UK Tax Bulletin

November 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
October 2023	377.8
Inflation Rate: September 2023	8.9%
October 2023	6.1%
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%

Transfer of Assets Abroad

The Supreme Court decision in *Fisher* earlier this month (2023 UKSC 44) is arguably the most important case on Transfer of Assets Abroad for 40 years.

(Anybody not know about TOAA? Well, lucky you. You certainly don't want to start now.)

Interested parties will recognise the position described in the opening words of the judgment of Lady Rose:

> "The taxing provisions which are at the centre of this appeal have been the subject of litigation in the senior courts almost from the moment they were first introduced into the tax code by the Finance Act 1936. They have been amended over the decades and re-enacted in consolidating legislation. But they have continued to perplex and concern generations of judges faced with the task of construing them."

The general idea of section 720 (and its predecessors section 412, section 478, section 739) is to prevent the avoidance of tax by transferring assets so that income becomes payable to a foreign resident person. If the transferor can enjoy the income, he remains taxable on it – automatically. Almost every word of the above has been the subject of extensive judicial consideration – not always consistently. It is often said that the legislation is very wide - but that is a serious understatement.

Lady Rose made reference to the approach of the House of Lords to such arrangements by earlier generations. In *Latilla v IRC 25 TC 107* Viscount Simon said:

> "… one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."

However, investing in an ISA, or a pension scheme also increases pro tanto the tax burden on other taxpayers. But they are OK – for some reason. It is a bit odd that there are some laws that the government wants you to follow, but there are other laws which if you comply with them, you will be penalised. Even odder when it is the government which makes the laws in the first place.

One might respectfully enquire why a citizen conducting his tax affairs in a lawful way should be singled out for penal tax treatment. The smoker and the heavy drinker place a disproportionate burden on the Health Services, and therefore on the shoulders of the great body of good citizens who do not desire to conduct themselves in that way.

Anyway, moving on, there were two major issues decided by their Lordships in *Fisher*. The first was that for section 720 ITA 2007 to apply, the transferor must be the individual who has power to enjoy the income of the foreign resident person. That is not an easy conclusion; "power to enjoy" is very widely defined, beyond anything which might reasonably be imagined, and it took the first 24 pages of the judgment to explain why this is the case. This is not quite as good as it might sound because non-transferors are still able to be taxed under section 731 on the basis of benefits received, but it is still very important.

The second fundamental issue is that only an individual can be a transferor for the purposes of section 720. Transfers by a company – even if controlled by the individual – are not transfers by the individual and the section cannot apply to them. (I think that the provisions relating to associated operations may have a role here so we cannot get carried away).

The Supreme Court did not agree with HMRC that this gave rise to an avoidance opportunity and suggested that if the wide definitions of all the terms in section 720, and the charge on non transferors imposed by section 731, are thought by the Government to be inadequate protection from such avoidance, then they know what to do.

Autumn Statement

There was a lot in the Autumn Statement but nothing requiring much detailed comment – and of course there have been hundreds of summaries of the proposals issued by professional firms.

I would only say that I am a bit puzzled about all the hype over "Full Expensing" of capital expenditure. Is this not just a relief previously known as a 100% first year allowance? There are of course technical differences between an expense and a capital allowance but hardly enough to merit all the excitement – and smaller businesses already have a 100% investment allowance. But thanks anyway.

The proposed extension of the Cash Basis for the self-employed looks like a helpful simplification. Having to worry about including debtors (and whether any of them bad or doubtful) and the calculation of work in progress, is always a pain. We shall see how helpful this really is when the legislation is published. There could be a significant one-off advantage in the transitional year ….. but we shall see.

Fiscal Share Valuation

This is a subject of endless fascination (or maybe I should get out more) aptly described by Danckwerts J as "a dim world peopled by the indeterminate spirits of fictitious or unborn sales".

There have been two recent cases where a taxpayer made a gift of AIM shares to a charity and claimed income tax relief under section 587B TA 1988 (now found at section 431 ITA 2007) on an amount equal to their market value. In both cases the value used was the price at which the shares were traded on AIM.

Section 587B(10) provides that the market value for that purpose is the CGT value as determined by section 273 TCGA 1992, being essentially "the price at which [the shares] might reasonably be expected to fetch on a sale in the open market."

In reaching that price you have to take into account all the artificial assumptions about the market and the hypothetical parties etc (which make the whole process so much more interesting).

In the case of *Chisnall v HMRC TC 8958* this did not look like much of a problem. The shares were traded on AIM at or around the transfer date at 48.5p so why were HMRC challenging the value.

HMRC said that AIM did not represent a reasonable or reliable value for the shares and sought an expert value for the shares from a Chartered Surveyor employed by HMRC. They later decided that they did not like his value and got another employee to provide an expert value at a lower figure – 10p per share.

The Tribunal said that extremely limited weight should be given to the evidence of the HMRC expert. They confirmed the value of the shares at the AIM figures on the basis that the prices at which the shares were traded on AIM carried more weight than the HMRC expert evidence.

The Tribunal did not say that the value at which the shares were traded on AIM was necessarily the right figure – there are many reasons why a different value might be appropriate – but under the circumstances, they had to choose between the taxpayer's figure and the HMRC figure.

Within a week, there was another FTT judgment on exactly the same point: *Kay v HMRC TC 8962*. Mr Kay gave away some AIM shares which had a listing value of 42.5p and claimed relief under section 587B – and again HMRC challenged the value. Their expert witness considered the shares were worth 9.42p per share.

The Tribunal "accepted HMRC's submission" that it was necessary to ascertain the price the shares could reasonably be expected to fetch on a sale in the open market. However, that was not accepting an HMRC submission – that was just stating the precise words of section 273 which the FTT were bound to apply.

The Tribunal accepted that the AIM value may be relevant - but not very relevant it seems, because they held that the shares were worth 9.42p per share in accordance with the HMRC expert, and not the 42.5p per share on which they were traded on the listed market.

I am not sure how you get past the argument that the prospective purchaser, being a man of business who is fully informed of the relevant facts, will be aware that the shares are listed on AIM at 42.5p that day. He is never going to pay that much of course, because of the inherent uncertainties and risks involved, but he is surely entitled to conclude that shares listed on AIM can be bought and sold at a figure bearing *some* relationship with the listed price. I would respectfully suggest that in these circumstances, no prospective purchaser would seriously have expected to pay only 9.42p per share.

And what about the requirement that we must consider not only a willing purchaser but also a willing seller. There was no discussion or even consideration of the position of the willing seller – who is willing, but not anxious, to sell at a fair price. Some explanation might have been helpful about why a seller would be willing to sell his shares which are traded on AIM at 42.5p, for only 9.42p. A balance has to be struck between the willing seller and the willing buyer – but it is hard to find such a balance in the case of Mr Kay.

As it happens, there was yet another case on exactly the same point released just last week: *Bell and others v HMRC TC 9000.* Same arguments and same result. The AIM values of 51p and 94p were ignored (or regarded as less relevant) than the HMRC values of 12p and 14.3p.

CGT: Transfers on Divorce

It is well known that transfers between husbands and wives are deemed to take place at a value that gives rise to no gain and no loss: section 58 TCGA 1992. Until recently this applied until the end of the tax year in which the spouses separate. Transfers after the end of that year were treated as taking place at market value in accordance with the normal rules.

In the case of *Wilmore v HMRC TC 8959* a property was transferred by the wife to the husband after the end of the tax year and HMRC sought capital gains tax on the transfer – as might reasonably be expected.

However, the FTT analysed the position in great detail and concluded that the discussions and correspondence between the parties and their lawyers prior to the year end gave rise to a constructive trust in favour of the husband in respect of the half interest held by the wife. Accordingly, there had been a transfer of the beneficial interest (although not the legal interest) within the year of separation and section 58 therefore applied to eliminate any gain on the transfer.

The written documentation may not have been enough to satisfy section 2(1) Law of Property (Miscellaneous Provisions) Act 1989, but fortunately those requirements do not apply to interfere with the creation of a constructive trust.

The case provides an interesting examination of the doctrine of constructive trusts and how they interact with the Law of Property Acts, and although it may be possible construct a less favourable analysis of the position, I rejoice in the taxpayer's success.

This problem has been largely eliminated from 6th April 2023 by section 41 Finance (No 2) Act 2023 which allows section 58 treatment to apply for three years following the year of separation or if earlier the date of the court order for the divorce or judicial separation. However, there is no time limit where the transfer is pursuant to a separation agreement or court order.

Transfers of Goodwill

Incorporating a business and selling the goodwill to the company was a popular course of action as it could secure a substantial capital sum chargeable to capital gains tax at only 10% because of Entrepreneurs Relief. Rather better than receiving such an amount as salary or dividend.

Entrepreneurs Relief (even with its new name) does not apply to such transfers any more, but a substantial advantage can still arise while the rate of CGT is comparatively low. But not always. You may remember the slip up with Jasper Conran (see August Bulletin): *HMRC v Jasper Conran [2023] UKUT 166.*

Another aspect has been reported in the case of *Smith and Corbett v HMRC TC 8977* dealing with the reverse position – a transfer of a business from a company to a partnership. Mr Smith and Mr Corbett had a company (SIFA), and they transferred the business to a partnership (SWM) of which they and their families were partners. Their capital accounts in SWM were each credited with £1m being the introduction of goodwill. They claimed that the company SIFA never owned the goodwill; they owned it personally.

HMRC said that the goodwill could not exist separately from the business to which it relates; therefore it belonged to SIFA and must have been transferred to SWM – so the credits to the partners accounts were distributions from SFIA. (I am not sure where the distributable profits came from to enable a £2million distribution to be made; the accounts filed for SFIA at the time show a balance on P&L account of only £168,000).

The Tribunal noted that the accounts of SIFA had never included a figure for goodwill and for this reason concluded that therefore the goodwill had never been an asset of the company. (This reasoning may be questioned because accounts generally show assets at cost – and do not show assets for which there is no cost. An asset such as goodwill can be introduced by revaluation but in a small company that is rarely done. And internally generated goodwill would not normally be included as an asset for the purposes of GAAP anyway).

The FTT also took the view that goodwill can exist separately from the business to which it relates. In this case they considered that Mr Smith and Mr Corbett did have contacts and relationships (however this asset may be labelled) which were valuable and capable of being sold to SWM.

But does not goodwill (or however this asset may be described) need to be assigned? SFIA expressly assigned its goodwill to SWM (although according to the FTT it did not have any); but there was no assignment by Mr Smith and Mr Corbett, nor any document relating to the sale of goodwill. The only reference in the judgment is that the credits to the partners accounts were described as "goodwill introduced".

The conclusion of the FTT was that there was no distribution as contended by HMRC.

Watch this space, I think.

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Important Note