UK Tax Bulletin

February 2024

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates: February 2024

Current Rates	
Retail Price Index: January 2024 December 2023	378.0 379.0
Inflation Rate: January2023 December 2023	4.9% 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%

The Budget

I am looking forward to the Budget to see what delights are in store, but I don't think the abolition of IHT will be one of them. The Chancellor seems to have gone cold on that.

I noticed an announcement explaining that HMRC recovered £326m from IHT investigations last year. Fantastic. Except that from other tax investigations their yield was **£39 billion**.

Getting distracted by IHT when there is some serious money to be had from other taxes looks like a lot of misdirected effort to me.

Non Doms

The Chancellor has been making some dark comments implying that non dom status will be abolished. This has caused a bit of a bulge in my inbox. Whether they mean it – nobody knows. I think they just wanted to shoot Labour's fox.

Anyway, the inevitable question is what can be done to protect the client?

It is difficult to take precautions to pre-empt a change in the rules when you don't know what the change might be; it might be anything – or nothing You could easily jump out of the frying pan into the fire. And it would be a pity to lose the benefit of any transitional provisions which might be introduced to sugar the pill. On the other hand, it would be intensely irritating not to do anything and find yourself caught by the changes when they could so easily have been avoided.

So, you might feel the need to do something now which is effective under the current law on the assumption that any change in the rules will not be retroactive. Gifts, or transfers into trust, of assets which are (at the moment) excluded property – but might soon not be - is very tempting; however, you have to accept the risk that it could prove to be a total disaster.

Mind you, it is always pretty irritating to have to buy a lottery ticket when you don't know the right numbers. It would be much better if you could know what the numbers would be – so you would know the right action to take.

Termination Payments

The tax exemption for the first £30,000 of a termination payment falling within section 401 ITEPA 2003 is valuable – but the other exemptions from section 401 are even more valuable. This includes an unlimited exemption for payments:

"On account of injury to, or disability of, an employee"

The Upper Tribunal had cause to consider the subject in *Mathur v HMRC UKUT 38* where the taxpayer received a payment of £6m in settlement of her claims which included breach of contract, unfair dismissal, harassment, discrimination and victimisation. The employer did not accept liability or attribute any of the money to any specific element of her claim.

The employer deducted PAYE and NIC from the amount (excluding the first £30,000) and she claimed a refund on the grounds that the payment was not within the terms of section 401(1)(a) which requires the payment to be:

> "directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment"

The FTT and the Upper Tribunal both concluded that the width of the words "or otherwise in connection with the employment" meant that there did not have to be a direct causal link between the settlement and the employment. In any event, the Tribunal found that in fact there was a close link because the termination of her employment was central to her proceedings before the Employment Tribunal – and the payment was made to settle those proceedings.

It is not easy for any payment of compensation to an employee to fall outside the scope of section 401. Apart from the specific exclusions for injury and disability in section 406 (which since 2018 includes psychiatric injury - but not injury to feelings) almost any other payment arising from a dispute with the employer, resulting in or following the termination of the employment, is likely to be directly or indirectly in connection with the termination of the employment - not least because the employee may not want to continue in the employment.

There is a possibility that the amount paid could be apportioned between the "employment bits" (taxable) and the "non-employment bits"(not taxable). This was specifically rejected by the Tribunal in *Mathur,* but the reasoning given for the lack of an apportionment was spelt out in detail, giving us a good checklist (mainly evidential) to enable an appropriate apportionment to be made in another case.

Entrepreneurs Relief (BADR)

The recent decision in *Stolkin and others v HMRC TC 9086* was about a claim for Business Assets Disposals Relief – but actually it was all about whether a company was carrying on a trade. That is a subject which has exercised nearly all of us over the years, and this is the most up to date word on the subject.

Mr Stolkin and his fellow shareholders disposed of their shares in a company when the company went into liquidation. The key question was whether the company was a trading company at the relevant date because that is a pre-condition for the relief. All the Badges of Trade were discussed (of course) and a mountain of decided cases considered, as well as the established principle that an asset can be acquired as an investment and appropriated to a trade: *Taylor v Good 49 TC 277*. Indeed, that is what section 161 TCGA 1992 is all about.

In very brief terms, the company acquired land as an investment but claimed to have appropriated it to a trade more than one year prior to the disposal. The original intention was to develop the site and to hold it as a long term source of income. Pursuant to this intention the company had sought planning permission for a large scale residential development. As a result of various commercial issues, the intention changed to a sale, and that was claimed to be the time that the land was appropriated to trading stock – whereupon the company became a trading company, whose shares would qualify for Entrepreneurs Relief.

The Tribunal explained that a person who purchases land with the intention of improving it or getting planning permission with the intention of flipping it as soon as possible, would undoubtedly be trading. However, the Tribunal also explained that when land is acquired otherwise than as trading stock, some decisive action is necessary to escape the fetters of the past; more is needed than merely deciding to sell, and then doing nothing more that taking steps to enhance the value of the land prior to sale.

The Tribunal added that they did not doubt the company wanted to make a profit – but in deciding whether a person is trading it is not enough to ask *whether* they are looking to make a profit, but *how* they are looking to make a profit.

Section 165A(4)(b) TCGA 1992 provided another opportunity for argument because it would have been enough for the company to have shown that it was preparing to carry on a trade. Unfortunately, the Tribunal held that it did not do that either.

It is difficult to avoid the thought that only a slight change in the circumstances of the company and their arrangements, could have enabled the relief to be secured.

Disguised Interest

I have been reading an interesting analysis about Loan Schemes – not those relating to employees and disguised remuneration where some MPs are making a huge fuss which may result in a bit of relief for taxpayers who are facing catastrophic consequences – but loans to sporting clubs from their members. These are sometimes made interest free with the intention of financing club projects where commercial funding may not be available or affordable.

A suggestion has been made that such loans can fall within section 381A ITTIOA 2005 if the lender obtains a benefit equivalent to interest, such as a reduction in the normal membership fee. You can see how this can be the case when you look at the terms of section 381A:

> (1) This Chapter applies where a person is party to an arrangement which produces for the person a return in relation to any amount which is economically equivalent to interest.
>
> ….
>
> (4) For the purposes of this Chapter a return produced for a person by an arrangement in relation to any amount is “economically equivalent to interest” if (and only if)—
>
> (a) it is reasonable to assume that it is a return by reference to the time value of that amount of money,
>
> (b) it is at a rate reasonably comparable to what is (in all the circumstances) a commercial rate of interest, and

> (c) at the relevant time there is no practical likelihood that it will cease to be produced in accordance with the arrangement unless the person by whom it falls to be produced is prevented (by reason of insolvency or otherwise) from producing it."

Whatever one might think about the Treasury wishing to penalise or otherwise discourage such generosity, which in all conscience ought to be welcomed, we have to consider the legislation as it stands. (Although maybe nobody will want to support their club in the future if the tax man is going to charge them to tax for doing so).

Accordingly, the question is whether the reduction in the membership fee is an amount which is economically equivalent to interest. The benefit can be quantified arithmetically, and given the wide variations in commercial interest rates which could be considered to represent the economic equivalent to interest, it is bound to satisfy the definitions in subsections (4)(a) and (b).

I cannot help thinking that Nectar points, Air Miles, Waitrose reward vouchers and a host of others must be equally vulnerable. Members of the Donmar Warehouse get a free programme for every performance they attend. And what about hotels which enable free access to a Spa. Or the widespread school fee lump sum composition scheme offered by many schools. (They seem rather popular at the moment; can't think why).

I could go on all day. The arrangement is that if you spend £x you will get a benefit of £y. Maybe the monetary equivalent of some of these benefits is too small to be equivalent to a commercial rate of interest – but that cannot be right because it is only a short time ago that the banks were paying 0.01% on deposits. (That is a benefit of £1 for every £10,000 you spend or lend).

It could perhaps be argued that if the membership rules provide that there is a graded membership fee – juniors, seniors, debenture holders, others – there is no "arrangement" here, but just the acceptance of the terms of the contract with all members or customers.

I cannot believe this is a serious point, except in cases which are obvious avoidance schemes (would almost certainly be caught by section 809CZC ITA 2007) but clearly this is a matter to be watched.

Crisps

I would not want to be accused of being frivolous or making fun of a serious subject, but I cannot resist a comment about the recent cases of *Walkers Snack Foods Ltd v HMRC TC 9024* and *Duelfuel Nutrition Ltd v HMRC TC 9055*.

In *Walkers Snack Foods* the issue was whether or not a product called a *poppadom* was standard rated for VAT. HMRC accepts that poppadoms are zero rated. However, Note 5, Group 1 Part II Schedule 8 VATA 1994 provides that the following are standard rated:

> "potato crisps, potato sticks, potato puffs, and similar products made from the potato or from potato flour or from potato starch."

The judge seemed to employ a sort of "duck" test. You can call it what you like, but if the crispy thing is made from potato and potato starch, then it is a potato crisp or similar product and is standard rated.

The issue in *Duelfuel Nutrition* was not quite the same. It was concerned with whether the company's flapjacks, cake slices and brownies were standard rated or zero rated. The FTT found that they were deemed to be confectionary and standard rated. I promise, you really don't want to know any more about this.

I am reminded of the guidance given by Lord Singleton in the case of *Briggenshaw v Crabb (H M Inspector of Taxes) 30 TC 331* in which he advised the Appellant:

> "you seem to have spent a lot of time in going through these various Acts, and if you go on spending your time on Finance Acts and the like, it will drive you silly."

I think he may have been on to something.

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