UK Tax Bulletin

September 2024

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates at September 2024

Current Rates	
Retail Price Index: July 2024	387.5
August 2024	389.9
Inflation Rate: August 2024	3.5%
June 2024	2.9%
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 7.5% which applies from 20th August 2024.

There is one exception: Quarterly instalments of corporation tax bear interest at 6% from 12th August 2024; interest on overpaid instalments will be paid at 4.75%.

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 4% from 20th August 2024.

Official rate of interest

From 6th April 2021 2%

From 6th April 2023 2.25%

The Budget: 30th October

The daily predictions and forecasts of tax doom continue – but still there is no smoke (black or white) emerging from the chimneys of Somerset House. There is lots of other smoke as the media set fire to the various ideas which are intended to raise money to fill up the "black hole", but may in fact have the opposite effect. Who knows. The sad thing is that we will probably only know when it is too late.

Everybody remains in a state of uncertainty (and in some cases acute anxiety). Once upon a time we knew nothing until Budget Day. The Chancellor would have been wise to have done the same and not given her opponents (of all stripes) the opportunity for such criticism.

Employment or Self Employment

A few days ago, the Supreme Court handed down their judgment in the case of *Professional Game Match Officials Ltd v HMRC [2024] UKSC 29* concerning part-time football referees. I will get to the decision in a moment.

This is not an IR35 case because there were no intermediary companies but it is absolutely crucial to the IR35 regime and all those arguments which always depend on whether or not the hypothetical relationship would represent a contract of employment.

HMRC claimed that the part-time referees were employees of PGMOL, with the obvious PAYE and NIC consequences. PGMOL said they were not employees by reference to all the conventional tests – mutuality of obligation, control etc. The FTT agreed with PGMOL; the Upper Tribunal also agreed; the Court of Appeal did not disagree but were not happy about the manner in which the tests had been applied to the facts and remitted the case to the FTT for reconsideration.

PGMOL argued that the Court of Appeal should not remit the case to the FTT. However, the Supreme Court have now decided that this was the right thing to do – so back it goes, all the way down the snake to the beginning, albeit with some important legal guidance from the Supreme Court on the meaning of mutuality of obligation and control.

(Actually we can forget mutuality of obligation; that only relates to whether a contract exists, and gives no indication of the nature of the engagement. So we are left with *control.* But we know from *Ready Mixed Concrete* that "control is not everything" – but maybe that is an argument for another day).

So when it is said that PGMOL have lost their appeal to the Supreme Court, that is quite correct. But what it means is that HMRC have won the right to start the case again at the FTT. Some way to go on this think. Whatever the FTT decide next, the matter could easily end up again in the Supreme Court after many more years. I will probably read about it in my Care Home.

Domicile: Not Dead Yet

The concept of domicile may be on the way out as a determining factor for tax liabilities – although we wait to see what treasures will emerge from Pandora's box next month – but it does not mean that HMRC will cease to engage in arguments over domicile. They will eventually I expect, but certainly not any time soon.

These changes take a while. You only have to look at the Statutory Residence Test to see the reality. It is over 11 years since we were blessed with Schedule 45 FA 2013 and there has only been one case on it – and that has so far only got to the Upper Tribunal. (Maybe its because the provisions are so clear they do not give rise to any dispute? Ho Ho.)

And how about the recent Upper Tribunal case of *McCabe v HMRC [2024] UKUT 280* where arguments still continue over the law relating to residence before 2013. Reading the case is pure nostalgia; all those famous cases, and all that stuff about clean breaks and the loosening of ties. It takes you back.

A very interesting recent article by Brodies LLP explains that domicile is far from dead for inheritance tax purposes if there is a Scottish component – for example if the deceased was domiciled in Scotland and had personalty in Scotland.

Why should this matter? IHT applies to Scotland as it does to the rest of the UK. It is because Scotland has some forced heirship rules called legal rights which override the terms of the Will – and they provide that children automatically inherit part of the estate, effectively disapplying the spouse exemption. So a

charge to IHT can therefore arise.

This unsatisfactory position can be repaired by a deed of variation (because section 142 IHTA 1984 applies to the whole of the UK) – but that requires the agreement of those whose interests would be affected, and that can never be guaranteed; and of course some may be under 18 and require a court application. However, this issue is recognised by the legislation in section 147 IHTA 1984 (Legitim) which sets out the implications and an available course of action.

The deceased would have to be domiciled in Scotland for these legal rights to exist, and this would give rise to all the familiar arguments over domiciles of origin and the acquisition or loss of a domicile of choice, and so on.

I am frequently concerned about whether or not a person is domiciled in the UK, but I have never thought to worry about whether they might be domiciled in Scotland. I will now.

This does of course raise the interesting issue of a "UK domicile" which as a legal concept does not exist; a person is domiciled in England and Wales, or Scotland or Northern Ireland. However the tax legislation is framed on the basis that there is such a concept. (The point is recognised in section 721 ITEPA 2003 but nowhere else). I will spare you any more of this fascinating analysis - and in any event, I don't think arguments on these lines have much chance of success.

The Burden of Proof

I don't want to get carried away with interesting legal points without any practical significance (well, actually I do – but never mind) but there is an issue here which can be extremely helpful when it comes to discussions with HMRC.

As everybody knows, the general rule in tax matters is that the burden of proof is on the taxpayer – and this is most acute when it comes to an assessment or a closure notice. The assessment or determination which is made by HMRC will stand good unless the taxpayer can prove on the balance of probabilities that the assessment is excessive: section 50(6) TMA 1970.

This comes as a surprise to some (optimistic) taxpayers who say that HMRC are

obviously wrong and cannot possibly prove that X or Y occurred. Unfortunately they don't have to. Once the assessment is issued, the taxpayer has to prove that HMRC are wrong – and sometimes (for example when trying to prove a negative) they cannot do so, and have to pay up.

However, that is not always the case. If HMRC claim that the taxpayer has been careless and therefore liable for a penalty, the burden of proof is on HMRC to prove their case. Similarly, as in the recent case of *Dennison v HMRC TC 9153* the onus of proof is on HMRC to show that an enquiry notice had been received by the taxpayer within the relevant deadline. And also in the case of *Chee Whye Yip v HMRC TC 9180* where HMRC were unable to prove deliberate conduct on the part of the taxpayer.

A more subtle point arose in *Get Onbord Ltd v HMRC TC 9238* where HMRC rejected the taxpayers claim for R&D relief on the cost of developing certain software. HMRC took the view that the software did not represent an advance in science and technology. They may have been right but they did not adduce any evidence to the Tribunal. They just relied on their view and the fact the burden of proof was on the taxpayer.

However, the taxpayer provided explanations and documentary evidence why the expenditure qualified for the relief, enough to cause a shift in the evidential burden. It then became necessary for HMRC to go beyond mere assertion and to provide evidence in support of its conclusion. Without any evidence they were unable to do so and the taxpayer was therefore entitled to its relief.

The shifting of the burden of proof does not happen very often in tax disputes but what happens more often is that HMRC suggest (or at least imply) that the taxpayer is careless and liable to a penalty, unless he can prove otherwise. This is completely wrong and should never be ignored. Not even if HMRC are willing to suspend the penalty - because nobody wants to have a record of admitted carelessness in dealing with their tax affairs on their file with HMRC.

I cannot resist mentioning the case of *Qureshi v HMRC TC 6372* where HMRC argued that evidence was not required because on evidential matters they "had an understanding with the Courts and Tribunals". (I promise you I am not making this up). The judge said that the very idea was "frankly incredible" and showed them the door sharpish. I don't suppose we will hear that again – but we should have never heard it in the first place.

Discovery Assessments

Coincidentally, similar issues arose in the recent case of *Lowe v HMRC TC 9285* which concerned the validity of a discovery assessment. The bar for making a discovery assessment is very low – a discovery can be as little as a change of mind by the Inspector of Taxes. But it has to be something.

The FTT in *Lowe* set out what is required. I mention it because I think that the circumstances and the arguments may be familiar – so the analysis by the FTT may be rather helpful.

The judge pointed to the following formulation by the Court of Appeal of the subjective test for the issue of a discovery assessment:

> "The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made".

Which was further summarised as follows:

> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax"

HMRC produced no evidence that a discovery was made. The FTT suggested that HMRC wanted to imply that because they issued assessments, they must have been valid. The FTT made it clear that no such inference could be made. This is the same point as I have referred to earlier. Evidence is required. Not very much perhaps – the bar is very low - but there must be something more than mere assertions, which are not evidence.

It may also be of interest to note the following passage by the FTT:

> "There is no obligation for a taxpayer to provide corroborating evidence at the same time as submitting self-assessment tax returns. That is the whole point of self-assessment."

HMRC might seek some corroborating evidence for a claim or position taken by the taxpayer (and their request may or may not be reasonable) but no criticism can be made of the taxpayer for not providing corroboration with their tax return.

Commercial Purposes

I am sure that we are all concerned at some time or another about whether a particular transaction is being undertaken for bona fide commercial reasons and does not have as one of its main purposes, the avoidance of a liability to tax.

These words will be familiar as they appear in numerous provisions, and it is sometimes difficult to dissuade HMRC, for example in clearance applications, from the view that if a transaction has a tax advantage then one of its main purposes must have been the tax saving, which is of course the avoidance of tax.

Faced with these difficulties the judgment of HH Judge Malek in *Brindleyplace Holdings SARL v HMRC TC 9282* is interesting. The details of the case are obscure, dealing with Type A transactions for the purposes of SDLT (No – you don't want to know… and I certainly don't either) but the key issue was whether the transaction was undertaken for bona fide commercial reasons and not tax avoidance.

On the issue of bona fide commercial reasons, Judge Malek said

> "One of the reasons why the Appellant chose to purchase the properties through a share sale is because this led to a lower tax burden and the Appellant was able, as a result, to offer a higher price for the properties….The desire to reduce complexity in the holding structure and reduce administration costs in the manner described and evidenced is, in my view, a sufficiently commercial reason such that it cannot be said that there was no commercial reason for the transfer of the properties …. this part of the transaction was, in my view, carried out for bona fide commercial reasons."

But bona fide commercial reasons or not, there must still be "tax avoidance" about which the judge had this to say:

> "The parties have the freedom to choose and choosing the option which, obviously, results in a smaller tax burden (whilst accepting the economic consequences of that choice) cannot, in any meaningful way at least, be described as tax avoidance….By choosing to take advantage of a relief expressly provided for by Parliament, … you cannot, again, be said to be avoiding tax".
>
> "And, what if, as in the present case, forethought was applied and a plan set in place at the outset detailing the steps, the order and the timeframe in relation to each step and then executed in line with the plan? To my mind this makes no difference and does not take what would otherwise not be 'tax avoidance' into the realms of that which is."

He was also able to conclude that the notorious section 75A FA 2003 did not apply (which is an anti-avoidance provision, but mysteriously does not require any tax avoidance motive). That seems pretty helpful too.

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Important Note