UK Tax Bulletin

January 2023

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: January 2023

Current Rates	
Retail Price Index: November 2022	358.3
December 2022	360.4
Inflation Rate: November 2022	14%
December 2022	13.4%
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 applies 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 gives a rate of 2.5% from 6th January 2023.

Official rate of interest

From 6th April 2020 2.25%

From 6th April 2021 2 %

Personal Service Companies:IR35

Relax. I am not going to bang on any more about this subject and the difficulties (and confusion) to which the various conflicting cases have given rise. I would just mention that there has been another decision on the subject: *S & L Barnes Ltd v HMRC TC 8697.*

This involved a TV personality and commentator who provided his services (inter alia) to Sky through a personal service company; usual stuff. The FTT found that if the services were provided under a hypothetical contract directly between him and Sky, (as required by section 49 ITEPA 2003), it would not have been a contract of employment.

This case was therefore decided in favour of the taxpayer; but there are a similar number of cases on similar facts which have decided in favour of HMRC. So where does that leave us? Still in need of something definitive so that taxpayers and advisers can have some idea of what the law is on this subject.

Information Notices: Privilege

HMRC have extensive powers to seek information and documents from a taxpayer or from a third party and the provisions of Schedule 36 Finance Act 2008 are widely known.

It is well established, and enshrined in Schedule 36(23), that HMRC are not permitted to seek information or documents covered by legal professional privilege.

It is with this in mind that I read the comments of the FTT in the case of *HMRC v Third Party and Taxpayer TC 8706* which involved an application by HMRC for the issue of a Third Party notice under Schedule 36(3).

A lengthy list of information and documents were required by HMRC from the taxpayer's solicitors relating to the purchase of two properties and this included:

> "all correspondence between the firm and the taxpayer in respect of the property purchases, including but not limited to letters, emails, faxes, notes of telephone calls and any completed forms sent to the firm"

The Tribunal judge rejected the argument that the information was protected by legal professional privilege saying that:

> "I find that it is highly unlikely in relation to a conveyancing matter that all the information and documents held by a law firm on its files would be subject to legal professional privilege"

I found this surprising in the light of the recent case of *Perring v HMRC TC 8091* in which the Judge explained the position in the following terms:

> "All correspondence between the Appellant and their solicitor in connection with the purchase of property and the fact that legal advice has been taken in that connection is protected by legal professional privilege".

Indeed, the decision in *Perring* was not mentioned in the judgment at all. Neither decision is binding of course, and there are loads of other cases (of binding authority) which address the issue of privilege in detail.

It is just odd (and unsatisfactory) that the two FTT judges should come to what appears to be a diametrically opposing view on such an important issue.

Unfortunately, we will not have the benefit of the matter being reviewed on appeal because there is no right of appeal against an Information Notice issued by HMRC with the approval of the Tribunal; a right of appeal is specifically denied by paragraph 29(3).

GAAR Opinions and Appeals

A good deal has been written about the General Anti Abuse Rule and the decisions of the GAAR Panel to whom HMRC can refer cases where they feel that the taxpayer has entered into a transaction which involved contrived or abnormal steps and that the arrangements did not represent a reasonable course of action - with the intention of securing a tax advantage.

Such a reference to the GAAR Panel is of course only made if the transactions are in accordance with the law. If they are not in accordance with the law then HMRC would obviously challenge them before the Tribunal.

Decisions of the GAAR Panel are not binding and have no particular force – but the Panel is comprised of tax professionals of impeccable skill and reputation, so their decisions will always be taken seriously. However they do not interfere with the right of the taxpayer to appeal against an assessment or counteraction notice issued by HMRC .

It is therefore interesting to find that although it has been operational since 2013, the case of *Wired Orthodontics Ltd and Others v HMRC TC 8679* is the first case in which a decision of the GAAR has been relied on by HMRC at a Tribunal.

There may be a reason for that. Section 212A Finance Act 2013 provides that if HMRC charges tax on the basis of an opinion from the GAAR Panel that a certain course of action should not be allowed to work on the grounds that it is contrived or abnormal and not a reasonable course of action etc, you challenge it at your peril. If you challenge it and win – that's fine. But if you do not succeed, there is a penalty of 60% of the tax. It is therefore hardly a surprise that there has been a certain reluctance to take such matters to appeal.

In essence this was a tax scheme involving the purchase of gold for employees in a manner intended to provide them with a substantial sum of money without a charge to income tax or NIC. The GAAR Panel said it did not or should not work. HMRC issued determinations charging tax on the basis that the scheme was not effective and argued that if they were wrong, the GAAR applied, and the intended tax advantages should be counteracted.

The FTT held that the arrangements did not work under the law so the GAAR aspects did not need to be considered. I expect the taxpayer had mixed feelings about all that.

It is interesting to note that although the provision of the gold to the employees was regarded as earnings in their hands (and would therefore have been assumed to have been a deductible expense) the FTT held that it was not deductible on the grounds of duality of purpose.

I wonder what will happen next.

Investors Relief

I read an article recently which suggested that the Investors Relief introduced by the Finance Act 2016 is the most pointless tax relief. Apparently only 60 claims to the relief were made in 2020/21 at a total tax cost of £1.3m – compared with 47,000 claims for Entrepreneurs Relief (Business Assets Disposal Relief) at a tax cost of £1billion.

Strange but true, I think. Investors Relief looks like a really attractive relief – allowing investors to benefit from a 10% rate of capital gains tax on gains of up to £10m on the sale of shares in an unquoted trading company which had been held for 3 years.

The relief can apply where BADR does not – maybe because the company carries on a disqualifying trade applies (or maybe because it has been fully utilised) – and also in circumstances when relief under the Enterprise Investment Scheme does not apply.

It applies to ordinary shares, subscribed for and fully paid, and there is no minimum or maximum holding. The shares must be held for a minimum of three years during which period the shareholder must not be a paid employee of the company or any connected company. Trusts can also claim the relief if an eligible beneficiary has an interest in possession for the three year period.

Lots of conditions of course – but a really valuable relief, especially now that BADR is so restricted. Maybe it is a bit early for significant claims to have been made as

the shares must have been subscribed for after 17th March 2016 and the shares would not have qualified for relief until 2019/20 at the earliest….but even so.

Settlements Legislation

The settlements legislation contained in Chapter 5 Part 5 ITTOIA 2005 is fiendishly complicated – in common with many provisions relating to anti-avoidance.

One issue which creates recurring problems is the meaning of "settlor" for income tax purposes. The definition is found in section 620 ITTOIA 2005 as being any person by whom the settlement was made, directly or indirectly. Section 620(3) explains that a person makes a settlement if they have provided funds directly or indirectly for the purposes of the settlement (or undertaken to do so), or if they have made a reciprocal arrangement with another person to do so.

There can be more than one settlor – and often there is, where a trust is established by one person and funds are provided by somebody else, or by a number of other people. So there may be multiple settlors – a conclusion which could be missed if you just look at the trust deed and the definition of the settlor.

What is meant by providing funds directly or indirectly has been the subject of numerous cases, the latest being the Upper Tribunal's decision in *Clipperton and Lloyd v HMRC UT/2021/70/71/95/96.*

In (very) abbreviated terms, a company (owned by the Appellants) established a trust to which it transferred a B share on which a large dividend was subsequently declared. The Appellants were beneficiaries of the trust and the trustees distributed the money to them – apart from a small amount which was payable to the company which was also a beneficiary. They argued that because the company was the settlor and capable of benefiting from the trust, the income of the trust was deemed to be the company's for income tax purposes under section 624 – so it could not be taxed on them.

Nice argument – but no cigar because the whole plan was struck down on *Ramsay* principles.

An interesting point was whether the individual appellants were settlors because it was the company which provided all the funds. No funds were provided by them – so how could they be settlors? Even if they were settlors, section 644 limited the application of section 624 to the extent of the property that they had provided.

However, it was held that because they were the sole owners (and managers) of the company (and therefore were instrumental in – not to say fundamental to – all the arrangements) they had indirectly provided funds for the purposes of the settlement, and had no protection from section 644.

Like it or not, this is a perfectly understandable conclusion, but the settlements legislation is difficult enough as it is; when it is overlaid with *Ramsay* principles it gets significantly worse.

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Important Note