UK Tax Bulletin

August 2023

FIELD COURT TAX CHAMBERS

FIELD COURT TAX CHAMBERS

Contents

August 2023

FIELD COURT TAX CHAMBERS

Latest Rates of Inflation and Interest

The following are the latest rates: August 2023

Current Rates	
Retail Price Index: July 2023	374.2
June 2023	376.4
Inflation Rate: July 2023	9%
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 7.75% which applies from 22nd August 2023.

There is one exception: Quarterly instalments of corporation tax bear interest at 6.25% from 14th August 2023; interest on overpaid instalments will be paid at 5%

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 4.25% from 22nd August 2023.

Official rate of interest

From 6th April 2021 2%

From 6th April 2023 2.25%

SDLT: Mixed Use

The recent case of *Gibson v HMRC TC 8869* is yet another decision on whether the land surrounding a dwelling was part of its garden or grounds. I will not dwell on it because claims to mixed use have been the subject of numerous recent cases. This one claimed (in vain) that the paddock was not part of the garden or grounds. No real surprise there.

(For devotees of this subject, the case of *Kozlowski v HMRC TC 8902*, just published, analyses the subject in more detail, including the relevant date for the determination of the use, and the effect of a commercial lease of a garage. And last week the FTT in *Espalier Ventures Property (Lansdowne Road) Ltd v HMRC TC 8914* also considered garages and a communal garden. There seems to be no end to the possible arguments here).

Whatever the merits (or otherwise) of these cases, I suggest that it is highly unsatisfactory for the Tribunal to say in *Gibson* (as they have said in other cases) that a good place to start in considering the issues is to look at the HMRC Manuals. No it isn't. The Manuals of HMRC merely represent the views of one of the parties. What if Mr Gibson (or his counsel) had written a series of articles on the subject and insisted that the judge should start his consideration on the basis of what he had written? (Maybe I should give it a try and see what happens).

I would suggest that a good place to start is with the skeleton arguments of each of the parties – and to consider them on their intrinsic merits.

One sad element of this decision was that Mr Gibson missed out on claiming Multiple Dwellings Relief by failing to raise the point until it was much too late. We do not know whether he had a decent claim to the relief because the Tribunal held that he did not make the claim in time, and he provided little by way of evidence. The availability of the relief did not form part of the decision, so he did not have any right of appeal on the issue either.

Interest on Unpaid Tax

When attempting to settle or agree a disputed liability with HMRC there will often be issues involving a degree of compromise. (Not many, because of the notoriously unhelpful HMRC Litigation and Settlement Strategy – but I am talking principles here).

Sometimes a penalty arises but HMRC has a wide discretion to agree a figure of penalties which befits the circumstances – allowing it to be reduced because of special circumstances, or even suspended in certain cases. Unfortunately, and to the frustration of many taxpayers, there is no such discretion when it comes to interest on the unpaid tax under section 86 TMA 1970. The interest is a statutory imposition over which HMRC has no discretion. Nor has the Tribunal. And when the Tribunal did reduce the interest in the case of *Gretton v HMRC TC 776,* it was quickly overturned on appeal.

However, HMRC has issued some new guidance in their Debt Management Manual saying that you can object to late payment interest where there are mitigating circumstances.

This is very welcome. I would not dream of complaining, but if the Tribunal has no power to mitigate the interest, I have real difficulty in understanding how HMRC can have authority do so. (There could be no greater mitigating circumstances than in *Gretton* where a blameless elderly couple were victims of a fraud, but that did not help them.)

Anyway – thank you very much.

Domicile

This important (and always controversial) subject has come in for a bit of an airing recently in the FTT.

The cases of *Shah v HMRC TC 8842* and *Strachan v HMRC TC 8858* were both concerned with the possible acquisition of a domicile of choice but from a different starting point. In *Shah* the taxpayer had a domicile of origin in Pakistan (probably) and the question was whether he had acquired a domicile of choice in the UK. In *Strachan* the taxpayer had a domicile of origin in the UK and the question was a whether he had acquired a domicile of choice in the US.

Domicile cases are always heavily dependent on their own facts (which different judges can quite properly interpret differently, based on their context) and they rarely provide a reliable precedent. It is the underlying principles of law which are important.

In *Shah*, the essential point is that he had been living in the UK for decades and his express intention of leaving the UK to live in India was not adequately supported by, or consistent with, the surrounding facts. He was settled in the UK and his intention of leaving was no more than "a vague hope or aspiration", the test set out in *The Estate of Fuld (No. 3) (1968).*

The Tribunal concluded that he had:

> "the intention of remaining permanently in England and so acquired a domicile of choice in England and Wales at some point after 1973".

This decision is clear and difficult to dispute on the facts, but it is rather undermined by the immediately following sentence:

> "We consider that it is not possible to infer that [Mr Shah] had subsequently formed a clear and definite intention of leaving England and moving to India any time thereafter and so find that he did not abandon this domicile of choice before the date of his death."

This is seriously confused because if Mr Shah had acquired a domicile of choice in the UK, then subsequently forming an intention to leave would have made no difference. Contrary to what is said in the judgment, this would not have caused his domicile of choice to be abandoned. (I don't suppose it really made much difference but it is bit like a thirteenth chime).

To lose a domicile of choice he would have needed more than an intention of leaving the UK. He would need to have ceased to reside in the UK *and* have ceased to intend to reside in the UK permanently or indefinitely: Dicey Rule 13.

The case of *Strachan* was a little more straightforward and of course crucially dependent on its facts. Mr Strachan had a UK domicile of origin (there was an interesting debate about whether it was Scotland or England and Wales – but never mind) and the issue was whether he had acquired a domicile of choice in Connecticut. (That is another interesting issue because you cannot have a domicile in the USA – you can only be domiciled in a particular state. A subject for another time perhaps).

The onus of proof was on Mr Strachan to show that he had lost his domicile of origin by acquiring a domicile of choice in Connecticut. To do so he had to satisfy Dicey Rule 10 as follows:

> "Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise."

The intention of residing permanently or indefinitely has been held to mean that the person intends to reside in that country until the end of his days, unless and until something happens to make him change his mind. see *IRC v Bullock [1976] STC 409*; *Bell v Kennedy [1868]LR 1 Sc*; *Henwood v Barlow Clowes International Ltd [2008] EWCA 577.*

There were a number of strands of argument in this case (not least the issues surrounding the concept and relevance of a "chief residence") but the key finding of the Tribunal was that at the relevant time Mr Strachan was residing in the UK and that he did not intend to reside permanently or indefinitely in Connecticut.

Distributions

A most interesting case recently hit the wires involving Jasper Conran. *HMRC v Jasper Conran and others [2023] UKUT 00166 (TCC)*

In 2007, an LLP of which Mr Conran was the controlling member, sold a business to one of his companies for £8.25m. He paid capital gains tax on the gain (at only 10% because of Entrepreneurs Relief) and the company claimed an intangibles deduction under Schedule 29 FA 2002. The rate of corporation tax at the time was 30%. Sounds like a great plan.

Except that HMRC argued that the business was not worth £8.25m because the sale did not include the use of the trademark. They said that the business was only worth £1 – and the FTT agreed. So no CGT, and no corporation tax relief. (There was lots of discussion and analysis on the principles which apply to the valuation of a business for fiscal purposes, which may be of wide interest).

However, the LLP had actually received £8.25m so HMRC charged this amount to income tax on the grounds that it was a distribution under section 209(2)(b) TA 1988 as being:

> "any other distribution out of assets of the company (whether in cash or otherwise) in respect of shares in the company, except so much …as represents …any new consideration received by the company for the distribution"

The FTT held that it was not a distribution in respect of shares on the grounds that it was received by the LLP. The whole amount was therefore tax free.

Now that really was A RESULT. What we tax chaps regard as the equivalent to the Holy Grail.

Too good to be true…. well yes. You cannot imagine HMRC letting that go, and the Upper Tribunal concluded that it was a distribution. That sounds clear cut but it was not really so simple. Did Jasper Conran receive the amount in his capacity as a shareholder or as a member of the LLP? An important distinction? Not really as it turns out.

An interesting excursion, but I would suggest that it was not really much of a surprise – although it was fun speculating on the opportunities when the FTT decision first came out.

Peter Vaines
Field Court Tax Chambers
31st August 2023

Contact
Peter Vaines
Field Court Tax Chambers
3 Field Court
Gray's Inn
London WC1R 5EP
Tel: 020 3693 3700
pv@fieldtax.com
www.fieldtax.com