which in other cases has been sufficient to represent a qualifying business, but in others has been found to be insufficient. I don't propose to go through the whole list. It does not help.

What is clear is that the case could easily have gone either way depending on which of the earlier cases one chooses to follow and which to reject.

HMRC have consistently taken the view that the letting of property is a business which consists wholly or mainly of making or holding investments, no matter how extensive the services which are provided. The Tribunals have shown that this is too extreme a view but looking at the score of wins and losses, HMRC is ahead. So, anybody seeking relief has a fight on their hands.

What is sorely missing is a definition of what is meant by making or holding investments.

The cases often refer to "managing investments" but that is not the test. It is *making or holding* investments. A company with a number of hotels in major cities would no doubt regard the hotels as investments, but would the business of the company be the making or holding of investments? Obviously not.

HMRC referred to the passage in *HMRC v Pawson [2013] (UKUT) 050* where the Upper Tribunal said:

> "I take as my starting point the proposition that the only and holding of land in order to obtain an income from it is generally to be categorised as an investment activity."

This passage has been criticised on the grounds that it wrongly starts from a presumption that a business which holds land is mainly making or holding investments. The proper starting point is to make no assumption either way but to establish the facts and determine whether the business is wholly or mainly one of making or holding investments.

Indeed, it was revealed that the Court of Appeal, when refusing permission to appeal in *Pawson* said:

> "There is no presumption that requires to be rebutted as a business which consists of the exploitation of land for profit is an investment business. Of course, it must be looked at in the round".

The Tribunal mentioned that they had been provided with a copy of the refusal for leave to appeal by the Court of Appeal in Pawson but made no further reference to it.

The Tribunal explained the position thus:

> "In summary, we find that on the investment side of the spectrum are the activities such as marketing, benchmarking, pricing, bookings, making the apartments ready for guests, dealing with complaints and requests, maintenance, repairs, insurance, and business rates. On the non-investment side of the spectrum are the welcome pack, the provision of cleaning if requested, linen, towels, shower gel, furniture, white goods, DVD player and TV, Wi-Fi, food and the ability to purchase extra packages".

And looking at it in the round, they concluded that the investment activities were predominant, so business property relief did not apply.

Not necessarily the conclusion that everybody (or every judge) would come to – but that just illustrates the uncertainty which exists on this subject.

The Pendulum Swings

Well - you never know. One swallow …. or maybe two … may make a summer.

I was encouraged by the fact that the GAAR Panel has recently expressed an opinion in favour of the taxpayer. And even more encouraged by an Upper Tribunal decision in a *Ramsay* case, in favour of the taxpayer.

I don't want to get carried away, but I will take any good news I can find at the moment.

In the case of *Altrad Services Ltd v HMRC [2022] UKUT 185* the taxpayers entered into a series of artificial transactions which created an apparent (and obviously economically unjustifiable) entitlement to capital allowances. You would have thought this was a slam dunk for HMRC on the basis of *Ramsay* or any of its derivatives. But no. The Upper Tribunal analysed the law in great detail and found that the HMRC's *Ramsay* argument could not apply.

The facts were long and complicated, as always with an artificial arrangement – especially one that wins – but the important point is that it did win.

However, it is worth noting that the judges expressly declined to comment on other *Ramsay* arguments which could have been advanced, and what other conclusions might then have been reached. I bet that was a relief. It would not have been unprecedented for the Tribunal to have identified what they considered the right argument, and to have decided the case on that basis.

Next time I bump into a *Ramsay* argument, I know I will be reading this judgment a lot more – and so I guess will everybody else.

The second swallow was a GAAR opinion which related to section 455 ITEPA 2003 (loans to participators) where a taxpayer had an overdrawn loan account with his company. Loans were made to him by subsidiaries which enabled his loan to the parent to be paid off. Leaving aside the fact that the loans from the subsidiaries were also vulnerable to section 455, HMRC, chose to challenge the repayment of the loan under the General Anti-Abuse Rule in order to support a section 455 charge on the loan to Mr Dougan from the parent company.

The GAAR panel said that although there were shortcomings in the legislation, there were no contrived or abnormal steps and that the arrangements represented a reasonable course of action.

It will be very interesting to see whether HMRC seek to challenge this view by issuing an assessment or a closure notice and having the matter adjudicated by the Tribunal. This would be the first opportunity for this to be done because the GAAR Panel have never published an opinion in favour of the taxpayer before – and their earlier opinions have never been challenged. That is no surprise because if a taxpayer challenges their view in the Courts, they face a penalty of 60% of the tax unless they win. Nice level playing field that one.

Discovery Assessments

I came down to earth with the case of *Dougan v HMRC TC 8471/V.* It concerned a discovery assessment (and penalties) issued on the basis of deliberate conduct by the taxpayer.

We have been here before – and the meaning of deliberate conduct was concluded by the Supreme Court in *Tooth* last year. For there to be deliberate conduct for this purpose, HMRC have to prove that the taxpayer deliberately intended to mislead the HMRC as to the truth of the relevant statement.

In *Dougan*, HMRC sought to ignore the decision of the Supreme Court (not wishing to sound too purist – that is the law!) and preferred to advance arguments which the Supreme Court said were wrong and to rely on a First Tier Tribunal decision which supported their case by suggesting a much lower test of deliberate conduct. That is pretty disrespectful, but it is much more than just disrespectful when that decision has been shown to be wrong by the Supreme Court.

Fortunately, not only for the taxpayer, but for all of us, the Tribunal recognised the situation and cancelled the assessments and the penalties. The taxpayer could certainly be criticised about the way he had failed properly to address his tax responsibilities and he deserved to suffer the consequences of his carelessness. However, careless conduct is not the same as deliberate conduct, no matter how much HMRC would like it to be.

Regrettably this is not the only case where HMRC have tried to ignore decisions of the Supreme Court because it does not suit their arguments. Let us hope that the pendulum knocks this approach on the head too.

SDLT: Multiple Dwellings

Having regard to the huge disparity in the rates of SDLT for residential property it is no surprise that claims are frequently made for Multiple Dwellings Relief. The latest one to hit the FTT is *Dower v HMRC TC 8497.*

To satisfy the test for Multiple Dwellings Relief under Schedule 6B FA 2003 the subject matter of the land transaction must consist of at least two dwellings. No surprise there.

Mr and Mrs Dower claimed that their annex, being a flat above the separate garage was a separate dwelling. It was self-contained with a secure entrance, a bedroom, a sitting room and bathroom but it did not have a separate kitchen. They cooked their meals with a microwave and a slow cooker.

Mr and Mrs Dower lived in the annex for 4 months while the main house was undergoing renovation.

HMRC said that it was not a separate dwelling, and that the Tribunal should have regard to the SDLT Manual on the matter. (I love it when HMRC do that. *We have said that this is the position – so obviously that must be right.* No need for courts then – or even laws ….)

The Tribunal explained that to be a separate dwelling, it needed to be suitable for residential accommodation, and to provide the occupant with facilities for basic living needs such as sleep and hygiene, as well as the ability to prepare food.

Under the circumstances it looks a bit difficult to say that the annex was not suitable for residential accommodation as the taxpayers lived there for 4 months and had all the necessary facilities in their separate dwelling.

The judge said that the absence of "proper kitchen facilities" weighed heavily against it being suitable for use as a dwelling. I wonder about "proper kitchen facilities"– we could have a lot of fun guessing what that means. (So tempting…

but I resist). Mr and Mrs Dower clearly thought the facilities were adequate as they lived and eat their meals there for months – although you cannot possibly have a ***proper*** meal cooked in a microwave…. I mean …obviously.

That clearly weighed heavily with the judge but she highlighted other tests which needed to be considered before the annex could be regarded as a separate dwelling:

- There was no separate council tax or postal address
- Whether it could have been sold separately?
- The occupation for 4 months was temporary because they were only living there while the main house was being renovated
- It would have been inconvenient for Mr and Mrs Dower to have had unrelated persons living there.

It is difficult to see how these tests can impact on whether the annex was suitable for residential accommodation. Indeed, if these tests hold, they would seem capable of disqualifying almost any separate dwelling from Multiple Dwellings Relief. Anyway, that is where we are - in the absence of an appeal.

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