UK Tax Bulletin

January 2024

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Latest Rates of Inflation and Interest

The following are the latest rates: January 2024

Current Rates	
Retail Price Index: November 2023	377.3
December 2023	379.0
Inflation Rate: November 2023	5.3%
December 2023	5.2%
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%

BAD Relief (ER)

The cases on the Business Assets Disposal Relief, formerly known as Entrepreneurs Relief, don't stop.

The latest case relates to shares held by trustees who sought the benefit of the relief on a sale of the shares. There are (of course) special rules for BAD relief for shares held by trustees; they are found in section 169J TCGA 1992. The relief only applies if the company is the personal company of the life tenant. This means that the life tenant must have been a director or employee of the company and must have held at least 5% of the shares for the two year period.

In the case of *Peter Buckley v HMRC TC 9022* the trustees of the Peter Buckley Settlement held the whole of the share capital of a valuable trading company; Mr Buckley was the life tenant. The instinctive reaction would be they ought to get the relief.

But no. The requirement for the company to be the personal company of a qualifying beneficiary means that the life tenant has to hold at least 5% of the shares. He did not have any shares. The whole of the share capital was held by the trustees.

One might say: tough luck – check the rules; you don't qualify. But I cannot help thinking that if we were talking about an Entrepreneurs Penalty which would be charged if these conditions were satisfied, HMRC would have argued vigorously (and possibly successfully) that a purposive interpretation of the legislation means that it ought to have applied.

Mr Buckley's counsel suggested that the *Ramsay* doctrine should apply to provide purposive interpretation having regard to the facts of the case. However, the FTT saw no reason for a purposive interpretation because the legislation reflected the clear intention of Parliament. (Well yes, but I thought that the intention of Parliament and a purposive interpretation are supposed to coincide).

Unfortunately, there are loads of really technical conditions for BAD relief and people are constantly getting caught out and failing to qualify for the relief which they thought would apply.

The only positive thing, I suppose, is that now this particular trap has been highlighted, it is more likely to be picked up and avoided in the future.

The arguments in this case were a little more subtle than would immediately appear because Mr Buckley was both a trustee and the life tenant. So it could be said that he had the legal title to the shares (the shareholding was registered in his name) and he also had the equitable interest because he was the life tenant. So why was that not enough?

The FTT said that by reason of his fiduciary position as trustee he did not own the shares personally. That must be right – but unfortunately, that is not the test set out in section 169S(3). The test is not that Mr Buckley "owned" the shares – however that may be defined – but whether he "held" the shares, and at that least 5% of the voting rights were exercisable by him. Which they were.

Incorporation Relief: section 162

The incorporation relief under section 162 TCGA 1992 is a seriously valuable relief allowing an unincorporated business to be transferred to a company - often for good bona fide commercial reasons - without creating a charge to capital gains tax which would obviously frustrate everything.

Section 162(1) reads as under:

> "This section shall apply for the purposes of this Act where a person who is not a company transfers to a company a business as a going concern, together with the whole of the assets of the business, or together with the whole of those assets other than cash, and the business is so transferred wholly or partly in exchange for shares issued by the company to the person transferring the business."

Where these conditions apply, any capital gains arising on the transfer are rolled over into the shares, and become chargeable when the shares are disposed of. The relief is automatic and does not need to be claimed but you can elect to disapply it. (Odd to have it this way round – but never mind).

This can give rise to a substantial (additional) advantage because the assets are deemed to be acquired by the company at market value. The sale of an asset by the company would therefore give rise to little or no gain. However, that is a whole new story ….to which I may return in due course.

There is an alternative incorporation route which is to transfer the business to the company and claim hold over relief on any asset where a gain arises under section 165 TCGA 1992. That is a really good alternative if Business Assets Disposal Relief would apply giving rise to tax at 10% - but that does not always apply, particularly to goodwill: see section 169LA(4) TCGA1992). And section 165 has its own detailed conditions which are not always able to be satisfied.

The relief under section 162 is supplemented by Concession D32 to the effect that any liabilities taken over by the company as part of the transfer are ignored because otherwise the assumption of the liabilities would represent consideration and prevent the relief from applying at all.

> **Concession D32**: Where liabilities are taken over by a company on the transfer of a business to the company, the Revenue are prepared for the purposes of the 'rollover' provision in TCGA 1992 s 162, not to treat such liabilities as consideration. If therefore the other conditions of s 162 are satisfied, no capital gain arises on the transfer. Relief under s 162 is not precluded by the fact that some or all of the liabilities of the business are not taken over by the company.

However, it has recently been suggested that any such liabilities need to be novated to the company to satisfy the condition that they are "taken over" by the company.

This seems to be an extreme view. There may be a significant number of creditors (outstanding telephone or utility bills, trade suppliers, a bank loan or overdraft and so on) and how much chance do you reckon there is of getting BT or British Gas for example to agree to and execute a novation within a reasonable time – or at all.

Foetunately, HMRC do not seem to take this view. The CGT Manual says at paragraph 65745 that:

> "This is normally done in practice by the company giving the transferor an indemnity in respect of those liabilities".

The concession does not say so, but HMRC suggest that this relates only to business liabilities. Personal liabilities such as the transferor's tax liability would not count for this purpose. It needs to be recognised that this is a concession and if HMRC say it only applies to business liabilities – then that's it. If you disagree, all you can do is apply for Judicial Review, which in my view, would be a rather optimistic course.

Incidental

"Incidental" is a perfectly ordinary word, and it crops up time and again in the tax code. Of course, we all learnt at our mother's knee about the incidental duties of the pilot in *Robson v Dixon* and I have recently been deeply concerned with the meaning of incidental in the context of the CIS Regulations. It can also assume real importance when it comes to various anti-avoidance tests where a tax advantage is more than an incidental benefit.

The Court of Appeal recently had cause to examine its meaning in the case of *HMRC v Dolphin Drilling Ltd [2024] EWCA Civ 1.* The case was about the provision of accommodation for workers on an oil rig, but we don't need to dwell on that.

The Court of Appeal surprisingly suggested that *Robson v Dixon* was the only authority on its meaning of incidental. They went on to confirm that it has no special or technical meaning and must be given its ordinary meaning.

So, what is its ordinary meaning? The Court explained that something is incidental if it arises from, or as a by product of, the primary activity. It may not necessarily be trivial but must be secondary or less important than the primary activity. Something will not be incidental just because it is trivial, if it is independent and unconnected with the main purpose.

A colourful example was given of a barrister using his business laptop (on which he primarily writes opinions) to write a domestic shopping list. The shopping list may be almost infinitely trivial, but the writing of the shopping list does not arise out of using it to write opinions. It is an independent end in itself, and cannot be regarded as incidental use.

HMRC have their own ideas about what incidental means (for example they say that incidental use must arise by accident; something that arises by a deliberate act cannot be incidental) and this approach is certainly contrary to the reasoning laid down by the Court of Appeal.

This clarification by the Court of Appeal is to be welcomed and will be relevant to a very much wider audience than oil rig workers.

Entity Classification

This may not seem an interesting (or relevant topic) – but stick with me just for a moment.

Where a client has an interest in a foreign company, it is kind of important to know how the foreign entity is going to be treated for UK tax purposes. In particular, it is important to know whether HMRC will regard it as transparent or opaque. If the entity is regarded as *transparent* you will be taxed on the income of the entity as it arises, and if it is *opaque* then you wont; you will be taxed the distributions.

That is where the entity classification comes in because HMRC have recently published (revised) guidance on their views of various foreign entities. So, it is certainly worth finding out how HMRC will treat the particular entity – whether you agree with it or not – so that you know where you stand.

The problems multiply where the client wants a credit for the foreign tax paid against his UK liability - which he probably would because otherwise he may be paying twice.

What happened in the case of *Anson v HMRC [2015] UK SC 44* was that a Delaware LLC made a distribution to Mr Anson. Mr Anson paid US tax on his share of the LLC profits, and when they were paid to him, he paid UK tax on that as well. That is OK – providing he gets credit for the US tax. However, HMRC refused to give him credit on the grounds that the income on which he was taxed in the US was not the same income chargeable to tax in the UK.

Fortunately for Mr Anson, the Supreme Court held that Mr Anson was entitled to credit for the US tax paid.

HMRC don't agree and although they cannot say that the Supreme Court was wrong (that is a bit like saying that the umpire was wrong when he gave you out), what they can and will say is that every case has different facts, and the Supreme Court decision does not apply to your case –nor probably anybody else's.

So, it is as well to know what you are in for when a problem of this nature crops up.

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