UK Tax Bulletin

February 2023

Field Court Tax Chambers

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Latest Rates of Inflation and Interest

The following are the latest rates: February 2023

Current Rates	
Retail Price Index: January 2023	360.3
December 2022	360.4
Inflation Rate: January 2023	13.4%
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 6.5% which applies from 21st February 2023.

There is one exception: Quarterly instalments of corporation tax bear interest at only 5% from 13th February 2023; interest on overpaid instalments will be paid at 3.75%

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 3% from 21st February 2023.

Official rate of interest

From 6th April 2020 2.25%

From 6th April 2021 2 %

Domicile

It is always difficult to draw conclusions from cases on domicile as they are so heavily dependent on the facts. However, they usually set out in detail the complex and antiquated legal principles which are necessarily at the heart of the case.

So it is with the latest case on the subject: *Jeremy Coller v HMRC TC 8738*. Mr Coller had a Austrian domicile of origin (being his fathers domicile at the date of his birth) but his father died during his infancy and he subsequently acquired a UK domicile of dependency from his mother.

When he reached the age of legal capacity for domicile purposes, his domicile had to be determined by reference to his own circumstances and intentions. The FTT said (or perhaps assumed) that his UK domicile of dependency became a domicile of choice, but held that he acquired a domicile of choice in the UK anyway.

In finding that Mr Coller was domiciled in the UK, the FTT set out in detail all the tests for the acquisition of domiciles of dependency and of choice which make interesting and informative reading.

I was surprised that no reference was made to the issue of *chief residence*. The FTT set out the important passage from *Udny v Udny HL 1869* where the concept originated and which has been crucial in other cases, but made no reference to it. That seemed a little odd because Jeremy clearly had his chief residence in the UK – in fact his only residence – and that could have been conclusive. Maybe it did not matter having regard to the other factors.

Some of the FTT's propositions of law caught my eye, although nothing to affect the clarity and firmness of the decision. The FTT suggested that Jeremy's father:

> "effectively abandoned his domicile of origin in the sense that he definitely did not want to go back to Austria."

I would respectfully suggest that this does not accurately reflect the position. A domicile of origin is not abandoned by a firm resolve never to return to the country of origin. Abandoning a domicile of origin is not a negative test - it is a positive test – satisfied by the acquisition of a domicile of choice. A person can leave the UK with the firmest possible intention never to return to the UK but that will not cause his domicile to be lost. Unless he acquires a domicile of choice in another country by residing there with the intention of residing there permanently or indefinitely, he will never lose his domicile of origin.

It was also suggested by the FTT that:

> "a domicile of origin is adhesive … that adhesiveness is considerably lessened where the individual in question has few, if any, links or attachments to that domicile of origin".

Again, I respectfully suggest that this is an overstatement. A person is given a domicile of origin whether he likes it or not. He may never have been to that country, may never intend to go to that country, may know nothing about its language or culture and have absolutely no connections with it whatsoever. Bad luck. He is stuck with it. His links or attachments to that country may be zero but that will not be relevant. What matters is whether he has acquired a domicile of choice in another country by residence and the intention of permanent or indefinite residence. If he does not – perhaps by moving about and not settling in any particular country – he will never lose his domicile of origin.

There was an interesting discussion about the nature of the intention required for the acquisition of a domicile of choice. Mr Coller argued that:

> "unless you have given positive thought and formed a positive intention about where you are going to die, or end your days, you cannot acquire domicile of choice."

That sounds logical. The test is that you must reside in a country with an intention to reside there for the rest of your days – and that certainly indicates a need for a positive and directed intention.

The FTT did not accept this and suggested that:

> "If you reside in a country without any intention of leaving it then you are likely to be settled there and to have a singular and distinctive relationship with it."

I am afraid that I respectfully suggest that this is overstated too. An intention can hardly be said to exist in circumstances where there is specifically no intention. The paradigm case is where a person has lost capacity and therefore is incapable of acquiring a fresh domicile.

The point is perhaps more subtle - and a clue comes from the case of *Fuld (ChD 1967)* - that the facts can represent evidence of an intention to continue to reside in the UK even if the taxpayer asserts otherwise. In *Fuld* it was said that his intention to leave the UK was not a real intention but only a "vague hope or aspiration". An inference can be made regarding the taxpayer's true intention, but that is not the same as there being no intention at all.

Only or Main Residence

Everybody is familiar with the capital gains tax private residence exemption in section 222 TCGA 1992. However there remains considerable uncertainty about what represents a main residence.

A fundamental condition is that the property must be a *residence.*

The starting point in all the authorities on this matter is always the judgment of Lord Widgery in *Fox v Stirk [1970] 3 All ER 7* who said that "a residence" means:

- The place where a man is based or continues to live;
- Where he sleeps, shelters and has his home;
- Something other than temporary accommodation;
- There is some expectation of continuity with a degree of permanence.

The subject has recently been considered by the FTT in the case of *Cohen v HMRC TC 8718* although not for the purposes of capital gains tax. It was in respect of the relief from the 3% SDLT surcharge which does not apply where the property purchased is a replacement for the purchaser's only or main residence.

The CGT exemption is extremely but is much misunderstood by clients (I am going to sell this house that I have had for years, so I am going to move in so that it is completely exempt from tax. Er, No). The SDLT relief is not as valuable, but 3% of the purchase price of a house is still going to be significant.

The trouble is that the decisions of the courts on the meaning of an only or main residence are so variable that it gives people confidence that their hopeless arguments might succeed. Some of them do.

In the case of _Cohen_, Mr Cohen moved into a house for 10 days. He claimed that it was his only or main residence and therefore avoided the 3% SDLT surcharge on the purchase of another property. However, before he moved in he had already decided that he was not going to live there and was in the process of purchasing another property where he did intend to live.

It is difficult to see how he could possibly have satisfied the above tests – or perhaps any of them – for the house to be his only or main residence, or indeed a residence at all, but he would no doubt have been encouraged by the case of _David Morgan v HMRC TC 2596._

Mr Morgan was getting married. He was in the process of purchasing a property which would be the matrimonial home. He was living with his fiancée's family but unfortunately two weeks before the purchase of the intended matrimonial home, the relationship ended. So he went to live with his parents. Nevertheless he carried on with the purchase of the property and moved in for two weeks specifically to prepare the house for renting and then moved back to live with his parents. The property was let and then sold. He claimed the exemption – to which many might have thought: You Cannot be Serious! However, the Tribunal decided that Mr Morgan had lived in the property for two weeks and this was enough to qualify it as a residence.

Mr Cohen might also have known about _Core v HMRC 7917._

Mr and Mrs Core bought a property and after they moved in they were soon approached by somebody who made an offer for the property. They rejected the offer– and did so again when the offer was repeated. However, about a month later, the purchaser made a higher offer which they accepted. They had occupied the property for 6 weeks and the Tribunal found that this was enough to represent a residence.

Mr Cohen may have been aware that there are lots of other cases where the taxpayer has lived in a property for a fairly long period as their only home but the Tribunals have said that it still did not qualify. But, even though his case may seem to be completely hopeless you can hardly blame Mr Cohen for giving it a try.

However, I think he should be grateful that he lost. If he had won and HMRC had appealed to the Upper Tribunal, he would have been at very serious risk of liability for costs.

Car Benefits

A taxable benefit arises when a car is made available to an employee for his private use by reason of his employment. That will come as no surprise to anybody. It derives from section 114 ITEPA 2003 and has a history long before that.

A crucial point is what is meant by "made available to him". Or more precisely when is the car "available". This was recently considered by the FTT in the case of *Norton v HMRC.*

Mr Norton (and his wife) were directors and shareholders of a company which had a Ford dealership and bought and sold cars. He was charged to tax on the benefit in kind of a car which he had not used at all during the year; it was off the road (and subject to a Statutory Off Road Notification) and untaxed. He did not use it and it could not legally be used.

The FTT said that this was not good enough. He could have got it taxed and could have revoked the SORN so it was sufficiently available to him and the benefit charge applied. The fact that he was contractually unable to use it did not matter either because he was a director and could have changed the contract and got rid of that prohibition too.

The Upper Tribunal have now considered Mr Norton's appeal: [2021] UKUT 00057. They took the view that the obstacles preventing Mr Norton from using the car – practical, legal and contractual – were all surmountable with comparable ease and upheld the decision of the FTT.

Surely both Tribunals were making it clear that the car was not available but it could easily be made available. It would seem to follow that they were acknowledging that the car was **not** available until such time as the obstacles had been dealt with to make it available.

And what about the 40 cars on the company's forecourt (there could have been 4000 - or any number); every one of them would have been equally available to him, and the tax on the benefit in kind would be huge - possibly unlimited. There is nothing that distinguishes the cars on the forecourt from the untaxed and unused car for which Mr Norton was charged to tax.

It is difficult to see what Mr Norton could possibly have done to avoid a benefit charge. Of course, the fact that I cannot think of anything is a failure of mine alone - but I would still like to know.

Discovery Assessments

The case of *Norton* considered another issue of importance, which is one of the conditions for the issue of a discovery assessment under section 29 TMA 1970.

The issue here was whether a discovery assessment can be issued by HMRC while the enquiry window is still open. The FTT has said that a discovery assessment issued during the enquiry period would be invalid. The enquiry period is the period between the delivery of the tax return and:

a) The closing of the enquiry window where no enquiry was opened, or

b) If an enquiry had been opened, the closure of the enquiry.

However, HMRC continue to issue assessments and to argue that they are valid. I hesitate to say so but perhaps the point is not been widely known and they have been accepted without challenge. That is difficult to defend if HMRC know the assessments are invalid – but maybe they merely say that decisions of the FTT are not binding so it does not matter.

It is going to matter now. Decisions of the Upper Tribunal such as that in *Norton* are binding authority and the Upper Tribunal has said that such assessments are invalid. A discovery assessment cannot be issued while the enquiry window is still open.

Closure Notices

Schedule 36 FA 2008 provides HMRC with extensive powers to seek information in order to check a person's tax position. Of course – that is absolutely essential – but Schedule 36 also contains numerous conditions for the proper protection of the taxpayer. (I have mentioned this once or twice before).

One important protection is the right for the taxpayer to apply to the Tribunal if he considers that HMRC has all the information they need and that the enquiry should be concluded. On such an application under section 28A(4) TMA 1970, the Tribunal is bound to direct HMRC to close the enquiry unless there are good reasons for it to continue – placing the onus of proof on HMRC to show that their continued enquiries are reasonable.

Two recent cases indicate that such applications can be worthwhile in bringing enquiries to a conclusion: *Barry Davies v HMRC TC 8619* and *Jonathan Hitchins v HMRC TC 8732*

In both these cases the continuation of the enquiries by HMRC were (regrettably- yet again) held to be impermissible fishing expeditions and the FTT directed HMRC to close their enquires and issue closure notices. They are well worth a read by anybody involved in a long running enquiry.

However, it is mistake to think of this as a silver bullet for the taxpayer.

A successful closure notice application does not mean that HMRC have to give in and agree with the taxpayers arguments. It means that HMRC have enough information for their purposes – and as a result they may well close the enquiry (and issue a closure notice amending the taxpayers self assessment) by determining the amount of tax they consider should be paid by the taxpayer.

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