UK Tax Bulletin

December 2023

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: December 2023

Current Rates	
Retail Price Index: November 2023	377.3
October 2023	377.8
Inflation Rate: November 2023	5.3%
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%

Reasonable Excuse: AI

Oh dear. There may be trouble ahead ….

I suppose we could have predicted this, but it is still a bit disturbing.

In the recent case of *Harber v HMRC TC 9010* Mrs Harber had sold a property at a capital gain but did not notify HMRC – and in due course a penalty was imposed.

She said that she had a reasonable excuse because her circumstances were the same or similar to a list of nine cases where the FTT had held there was a reasonable excuse.

That sounds fair enough. Except - none of the cases were genuine. They had been obtained by a lawyer friend from the internet and she was unaware that they had all been generated by ChatGPT. (*I hear voices; how on earth do you do that? Not a clue; but I am sure we will soon learn.)*

The Tribunal judge was sympathetic but naturally decided the case on its merits and held that Mrs Harber did not have a reasonable excuse on the facts. Inevitable really. Thinking that you have a reasonable excuse does not mean that you have one.

But it does give the taxpayer a bit of a problem (as does any fraudulent activity). How do you know this information is fake? These cases were not listed on the FTT website or on BAILII – but the lay taxpayer may not have ready access to these sites or necessarily be able to do an effective search. She could (or maybe should) have taken advice and her adviser could have searched - but why should she have doubted these cases anyway? And it wont be long before whoever puts these fake cases on the internet will provide a fake link to the other websites too.

Nor will it be long I suppose before advisers are also tricked into error. That may protect the taxpayer but will put the adviser at risk. Oh dear, indeed.

Many will remember with huge affection AP Herbert's famous *Misleading Cases*. They were great fun. However, this is really serious. And this is surely only the beginning.

IR 35: Again

The cases on the intermediaries legislation, known fondly (?) as IR35, don't stop. To anybody other than tax nerds, this must look like some kind of private joke. There are so many cases – all virtually indistinguishable – giving rise to conflicting (and irreconcilable) decisions, which is a disservice to the taxpayer and HMRC alike.

Having regard to the plethora of cases, the taxpayer can look at a long list of (genuine) cases won by the taxpayer which appear to be identical to their circumstances and fight the case with confidence. But there are just as many cases where HMRC has won, so they can proceed with equal confidence. This is litigators heaven.

The recent decision in *Atholl House Productions v HMRC* is the latest in this series – and it was noted by the judge that each party confidently asserted that their position is the one which is very obviously correct. (But I suppose they would, wouldn't they?)

Atholl House involved a TV presenter (most of them do) who provided her services through a personal service company; usual stuff. She succeeded at the FTT in showing that the intermediaries rules did not apply to her circumstances. The Upper Tribunal agreed – but for different reasons!

HMRC could have left it there and moved on to the next one, but they appealed to the Court of Appeal who held that the UT decision was flawed in a number of important respects. They also criticised the FTT judgment for failing to take relevant facts into account. But they did not decide the matter. They sent it back to the FTT to reconsider the position in the light of the Court of Appeal's guidance. The FTT did so and reached the same conclusion; IR35 did not apply in this case.

So, will this help when the next case comes along? Unfortunately not. It will guide the parties as to the correct approach, but it will not help at all in the assessment of the facts.

We really do need something definitive so that taxpayers, advisers (and equally important, HMRC) can have some idea of what the law is on this subject.

By Reason of the Employment

The case of *OOCL UK Branch v HMRC TC 9007* is a really important case on the scope of the legislation relating to the taxation of earnings.

Mr Tung was the controlling shareholder of a company and when it was sold he chose to make a personal and gratuitous payment to 99 of the company's employees. HMRC argued that these payments were taxable as earnings in the hands of the individuals.

Mr Tung was not their employer and the FTT held that the payments were not for past or future services and were not *from* the employment. Therefore, they were not earnings within section 9 ITEPA 2003. That sounds OK.

However, there is also section 62 ITEPA 2003 to consider. This brings into charge as earnings a "benefit of any kind obtained by the employee" and this is defined in section 201 as a benefit provided "for an employee … by reason of the employment".

So the question was whether the payments by Mr Tung were provided by reason of the employment.

The Tribunal held specifically that the employment was not the "causa causans" of the payments, but still concluded that because the individuals had to be employees, the employment was "a cause of the payment" and the payment was therefore made by reason of the employment.

For the Tribunal to say that the test is "*a cause* of the payment" rather than "*the cause* of the payment" would seem to overstate the position. To be the causa causans, the employment must be the true or main cause of the payment. This would otherwise be a bit difficult because it is not unusual for a shareholder to make a gift to an employee of the company - not for their services but for personal reasons. But of course, they would only know each other because of the employment relationship so that would always be "a cause" for the payment.

The crucial feature would seem to be that if a specific condition for the payment is that the recipient must be an employee, the line is crossed and the payment is by reason of the employment. A fine line perhaps, but clearly not one to be crossed.

Payments *From* the Employment

Coincidentally, a few days later a similar issue arose in the Court of Appeal – that is to say whether a payment was *from* the employment and within section 9 ITEPA 2003: *HMRC v E.ON [2023] EWCA Civ 1383*.

The payment in question arose out of discussions with employees concerning a change to the E.ON pension scheme. The employees were offered a package which included a Facilitation Payment of 7.5% of their salary.

The employees argued that this payment was not taxable as it was not "from the employment" but represented compensation for the reduction in pension rights.

The Court of Appeal agreed with the FTT that the payment was more properly described as an inducement to provide future services on different terms – and merely replaced the lower earnings that would be suffered if they wanted to maintain the same pension benefits.

Nugee LJ summed up the issue succinctly thus:

> "The employees are being asked to agree to a change in the terms on which they might be employed in the future, and in return receiving a payment in money. The payment seems to me plainly to have come from the employment".

It is unclear why the payment would not have been taxable anyway on the reasoning set out in *OOCL* above, being a benefit provided by reason of the employment – whether it was *from* the employment or not. The payment was clearly a benefit and section 201 makes it even clearer by deeming it to be by reason of the employment:

> "A benefit provided by an employer is to be regarded as provided by reason of the employment".

It could be that if the payment had been held to be compensation for the loss of pension rights, it would not have been taxable at all, following *Tilley v Wales [1943] AC 386*. But it wasn't. Maybe I am missing something, or maybe it does not matter, or maybe if and when *OOCL* goes further a different conclusion will be reached.

Penalties

An essential part of the tax code is the imposition of penalties if people do not comply with their tax obligations. It stands to reason that there must be some sanction, even though some of the obligations passeth the understanding of the lay taxpayer – and advisers too.

One of the requirements for the imposition of a penalty is that HMRC, after obviously proving the relevant default, must assess the amount of the penalty, provide all the relevant details and notify the taxpayer of the penalty: Schedule 55(18) Finance Act 2009.

The notification can be made by email following the Income and Corporation Taxes (Electronic Communications) Regulations 2003 (2003/282). This contains the procedures for proving (or at least providing a rebuttable presumption) that the taxpayer has been notified.

A Mrs Walker had admittedly failed to submit her tax return on time and HMRC charged a penalty; however, the penalty assessments were never received by Mrs Walker. She valiantly (and successfully) challenged the penalties representing herself before the FTT. The circumstances, explained in the FTT decision in *Walker v HMRC TC 8942,* were not out of the ordinary and may encourage others not simply to assume that the relevant conditions for the penalties - and other things - have been complied with by HMRC.

HMRC did not argue that the procedures In the Electronic Communications Regulations had been satisfied (although it is not known why not). The FTT said that HMRC's case "comprised factual assertions for which no primary evidence was provided, or assertions of fact that purported to be legal submissions".

Accordingly, the FTT brought Mrs Walker tidings of great joy and quashed the penalties.

It is perhaps worth recalling the case of *Qureshi v HMRC* TC 6372 where the taxpayer was also challenging a penalty and where the FTT explained the position in the clearest terms:

> *"We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that would have or should have happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence".*

Well done to Mrs Walker for sticking by her guns – and credit to the FTT judges for the care they took to ensure that the unrepresented taxpayer obtained the benefit of the relevant arguments. Appropriate perhaps in the season of goodwill.

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Important Note