# UK Tax Bulletin

October 2023

Field Court Tax Chambers

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FIELD COURT TAX CHAMBERS

# Latest Rates of Inflation and Interest

The following are the latest rates: September 2023

| Current Rates | |
|---|---|
| Retail Price Index: September 2023 | 378.4 |
| August 2023 | 376.6 |
| Inflation Rate: September 2023 | 8.9% |
| August 2023 | 9.1% |
| 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%

# IHT: Business Property Relief

Business property relief is such a valuable relief – effectively representing an exemption from IHT – that it is no surprise that it frequently engages the attention of the tribunals and the courts.

One of the key issues surrounds the conditions imposed by section 105(3) IHTA 1984 which denies relief if the business:

> "consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments".

It is never easy to obtain business property relief where the business includes exploitation of a property. HMRC have consistently taken the view (and have had significant success before the Tribunals) that being paid for the something which includes the use of a property, is a business which consists wholly or mainly of making or holding investments, no matter how extensive the services which are provided.

Obviously a commercial property investment would be the making or holding of an investment, but a hotel is said to be clearly not. But why not? It is all to do with the services provided. That does deserve some examination because in my experience of major hotels they provide a room which is cleaned daily but they do not "provide" anything else. You have to pay for nearly everything else - calls, internet, food and even water in some cases. Anyway, I am not going to argue about it – at least not yet.

The case of the *Executors of Vignes v HMRC [2018] UKUT 357*, concerned a livery business. Land and buildings are naturally an important part of any livery business and HMRC took the view that, for that reason, business property relief was not available because the business was that of letting or licensing of land; it was therefore a business of making or holding investments.

The Tribunal did not accept this view and rejected all the arguments of HMRC, saying that no properly informed observer could have concluded that the business was that of holding investments. They described the view of HMRC as a wholly artificial analysis.

The Upper Tribunal similarly rejected the arguments of HMRC and confirmed that the FTT applied the correct legal test in allowing the relief.

In the recent case of *Butler v HMRC TC 8949* the issue was whether the deceased's interest in an LLP which carried on three businesses – farming, commercial property lettings and a wedding venue business – qualified for business property. relief. The case concentrated entirely on the wedding venue business.

As with the livery business in *Vignes*, land and buildings were naturally an important part of the wedding venue business. The judge explained that there is a broad spectrum of activities for event venues ranging from the hire of a village hall at one end to a fully serviced conference venue providing a complete wedding event package at the other.

Having considered all the services provided by the business (and "stepping back and looking at the business as a whole") the judge concluded it was a business of holding investments.

This may have been a disappointment to the taxpayer as there would seem to have been ample grounds for the decision to have gone the other way. Indeed, going back to my comments about a hotel (which the judge cited as something which clearly qualified for BPR), the services in *Butler* went beyond those provided by a hotel. However, it just reinforces the point that where land or buildings are involved, claiming business property relief will always be a struggle.

An interesting feature of the decision was the judge's conclusion:

> "I find that the wedding venue business (and therefore the business of the LLP as a whole) was wholly or mainly for the purposes of holding its property as an investment. Accordingly, there is no entitlement to BPR"

Clearly the judge considered that the farming, the commercial lettings and the wedding venue business were all part of a single business carried on by the LLP, rather than three separate businesses, because otherwise the farming business might have qualified for relief. The concept of a hybrid business is well known in the context of a company, but not so easily applicable to a sole trader or partnership.

# Carelessness

Some of the time limits for the issue of assessments, and the liability to penalties, can depend on whether the taxpayer has been careless.

The relevant provision is section 36(1) TMA 1970 which states:

> "[an] assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates."

Section 118(5) TMA 1970 provides that:

> "A loss of tax … is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss."

The onus is on HMRC to prove that the taxpayer had been careless and until recently it was well understood that the loss of tax has to arise by reason of carelessness – in other words there needs to be a causal link.

This seems inescapable from the wording of the legislation and had been confirmed, inter alia, by the Upper Tribunal in *Bella Figura [2020] UKUT 120* and by *Magic Carpets (Commercial) Ltd v HMRC TC 8892.*

However, the recent case of *Delphi Derivatives Ltd v HMRC TC 8912* has come to the opposite conclusion, holding that there is no test of causation for the purposes of the penalty provisions in Schedule 24(3) FA 2007. This defines an inaccuracy as being careless:

> "if the inaccuracy is due to failure by P to take reasonable care."

The Tribunal noted that "*due to* arguably may have given rise to the notion of causation". Well yes; one can imagine it would.

The Tribunal went on to cite the dictionary definition of "due to" as "*attributable to, ascribable to*". Well, again this looks pretty clear.

Nevertheless, the judge held that the words "due to" in Schedule 24(3) did not import any causation. Accordingly, if there was a loss of tax, the taxpayer was liable for a penalty if he had been careless – without regard to whether his carelessness had any connection with the loss of tax (like maybe he fell off his bike?). I may not be the only person who has difficulty in grasping the (Delphic?) reasoning here. *Sorry, I couldn't resist.*

It will be interesting to see what happens with this decision in the future. It might be said that the FTT was not bound by the Upper Tribunal decisions on this subject as they were concerned with different wording. But close.

The FTT decision in *Delphi Derivatives* certainly does not override the Upper Tribunal decisions on section 36 TMA 1970 where causation remains a requirement, and where HMRC have to prove not only that the taxpayer was careless but that his carelessness caused the loss of tax involved.

## Remittances and Collateral

HMRC have long taken the view (see RDRM 37050) that where a loan is taken out abroad, secured on assets representing foreign income and gains, then a remittance of the full amount of the loan is treated as the remittance of the whole of the collateral – even if the collateral is substantially larger that the amount remitted. (I would really like to see what the Courts would say about this argument. For some reason you borrow £100,000 from the bank which is secured on the investment portfolio of £5m you have with the bank which derives from foreign income). Hardly an unnatural situation. But remit the £100,000 and you will be charged tax of £2.25m). Um.

By contrast, where anything less than the full amount of the loan is remitted, the taxable remittance is limited to the actual amount remitted.

Discussions have been taking place between the CIOT and HMRC and the matter is being reviewed. Not before time.

# CGT: PPR

Everybody knows about the private residence relief for CGT under section 222 et seq TCGA 1992 and it is a bit surprising that funny points still seem to arise after all these years.

One such quirk arose in the case of *HMRC v Lee [2023] UKUT 242* where the Upper Tribunal had to consider the meaning of "period of ownership" in the context of section 223:

"No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling house or part of a dwelling house has been the individual's only or main residence throughout the period of ownership…."

What happened was that Mr and Mrs Lee bought some land in 2010, demolished the existing house and built a new one, in which they lived from 2013. When they sold the house at a gain, they claimed relief for the while period back to 2010.

HMRC said that they only lived in it from 2013 so the first 3 years did not qualify. You can see their point.

However, the Upper Tribunal explained that Mr and Mrs Lee moved into the house as soon as they could (as soon as the dwelling house came into existence) and occupied it until it was sold. So, the house was their "only or main residence throughout the period of ownership" of the house.

The view of the Upper Tribunal was that legislation makes it clear that the relevant asset is the house (which includes the land on which it sits) - not two different assets – with the result that the whole of the gain was exempt. There are special provisions where different interests are acquired at different times, but there were no different interests here.

However, this does not seem quite as clear as all that, because, section 222(1)(a) and (b) do actually refer to two assets – the house and the surrounding land – and moreover specifically envisage the land being disposed of separately from the dwelling house . I wonder whether this ought to have made a difference?

# By Reason of the Employment: Deeming

Some time ago I wrote about an interesting decision concerning a deeming provision in the case of *Vermilion Holdings Limited v HMRC TC 7077*. This case concerned the grant of a share option to an employee and whether it should be taxed as earnings as having been made available by reason of his employment.

The relevant provision is 471(1) ITEPA 2003 which applies:

> "to a securities option acquired by a person where the right or opportunity to acquire the securities option is available by reason of an employment."

The Tribunal found that as a question of fact, the option had been granted to him by his employer. The Tribunal also found as a fact that it was not granted to him by reason of his employment.

However, there is a deeming provision in Section 471(3) which says that where the right or opportunity to acquire an option is made available by a person's employer, it is deemed to have been made available by reason of the employment.

HMRC argued that this was exactly the case here. The option had been provided by the employer and it was therefore deemed to have been made by reason of his employment. That looked like game, set and match to me.

Well, the Tribunal said not. The judge said that she had decided as a question of fact that the employment was not the reason for the grant of the option. She said that the scope of section 471(3) "should be limited where the artificial assumption from deeming is at variance with the factual reason that gave the right to acquire the option". Accordingly, the deeming provision did not apply.

The Court of Session agreed, explaining that if the option was not within section 471(1) then the deeming provision in section 471(3) could not operate. Section 471(1) did not apply and that was the end of it.

I had a crisis of confidence because I found this REALLY difficult to grasp. The whole point of a deeming provision is to override the factual position, and in this case specifically to provide that the option is taxed even when the option was not in fact granted by reason of the employment. Indeed, a deeming provision could never apply if it had to give way to the facts.

I am feeling much better now because the Supreme Court has now considered the matter in a brief, no nonsense, judgment: *HMRC v Vermilion (Holdings) Ltd [2023] UKSC 37*.

The Supreme Court explained that the purpose of the deeming provision in section 471(3) was clear. It was to provide a bright line rule that if the right is provided by the employer, it is conclusively treated as having been made available by reason of the employment. End of.

Contrary to the views of the court of Session (and the Tribunal Judge) there was no anomaly or injustice in this deeming provision. It did exactly what it said on the tin. Crisis over.

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