UK Tax Bulletin

December 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: December 2022

Current Rates	
Retail Price Index: November 2022	358.3
October 2022	356.2
Inflation Rate: November 2022	14%
October 2022	14.2%
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 6% which will apply from 6th January 2023.

There is one exception: Quarterly instalments of corporation tax bear interest at only 4.5% from 26th December 2022; interest on overpaid instalments will be paid at 3.25%

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which will give a rate of 2.5% from 6th January 2023.

Official rate of interest

From 6th April 2020 2.25%

From 6th April 2021 2 %

Payment of Dividends I

There have been two cases recently on the taxation of dividends – and in particular when dividends are paid for tax purposes. The analysis of interim dividends and final dividends is strikingly different.

A final dividend declared by the shareholders in general meeting, or by written resolution, is treated treated as paid for the purposes of the Corporation Tax Acts 'on the date when they become due and payable: see section 1168 CTA 2010.

The date when a final dividend becomes due and payable is usually set out in the resolution of the company. If a date for payment is not specified, the date of declaration of the dividend is the due and payable date, creating an immediately enforceable debt

An interim dividend is a dividend paid on the authority of the directors (not the shareholders) under power given to them by the Articles: see for example Article 30 of the Model Articles and previously Table A. No entitlement to the dividend (nor any enforceable debt) arises until actual payment. At any time before payment the directors are able to change their minds and decide not to pay the dividend: see *Potel v CIR TC 46 658.*

In the case of an interim dividend the question arise when payment is actually made. It has been suggested that unless provided otherwise by the Articles, payment must be in cash, in which case merely crediting the dividend to the shareholders loan account with the company would not be sufficient. That could be highly troublesome if a dividend is resolved to be paid by the directors where there are inadequate funds to make a payment in cash, and this happens shortly before the year end for the purpose of clearing an overdrawn director's loan account.

The case of *Garforth v Newsmith Stainless Ltd 52 TC 522* provides a lifeline here as the High Court held that the placing of money unreservedly at the disposal of the director was equivalent to payment in the case of a bonus. It is assumed this reasoning applies equally to the payment of a dividend but this has yet to be conclusively decided – although it is clearly the view of HMRC: see CT Manual paragraph 15205.

However there is a sting in the tail here. HMRC take the view that placing the money unreservedly at the disposal of the shareholder by crediting it to their loan account means that the entries must actually be made in the books of the company – and if that does not occur until after the year end, payment will not be treated as having taken place.

With these principles in mind it is interesting to read the recent case of *Gould v HMRC TC 8647.* In this case the directors resolved to pay an interim dividend on 31st March 2016. The dividend was paid to one of the shareholders on 5th April 2016 and to the other shareholder in December 2016 (when he was not UK resident).

HMRC argued that both dividends should be treated as paid on 5th April 2016 on the grounds that the payment to the first shareholder gave rise to an enforceable debt in favour of the other shareholder. They claimed that the company's articles and the common law required the company to pay dividends equally and proportionately to shareholders of the same class. So on the 5th April 2016 the non resident shareholder had an enforceable right to his dividend – and that represented payment.

Not so said the FTT. They acknowledged that the failure to pay the dividend to the non resident shareholder on 5th April may have given rise to legal remedies – but that did not mean an enforceable debt had arisen.

The decision reinforces the established position that an interim dividend must actually be paid.

Payment of Dividends II

The decision in Marcus and Karen Jays v HMRC TC 8639 dealt with a rather different situation. In this case the company declared a dividend – in a rather confused manner – which the Tribunal held was a final dividend. Accordingly it was deemed to be paid in accordance with section 1168 CTA 2010 as under:

> "For the purposes of the Corporation Tax Acts dividends are to be treated as paid on the date when they become due and payable."

The dividend resolution declared a dividend but specifically provided that part of the dividend was to be credited to a blocked account and could not be withdrawn by the shareholder until further notice.

The taxpayer therefore argued that the blocked amount had not been paid – and could not be treated as being paid until withdrawal was permitted.

HMRC argued that the dividend had been paid. It had been declared, the reserves of the company had been diminished and the directors loan account balance had been increased. Furthermore, the minutes or the undertaking did not represent a legal restriction precluding access to the dividends and that the taxpayers were merely agreeing not to take the cash until the company could afford to pay.

The FTT would have none of this. They said that they crucial point was whether the amount of the dividend was an enforceable debt – and because of the blocked nature of the loan account, it was not an enforceable debt. Therefore it was not due and payable until it was enforceable.

The logic of the decision is clear – and there is good authority for the reasoning - but it does look a bit too good to be true. By crediting the dividend to the loan account, the shareholder has all the advantages of having the dividend; he would not have the money in his hands, but he might not need it. It would be the same as him having it in his bank account – as long as he did not need to actually spend it. And if he did want to spend it, why could he not use the loan account as security for borrowings. After all the company is showing the amount of the dividend as a creditor in the accounts, indicating that he is actually owed the money. I wonder if we will be hearing more about this.

Embiricos – Update

In January, in the case of *Embiricos v HMRC [2022] EWCA Civ 3* the Court of Appeal upheld the argument of HMRC that they had no power to issue a partial closure notice in respect of the taxpayer's remittance basis claim, without specifying the tax payable on that basis.

Having regard to the High Court decision in *R (Archer) v HMRC [2016] EWHC 296* the Court of Appeal held that a final closure notice was not valid unless it stated the amount of tax due, and that this principle applied equally to partial closure notices.

Section 28A(1A) TMA 1970 provides that:

> "Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a partial closure notice) that the officer has completed his enquiries into that matter".

In the case of *Embiricos*, the question was essentially whether the taxpayer's claim for the remittance basis was a matter to which HMRC's enquiry related.

HMRC argued that this must mean a matter in respect of which HMRC could issue a final closure notice – and that the rejection of the remittance basis claim by HMRC would inevitably lead to an assessment to tax on the arising basis. A valid PCN would therefore have to state the conclusion that the remittance basis was disallowed and make the amendments to the self-assessment to bring into charge the relevant foreign income.

For this reason Mr Embiricos had to provide all the details of his worldwide income and gains – even though none of it would be taxable unless and until it had been established that he had acquired a UK domicile.

So the essential conclusion here is that when issuing a partial closure notice or a final closure notice, it is necessary for the tax payable as a result of those closure notices to be included in the notice. In the case of a foreign domiciled individual, that means that full details of his worldwide income and gains have to be provided to HMRC so that the PCN or FCN can be issued even before it has been established that such income or gains are within the scope of UK tax.

The decision of the Court of Appeal now concludes this issue (permission to appeal to the Supreme Court was refused) – but it is difficult to see that a PCN serves any practical purpose at all.

Anyway the arguments continue. Mr Embiricos has now applied to the FTT (TC 8664) for the question of his domicile to be determined as a preliminary matter before the quantum of his liability was considered.

The key principle in dealing with applications for a preliminary hearing (one of the Wrottesley criteria set out by the Upper Tribunal) is that the matter should be a "succinct, knockout point". It was accepted that it would be a "knockout point" but the FTT did not consider that a preliminary hearing on Mr Embiricos' domicile was be a succinct point. Furthermore the likelihood of an appeal could cause significant delay to the subsequent hearing on liability The judge drew attention to the case of *Gaines-Cooper* where the preliminary hearing on his domicile and residence took place in 2006 and has only recently reached the FTT for the determination of liability, during which period the taxpayer had died.

The FTT held that the resolution of the domicile as a preliminary issue is unlikely to reduce the time required for dealing with the liability, but carried the risk of increased costs and delay – so a preliminary hearing should not take place.

The reasoning here is not easy to grasp because Mr Embiricos' domicile will obviously need to be determined before any liability can be determined. And if he is found not to be UK domiciled there would be no need to argue about quantum - and all the time and costs relating to quantum would be saved.

Associated Companies

I imagine that there are very few practitioners who have not been faced with the difficult and irritating situation where two companies are associated because they are owned by connected persons (eg brothers) but have little to do with each other.

The fact that the companies are associated has an adverse effect on the rate of tax they pay or their liability for quarterly instalments, or the loans to participators legislation or numerous other provisions.

Extra Statutory Concession C9 gives some relief where there is no "substantial commercial interdependence" between the two companies.

This concession is being replaced by sections 18A to 18N CTA 2010 so that with effect from 1st April 2023, whether companies are associated will be determined by reference to whether they are financially interdependent, economically interdependent or organisationally interdependent.

Financially interdependent means one giving financial support to the other or having a financial interest in the other company's activities.

Economically interdependent means seeking to realise the same economic objective, with the activities of one benefiting the other or involving common customers.

Organisationally interdependent means having common management, employees, premises or equipment.

These rules are still capable of a wide interpretation – but not as wide as ESC C9.

Happy New Year

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