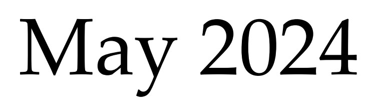

FIELD COURT TAX CHAMBERS

Field Court Tax Chambers

Contents

May 2024

Current Rates...The latest rates of inflation and interest

Non Doms………………………………………………………………….…..Er, Um

Entrepreneurs Relief……………….…………………..………An imaginative escape

Provisions and deductibility………………....……….All is not as one might expect

Options…………..……………………………..….What is an option and how is it taxed

Furnished Holiday Lettings…………..…These will probably be abolished …but….

Field Court Tax Chambers

Latest Rates of Inflation and Interest

The following are the latest rates: April 2024

Current Rates	
Retail Price Index: March 2024	383.0
April 2024	385.0
Inflation Rate: March 2024	4.3%
April 2024	3.3%
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%

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Non Doms – Update

Update? No idea I am afraid. Nor do I think does anybody else. My personal guru (Mystic Meg) has been rather unresponsive.

The General Election wipes out all the non dom proposals. However, they will no doubt be resurrected after the election - whoever wins - but in what form, who knows.

There have been some very impressive representations made by the CIOT and the ICAEW on the proposals and I am sure they will be taken seriously by HMRC. They highlight implications which must surely have been overlooked. (Actually, what they say is enough to make anybody think: Whoops ! We need to get back to the drawing board on this. But we shall see).

In any event, let's hope that we will have time to take some precautionary action. I guess there will be some kind of mini-budget after the election and a proper Budget next March so there is some hope on that score.

Entrepreneurs Relief

Entrepreneurs Relief – now called Business Assets Disposal Relief - has always been subject to numerous (and often highly subtle and complex) conditions. However, one of them is quite clear and straight forward. You need to have 5% of the relevant shares. That does not look to be such a tough condition.

In *Cooke v HMRC TC 9118*, Mr Cooke had 4.999%. He thought he was getting 5% of the shares and all the other shareholders thought so too, but as it turns out his shareholding of 245,802 shares was one share short of being 5% - so obviously he did not qualify for the relief. A bit sad, and very irritating, but the law is clear.

Well, you would have thought so.

Mr Cooke argued that the documentation whereby he obtained his shares ought to be rectified because it did not reflect the parties common intention that he should have had 5%.

The Tribunal does not have the jurisdiction to order rectification, but they do have

the power to determine that, if rectification were to be granted by the High Court, Mr Cooke's tax position could follow as if rectification had been granted.

Which is exactly what happened. The Tribunal considered that rectification would be granted in these circumstances and that Mr Cooke should therefore be allowed his entrepreneurs relief.

Wow. Who would have thought it?

(Well, actually I should have thought it because the FTT took much of their reasoning from the case of *Lobler v HMRC [2015] UKUT 152* which was an important case at the time – and clearly still is.)

Provisions

The recent decision in *AD Bly Groundworks and Civil Engineering Ltd v HMRC [2022] UKUT 0023* contained some unexpected and interesting features. It was all about whether a provision in the company's accounts in respect of liabilities to make future pension payments was deductible for corporation tax purposes.

It is generally accepted that remuneration and benefits payable to or for the benefit of employees is almost certain to be an allowable deduction from the company's profits under section 54 CTA 2009 as being:

> "incurred wholly and exclusively for the purposes of the trade"

although one can imagine circumstances when it might be disallowed. One of those circumstances was referred to by the Court of Appeal in the case of *Hoey v HMRC [2022] EWCA Civ 656:*

> "For example, the wages may be deliberately inflated so as to confer a personal benefit on the employee or with the object of artificially reducing the employers taxable profit".

This must be an extreme example because there is lots of authority to the effect that expenditure incurred with a tax motivation does not give rise to a duality of purpose so as to disqualify the expense. Indeed, this principle was acknowledged in *Hoey* where it was said that even engaging in a tax avoidance scheme cannot amount to a separate object of the employers in making the payment.

Be that as it may, in the case of AD Bly the conclusion of the Tribunal was not that there was a duality of purpose, but that the primary purpose of the company was to reduce their liability to tax without incurring actual expenditure, and not to benefit the employees.

As a result, the deduction was disallowed by the Tribunal, which perhaps indicates that the company may have rather overdone things.

However, there was a very puzzling aspect to this case.

The issue was whether a provision in the company's accounts in respect of liabilities to make future pension payments was deductible for corporation tax purposes under section 54, that is to say, the expense must be:

> "**incurred** wholly and exclusively for the purposes of the trade"

There was no suggestion that there was anything wrong with the provision – only whether it was tax deductible. For example, it satisfied the tests for a valid provision set out in the HMRC Business Income Manual at paragraph BIM 46250.

However, it was a *provision* – a figure which the accountants considered the company would probably have to pay sometime in the future. But section 54 requires the expense to be "incurred". It is clear that no expense had been incurred and this was confirmed by the FTT who said that the primary purpose of the company was to reduce their liability to tax *without* incurring actual expenditure. The Upper Tribunal said:

> "We think that it would have been more accurate for the FTT to have referred to the incurring of actual expenditure in the accounting period in which the deduction arose for tax purposes, since in AD Bly's case it did incur some of the expenditure albeit in subsequent accounting periods."

In other words the company had not incurred any expenditure in the accounting period for which it made the claim.

This must be right because if the company had incurred an expense and it remained unpaid, that would not have given rise to a provision – it would have been a creditor.

So all the arguments about whether it was wholly and exclusively for the purposes of the trade seem to have been irrelevant anyway.

Options

An option is an asset for the purposes of Capital Gains Tax by reason of section 21(1)(a) TCGA 1992 which states the position quite clearly:

> "(1) All forms of property shall be assets for the purposes of this Act, whether situated in the UK or not, including:
>
> (a) Options, debts and incorporeal property generally…."

The reason I mention this is because of the recent case of *Krishnamohan v HMRC TC 9146,* in which the Tribunal had occasion to consider what is meant by an option.

The taxpayer had obtained some financing for the purchase of a property and part of the documentation included an Option Agreement. For a consideration of £600,000, the taxpayer granted the lender an option to purchase the property exercisable any time after the expiry of 12 months. However, if the taxpayer repaid the loan (with interest) within 12 months the option ceased and was no longer exercisable.

This would not appear to be out of the ordinary - so what is the big deal here?

The problem derives from section 144 TCGA 1992 which provides that:

> "the grant of an option … is the disposal of an asset (namely the option)"

HMRC said that the legislation was quite clear; the option was an asset (by section 21), and the grant of the option was a disposal of the option (by section 144) so the taxpayer was faced with a charge to CGT on the consideration for the option of £600,000.

That sounds compelling - but only if the "Option Agreement" was really an option. It was called an option – but we have seen before (remember the crisps which were called poppadoms) that calling something an option does not make it

so. Nominative determinism is not a feature of the tax code.

Without getting too bogged down, the Tribunal explained that an option is an agreement whereby the grantor grants the grantee a right to buy something, not necessarily immediately but on a specific day or during a specific period; the grantee is not obliged to exercise the option.

The Tribunal held that this was not an option, but an agreement to grant an option if certain events were to occur. The events did not occur because the taxpayer repaid the loan, so the lender never acquired the option.

The distinction between an agreement to sell somebody the right to purchase an asset in 12 months time, and an agreement to sell somebody the right in 12 months time to purchase the asset, is a very fine one.

It all comes down the whether the agreement is revocable before the exercise date. If the right does not come into existence until a specified date and the grantor can unilaterally prevent it coming into existence before that time, it is not an option.

Furnished Holiday Lettings

The Finance Act 2024 was expected to reflect the announcement in the Budget that the furnished holiday lettings regime will be abolished from April 2025.

Furnished holiday lettings have benefited from a number of tax reliefs – generally those which apply to trades, such as capital allowances and capital gains tax reliefs like Business Asset Disposal Relief.

Not any more – or so it seems. Except that the Finance Act did not include any reference to furnished holiday lettings. Having regard to the election and the expected change of government, the whole subject might disappear into the long grass. Maybe.

More likely is that it will be picked up by the new government and enacted as originally suggested. I cannot imagine Rachel Reeves forgoing an opportunity to abolish a “loophole” – which I think is defined as is a tax relief introduced by the government which (shock horror) is actually used by taxpayers to reduce their tax

liabilities.

However, the possibility exists that in the right circumstances, a business of furnished holiday lettings can qualify as a genuine trade and get all the reliefs of a trade as of right, not just by being within the FHL regime.

The Institute of Chartered Accountants (and the Office for Tax Simplification) have suggested that there should be a statutory test to define when a property business is being carried on as a trade. HMRC have rejected this suggestion saying that it needs to be determined on the facts. (Well, of course – it will always depend on the facts – what is being asked for is some guidance about what facts give rise to a trade….. but never mind).

For inheritance tax purposes, a trade is not required – the issue being whether the business of property letting is disqualified from 100% Business Property Relief by being a business which consists wholly or mainly of holding investments.

HMRC take the view that furnished holiday lettings will in general not qualify for relief – but there are cases where the level of services provided is so high that it would be more akin to a trade and therefore qualify for the relief.

The decided cases on the subject indicate that the level of services provided is never high enough to satisfy HMRC, but sometimes they are enough to satisfy the Tribunals.

Maybe the new initiative from the ICAEW will give rise to some helpful development in this area – possibly enabling relief to be obtained (and perhaps stimulating the supply of rental accommodation.)

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FIELD COURT TAX CHAMBERS

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