UK Tax Bulletin

July 2023

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: July 2023

Current Rates	
Retail Price Index: May 2023	375.3
June 2023	376.4
Inflation Rate: May 2023	11.3%
June 2023	10.7%
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 7.5% which applies from 11th July 2023.

There is one exception: Quarterly instalments of corporation tax bear interest at only 6% from 3rd July 2023; interest on overpaid instalments will be paid at 4.7 5%

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 4% from 11th July 2023.

Official rate of interest

From 6th April 2021 2%

From 6th April 2023 2.25%

Statutory Residence Test: Exceptional Days

It may be remembered that last year the FTT examined the meaning of exceptional days for the purpose of the day count under the Statutory Residence Test.

Now that UK residence is determined mainly by how many days are spent in the UK (and the multiplicity of different day count limits just make your eyes water), what is meant by a day spent in the UK is of supreme importance.

One of the key issues is the possibility of being able to disregard exceptional days – so that if you go over the limit because of exceptional circumstances, you will not be resident for the year.

When I say supreme importance – I really mean it. Quite apart from the fact that getting your day count wrong can make you resident and therefore liable to income tax and capital gains tax, it can be so much worse. 15 years of residence can now make a person deemed domiciled and subject to inheritance tax on their world wide assets. One extra year– created perhaps by one exceptional day– can be catastrophic. This is not just a theoretical risk – I have cases.

So forgive me if I spend a little more time on this issue than normal.

The law on the subject is brief. Paragraph 22(4) provides that a day will not be counted as a day spent in the UK if:

a) The taxpayer would not have been present in the UK at the end of that day but for exceptional circumstances beyond his control that prevent him from leaving the UK, and

b) He intends to leave the UK as soon as those circumstances permit.

Paragraph 22(5) gives examples of such exceptional circumstances:

a) National or local emergencies such as war, civil unrest or natural disasters, and

b) A sudden or life-threatening illness or injury

That is all it says.

In earlier Tax Bulletins I analysed these rules, which on a plain reading of the legislation are extremely difficult to satisfy. In fact, I suggested that it was not just difficult; it was for all practical purposes impossible to satisfy these tests.

HMRC have produced some guidance on the meaning of exceptional circumstances. I am afraid that is not helpful. In parts it imposes additional conditions which are not found in the legislation, and in other parts it simply ignores conditions which are in the legislation. This is food for judicial review by both HMRC and the taxpayer – but what help is that?

Last year the case of *A Taxpayer v HMRC TC 8464* reached the FTT and provided the first judicial guidance about how paragraph 22 should be interpreted.

The judgment was very helpful to the taxpayer – but I thought it was rather too helpful and would not survive an appeal. It didn't, and the Upper Tribunal has now given us some authoritative guidance on the subject.

The judgment contains a great deal of very important stuff and I can only pick out a few things. The most significant was the meaning of "prevent" in the phrase:

> "exceptional circumstances beyond his control that prevent him from leaving the UK"

The FTT said that the events preventing the taxpayer from leaving the UK need not be just physical but could include moral obligations such as being at the bedside of a sick relative. The Upper Tribunal said this was clearly wrong. They took the meaning of *prevent* from the Supreme Court as meaning:

> "stopping something from happening or making an intended action impossible"

It is therefore very difficult to imagine any circumstance (short of being in prison or being immobilised in hospital) that would enable this test to be satisfied.

So while the FTT tried to be generous to the taxpayer in their interpretation, the Upper Tribunal have made it clear that the test is every bit as strict as was feared.

You must be prevented from leaving the UK. But how can you going to satisfy that test? Even if the airports are closed, you can get on a ferry to Ireland, France, Holland and so on; or you can get the Eurostar or the Shuttle. (Total lockdown is possible – as we know- but this could not have been contemplated in 2013).

The second issue to be examined was that each day had to be considered separately and there must be evidence to show that exceptional circumstances existed to prevent departure for each day.

The circumstances preventing departure must be exceptional. There are statutory examples in 22(5) but they are only examples. Again, moral obligations or anything like that simply do not count. The Upper Tribunal referred to the judgment of Lord Bingham in *R v Kelly [2000]:*

> "We must construe "exceptional" as an ordinary familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception which is out of the ordinary course, or unusual or special, or uncommon. To be exceptional, a circumstance need not be unique or unprecedented or very rare; but it cannot be one that is regularly or routinely or normally encountered"

This perhaps even excludes my suggestion that being in prison or immobilised in hospital are enough to satisfy the test. Clearly not. The hospitals contain many people who cannot leave - and there are lots of people in prison – so those examples can hardly be unusual or uncommon.

The Upper Tribunal did not put forward any example or indication of a circumstance which could satisfy the test. Perhaps that is only reasonable – the Tribunal concentrated on the facts of the case, and they concluded that the taxpayer certainly did not do so.

Some points do seem to have been clarified. HMRC claim in their guidance that that to be exceptional circumstances, the events which prevented the taxpayer from leaving the UK had to be unforeseeable. Otherwise, the taxpayer could plan ahead and avoid being prevented from leaving the UK. Furthermore, if they were foreseeable, they were not outside his control. The FTT said this was wrong. Foreseeability could be relevant but it is not the determining factor as suggested by HMRC. The Upper Tribunal did not disagree with this conclusion.

HMRC say that you have to be in the UK when the relevant event occurred. If you come to the UK for example for medical treatment – no deal. The FTT said this was wrong. What you have to do is to look at the position at the end of each day and see whether or not the taxpayer is prevented from leaving the UK. The Upper Tribunal did not disagree with this conclusion either – although you need evidence for each of the claimed days.

So we are not really any further forward. Before this case it was impossible to see how anybody could claim an exceptional day – other than those in 22(5) - and it was hoped that the courts would provide a sensible framework about how this could be done; after all it can be presumed that Parliament did intend that the relief was possible. We will need to wait a little longer for such guidance. In the meantime, I am afraid that the advice to anybody claiming exceptional days must be: Dream on.

Expenses in Employment

I am sorry to say that my foreboding in October 2021 over the FTT decision in *Kunjur v HMRC TC 8296* has proved to be well founded.

The sadness of this case is not that Mr Kunjur lost - but because he won. He should never have won - the case was hopeless and HMRC were bound to appeal and win, so I expect that Mr Kunjur is now saddled with the costs of the Upper Tribunal appeal: *HMRC v Kunjur [20233] UKUT 00154 (TCC)*

The rules relating to the deduction of expenses from employment income are almost too well known to be worth repetition. They have been around forever - the latest incarnation being in section 336 ITEPA 2003 which sets out the general rule that a deduction from earnings is allowed for an amount if:

a) The employee is obliged to incur and pay it as a holder of the employment and,

b) The amount is incurred wholly, exclusively and necessarily in the performance of the duties of the employment".

It must be necessary for the employment to require the expenditure to be incurred and not merely be necessary for the particular employee. So if every employee must

incur the expenditure to do his job then this element would be satisfied.

But even if you can satisfy that test it is still not enough, because you also need to satisfy the second condition: the expenditure must be incurred wholly, exclusively and necessarily in the performance of the duties.

The House of Lords in *Fitzpatrick v IRC 66 TC 407* explained that doing something preparatory to the work is not enough; it has to be "in the performance of the duties". The taxpayer was a journalist who worked for a newspaper. He purchased and studied other newspapers as an essential part of his job. Lord Templeman explained the test:

"The question … is whether when a journalist reads newspapers he is performing his duties of his employment".

His Lordship said that he was not, because the journalist did not read the newspapers in the performance of his duties, but to enable his duties to be performed.

Actually, I would respectfully suggest that the wrong target is in the judicial sights here. Whether or not the reading of the newspapers was done in preparation for, or in the performance of, the duties has nothing to do with the entitlement to the deduction. Reading newspapers does not involve incurring any expenditure. It is the act of purchasing the newspapers (not reading them) which must be done in the performance of the duties of the employment.

There are loads of cases on this point – and travelling is favourite. Although it may seem obvious that the cost of travelling to work is necessary to be able to do the work, not only is the travelling only preparatory, the expense is actually incurred to enable the employee to live elsewhere. This is pretty tough and just goes to demonstrate what a strict test is imposed by the legislation. The fact that the test is virtually impossible to satisfy has not (unfortunately) caused any judicial flexibility in its interpretation. Somebody should have told Mr Kunjur.

Mr Kunjur was a dental surgeon and he practised in Southampton where his family lived. He accepted a position in St George's Hospital in London. He found the commuting unacceptable and he also had on-call responsibilities where he was required to have accommodation within 30 minutes from the hospital to discharge his on-call duties. Accordingly, he rented modest accommodation in London where he stayed during the week. HMRC refused a deduction for this expenditure. Given

the terms of the legislation, and the wealth of authorities, that is hardly surprising. However, the Tribunal found that Mr Kunjur was entitled to a deduction for at least some of the accommodation costs.

The Tribunal said that Mr Kunjur's duties required him to be able to treat patients within 30 minutes. He could not perform his duties from Southampton and it was unreasonable to expect him to use undergraduate accommodation or to uproot his family. It was therefore necessary for him to rent accommodation in London.

There is so much authority against this proposition it is difficult to know where to start. (For anybody who is interested, a full analysis is found in the October 2021 Tax Bulletin).

With all due respect, the decision of the FTT was so obviously wrong that HMRC could never have allowed it to stand - and they didn't. The Upper Tribunal held that the FTT made an error of law on every point and disallowed all the expenditure.

Maybe Mr Kunjur felt strongly that the rules were impossibly strict and deserved to be publicised - despite the costs which were inevitably involved - in which case he should be applauded. But maybe not. Anyway the case does show (for the umpteenth time) that the rules are impossibly strict and ought to be changed. However, no change is in sight.

FTT Decisions

These cases highlight two important and very unsatisfactory features.

The first is that some parts of the legislation are so strict and impossible to satisfy, that they mislead taxpayers and cause disadvantage and damage. Taxpayers can reasonably expect that if there is a relief it ought to be possible to claim it. Otherwise why is it there. It causes a sense of grievance – and of loss - because claims are pursued at considerable cost where there is no hope of success. Such obvious unfairness damages the public perception of HMRC and undermines their quest for compliance. A perception of fairness would be so much more effective.

The second feature is the publication of First Tier Tribunal decisions. They are not binding and cannot be relied on (although HMRC rely on them if they are in their favour – and that does not help any perception of fairness). But the fact that they

are published leads taxpayers into believing that they do actually have some authority. You just have to think of the all the cases on the CGT private residence relief – many of which are inconsistent and contradictory- which have the effect of encouraging both HMRC taxpayers and to litigate.

In both the above cases the FTT were completely wrong – and to have a body of published tax tribunal cases which set out views of the law which are plainly wrong is a serious disservice to the public. One has to ask: how is the taxpayer advantaged by their publication.

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Important Note