UK Tax Bulletin

October 2022

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Latest Rates of Inflation and Interest

The following are the latest rates: October 2022

Current Rates	
Retail Price Index: August 2022	345.2
September 2022	347.6
Inflation Rate: August 2022	12.3%
September 2022	12.6%
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 4.75% from 11th October 2022.

There is one exception: Quarterly instalments of corporation tax bear interest at only 3.25% from 3rd October 2022.

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 1.25% from 11th October 2022.

Official rate of interest

From 6th April 2020 2.25%

From 6th April 2021 2 %

More Nudge Letters: Residence

HMRC are now sending letters to people who have included in their tax returns a claim for exceptional days to be disregarded in determining their residence status under the Statutory Residence Test.

Apparently HMRC have identified a number of common errors so they are encouraging taxpayers to check their returns and make any necessary amendments (while they can). Particular reference is made to the HMRC Help Sheet SA109 which directs the reader to Annex B of the RDR Manual paragraph 13200 which explains the meaning of exceptional circumstances for this purpose.

As I have said, I think these nudges can be genuinely helpful…. but not always. Unfortunately, this one is seriously unhelpful.

This particular Help Sheet provides guidance which is incorrect. In TC 8464 the Tribunal held that the assertion by HMRC (in their guidance) that circumstances are not exceptional if they are foreseeable, was wrong. Similarly, HMRC were wrong to say (in their guidance) that coming to the UK for medical treatment voluntarily did not count. Unfortunately, the guidance still contains these errors. There are others.

Of course, the Help Sheet was issued in April just before the Tribunal judgment in TC8464 was released and it naturally contained the HMRC views at the time. However, it is a pity that letters are going out to taxpayers directing them to guidance which is now known to be wrong.

Residence: Old Rules

Anybody reading the case of *Kevin McCabe v HMRC TC 8609* is likely to conclude that the Statutory Residence Test is a blessing in disguise (although pretty heavily disguised in my view).

The case itself is perhaps unremarkable as it is typical of residence cases prior to 2013 where the most unbelievable amount of information had to be provided to HMRC and the FTT about practically every day (and item of expenditure) for a 6

or 7 year period (at eye watering cost to the taxpayer and HMRC) and you simply drown in the facts.

I won't go into much detail but the case concerned a taxpayer who left the UK to live in Belgium where he was resident for 7 years. HMRC claimed that he did not cease to be resident in the UK and remained liable to income tax and capital gains tax. All familiar stuff – and not of much current interest perhaps.

However, anybody concerned with residence issues under the IR20 regime will find a detailed summary of the position prior to 2013– and in particular the factors which caused the FTT to conclude that Mr McCabe had not loosened his UK ties sufficiently to have lost his UK residence.

Although we are mainly (and mercifully) free of all this now, I would just mention that these old rules are still relevant when looking at various aspects of the Statutory Residence Test as I mentioned in June – such as determining whether somebody was an *arriver* or a *leaver*, although the number of those cases is naturally going down now, as 2013 recedes into the distant past.

Another aspect of the case, of more continuing interest, was the effect of the UK/Belgium double tax agreement and the tie breaker clause - dealing with issues of permanent home, habitual abode, and centre of vital interests.

Information Notices

It is well known that HMRC can issue an Information Notice under Schedule 36 FA 2008 for information and documents:

> "if the information or document is **reasonably required** by the officer for the purpose of checking the taxpayer's tax position."

There has been some divergence of views at the FTT regarding whether the burden of proof about whether the information sought by an Information Notice is reasonably required, is on the taxpayer or HMRC.

In the case of *Joshy Mathew v HMRC TC4342* it was held that:

> "We find that the weight of authority is that the burden of proof in relation to the "reasonably required" test in Sch 36 Notices rests on the appellant, and not on HMRC".

This conclusion was followed in other cases but it now seems to be agreed that this is wrong and the burden of proof falls squarely on HMRC. HMRC has accepted this to be correct in a number of subsequent cases (examples being *One Call Insurance Services Ltd v HMRC TC8509* and *Perring v HMRC TC8091* and *Davies v HMRC TC8619*). I think we can take it that the question is now settled.

In *Davies* the judge added that this also applies to the burden of showing that the Inspector has reason to suspect an under-assessment of tax. She went on to set out the meaning of "reasonably required" which excludes fishing expeditions:

> "reasonably required" must impose a limitation on HMRC's issue of notices to the extent that each item of information requested must be required for the purposes of an enquiry into the taxpayer's tax affairs and that it is objectively reasonable for HMRC to do so. …. HMRC must be pursuing a legitimate purpose in issuing the notice, so HMRC cannot undertake a fishing exercise where HMRC have no reason to believe tax has been understated.

Skeleton Arguments

In March I mentioned the case of *Gunfleet Sands Ltd v HMRC and KPMG TC8424* which concerned the ability of third parties to get hold of really interesting documents (like skeleton arguments) in a case which has nothing to do with them, but might be helpful in connection with a dispute they may have with HMRC. Goodness me; all the detailed arguments of counsel for the taxpayer and for HMRC on the issues are bound to be more than just helpful.

The Supreme Court has made it clear that a third party has no right of access to such documents, but that the courts have power to grant access if the applicant has a legitimate interest, and if it would advance the principle of open justice.

The courts have not always been satisfied that a legitimate interest existed – for example where the case was at an early stage and not yet listed for hearing: *Cider of Sweden Ltd v HMRC TC 8407*.

However where the applicant was a barrister practising frequently in the Tribunal and interested in related litigation, he was held to have a legitimate interest in the disclosure of certain documents.

We now have the case of *BouncyLagoon v HMRC TC8613* (what a great name!) where the Upper Tribunal held that a journalist requesting access to or copies of documents need do no more than indicate that they are sought for journalistic purposes:

> "the journalist stands in the place of the public and enabling the journalist to understand and scrutinise the justice system and how and why decisions are made also enables the public to do so which advances the principle of open justice."

I understand that more use is made of this opportunity than may generally have been thought… and I am not surprised.

A GAAR Decision on SDLT:

The GAAR Panel have published their opinion on arrangements undertaken by a taxpayer with a view to avoiding SDLT on the purchase of a residential property.

It was complicated of course, but in essence there was

- a settlement of the purchase price

- the establishment of a separate bare trust

- an Alternative Finance Agreement involving a lease

- a lease agreement involving a lease at a peppercorn

It would seem that the arrangements must have worked otherwise they would have been challenged in court in the normal way. Having regard to the legislation at the disposal of HMRC such as section 75A FA 2003, and the *Ramsay* doctrine and purposive interpretations, that is quite an achievement. (How did it work? Never mind). So in order to strike down the advantages gained by the taxpayer a reference was made to the GAAR Panel on the grounds that the arrangements were abusive and should be rendered ineffective.

There is an interesting philosophical point here that if the arrangements worked and could not be challenged on the grounds of *Ramsay* or on a purposive interpretation of the legislation, they must have been in accordance with the intention of Parliaments. So how can it be an abuse? And how can anybody (other than Parliament) say that the intention of Parliament should be disregarded and tax should be paid when Parliament provided that it should not. Worse still, why should you be penalised so harshly (a penalty of 60% of the tax can obviously be described as harsh), by following the law in this way.

Like many philosophical points there may not be an answer - except to say that something is not quite right here. Anyway, I should move on.

The decision was very detailed in its explanations about its authority and procedures but not so detailed in its reasoning on the substantive issue. It was acknowledged that there was no shortcoming in the legislation which was being exploited. The Panel said that:

> "We think that it is clear that the policy objectives of Schedule 16 FA 2003 are to provide a framework for charging SDLT where trusts – whether bare trusts or other trusts – are involved in an acquisition"

I would respectfully suggest that the Yellow Books provide a framework for charging income tax, CGT, IHT etc where trusts are involved, but that is not really enough to found a charge to tax.

More directly perhaps, the reference to the legislation suggest that the legislation should be applied to the transaction, which seems to be at odds with the finding that "there are no obvious shortcomings in the legislation being exploited"

Another key element in the decision was that "the steps all seem to fall under the meaning of contrived or abnormal steps" and therefore the requirement for being abusive was satisfied.

The steps were of course contrived. All tax planning is contrived to a greater or letter extent. The famous example of investing in an ISA is a contrived step – being a step deliberately done for a specific purpose – which is to secure the freedom from tax which an ISA provides. Will this be struck down by the GAAR Panel. Of course not. Why not?

The answer is that the purchase of the ISA may be contrived but it is a reasonable course of action – whereas the arrangements for the SDLT saving were not. (However, this of course makes the statutory reference to contrived steps completely redundant). So, on this basis all tax planning must now satisfy the elastic term "reasonable" which means different things to different people – so out of the window goes any kind of consistency or certainty of the law.

It would seem to follow that we might be able to throw away our yellow (and orange) books because what the law says will not determine whether tax should be charged. A silver lining perhaps… maybe.

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