UK Tax Bulletin

November 2024

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Latest Rates of Inflation and Interest

The following are the latest rates at November 2024

Current Rates	
Retail Price Index: September 2024	388.6
October 2024	390.7
Inflation Rate: October 2024	2.7%
September 2024	3.4%
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 7.25% which applies from 26th November 2024.

There is one exception: Quarterly instalments of corporation tax bear interest at 5.75% from 18th November 2024; interest on overpaid instalments will be paid at 4.5%.

It is proposed that from April 2025 the rate will be increased to 4% over bank base rate.

Repayment supplement

Interest on overpaid tax is paid at Bank base rate minus 1% which gives a rate of 3.75% from 26th November 2024.

Official rate of interest: From 6th April 2023: **2.25%**

The Budget

OK – we now have the Finance Bill. It is not a lot better but at last we have some draft legislation to consider.

Share Valuation: Rebasing

I have often mentioned the various issues which are involved when valuing unquoted shares for tax purposes and the numerous artificial assumptions which must be used in determining the value. This has famously been described as a "dim world peopled by the indeterminate spirits of fictitious or unborn sales".

In most cases, the value will need to be determined by reference to section 273 TCGA 1992, being essentially:

> "the price at which [the shares] might reasonably be expected to fetch on a sale in the open market."

Inevitably when valuing a minority holding, a discount will be applied to reflect the intrinsic nature of a minority shareholding – not least the inability to benefit from the assets or profitability of the company except at the whim of those in control, and of course the lack of a market in which the shares can be sold. The size of the discount is usually dependent on the size of the holding.

That is fine when you are considering a value on which tax will be payable; the taxpayer will usually want the value to be as low as possible. However, sometimes it is more advantageous to argue for a higher value. Certainly, that will occur in the real world when a minority shareholder is being bought out – because he will be mightily put out if he only gets a small fraction of what he thinks his shares are worth.

This is also relevant where there is an opportunity for rebasing (which now seems to be on the horizon). In such cases the concept of a "quasi partnership" may be rather helpful as it can eliminate a discount, thereby substantially increasing the value of the shares. This was recently highlighted by the case of *Gibbins v Tierney and others [2024] EWHC 2004 (Ch).*

There was nothing particularly new here, but it did reaffirm the principle that the enterprise can be regarded as quasi-partnership if, for example, the business is being carried on by a company with all the shareholders participating fully in the management, and the risks of the business, with personal relationships and a degree of mutual trust. In such cases, a pro rata valuation of all the shares will usually be appropriate.

There are numerous authorities on quasi-partnerships, the more celebrated cases being *Ebrahimi v Westbourne Galleries Ltd [1973] AC 360*, *Buckingham v Francis* and in *Re a Company 003420/1987* and more recently *Wootliff v Rushton-Turner [2016]. EWHC 2802.* This decision in *Gibbins v Tierney* adds helpfully to that list.

Dividend: Date of Payment

The Upper Tribunal has recently had something interesting to say about when dividends are treated as having been paid – in other words when they become taxable. And their analysis provides a fantastic lifeline to some struggling companies. (Those who are not much interested in the technical analysis might want to skip to the last paragraph).

A final dividend which is declared by the shareholders in general meeting, or by written resolution, is treated as paid for the purposes of the Corporation Tax Acts on the date when the dividend becomes due and payable: see section 1168 CTA 2010.

The date when a final dividend becomes due and payable is usually set out in the Shareholders Resolution. If a date for payment is not specified, the date of declaration of the dividend will be the due and payable date, creating an immediately enforceable debt.

An interim dividend different. It is a dividend paid on the authority of the directors (not the shareholders) under powers given to them by the Articles - for example Article 30 of the Model Articles and previously Table A. No entitlement to the dividend (nor any enforceable debt) arises until actual payment. At any time before payment the directors are able to change their minds and decide not to pay the dividend: see *Potel v CIR TC 46 658*.

In the case of an interim dividend a question arises when is payment actually made. It has been suggested that unless provided otherwise by the Articles, payment must be in cash, so merely crediting the dividend to the shareholders loan account with the company would not be sufficient. That could be highly troublesome if a dividend is resolved to be paid by the directors where there are inadequate funds to make a payment in cash, and this happens shortly before the year end for the purpose of clearing an overdrawn director's loan account. (Anybody recognise that situation?)

The case of *Garforth v Newsmith Stainless Ltd 52 TC 522* provides a bit of a helping hand here as the High Court held that the placing of money unreservedly at the disposal of the director was equivalent to payment in the case of a bonus. It is assumed this reasoning applies equally to the payment of a dividend, but this has yet to be conclusively decided – although it is clearly the view of HMRC in the CT Manual paragraph 15205.

However, there is a sting in the tail. HMRC take the view that placing the money unreservedly at the disposal of the shareholder by crediting it to their loan account means that the entries must actually be made in the books of the company – and if that does not occur until after the year end, payment will not be treated as having taken place. (So a loan to a participator will arise and a charge to tax under section 455 CTA 2010 would loom large.)

With these principles in mind, it is interesting to read the recent case of HMRC v *Gould [2024] UKUT 285*. In this case the directors resolved to pay an interim dividend on 31st March 2016. The dividend was paid to one of the shareholders on 5th April 2016 and to the other shareholder in December 2016 (when he was not UK resident). Sounds like a smart move.

HMRC argued that both dividends should be treated as paid on 5th April 2016 on the grounds that the payment to the first shareholder gave rise to an enforceable debt in favour of the other shareholder. They claimed that the company's articles and the common law required the company to pay dividends equally and proportionately to shareholders of the same class. So, on the 5th April 2016 the non resident shareholder had an enforceable right to his dividend – and that represented payment – and at that date he was UK resident. Oh dear.

The FTT said that the failure to pay the dividend to the non resident shareholder on 5th April may have given rise to legal remedies – but not to an enforceable debt. But the Upper Tribunal has now decided that the FTT was wrong to conclude that there was no enforceable debt, because the directors can change their mind at any time before payment of an interim dividend – and once it is paid there is obviously no debt.

However, they took a different view about the position where one shareholder has been paid an interim dividend and the other has not. The Upper Tribunal held that this did create a debt:

> "If a shareholder is not paid their share of an interim dividend, then a debt arises at the time the other shareholders are paid. That must follow from the principle that shares of the same class confer the same rights and impose the same liabilities."

This would seem to be extremely helpful because it would get round the directors' loan account problem. You don't actually have to pay the interim dividend to everybody – just to one of the shareholders, then all the others have a debt which clears the loan account without having to pay out the money (which could be crucial if funds were not available). Silver lining? More like the Holy Grail for companies where these are real and continuing problems.

Loans to Participators: Section 455

It is probably now long forgotten, but during lockdown HMRC issued some guidance on the loans to participators rules in section 455 CTA 2010. It was not guidance really but an explanation of their view about what represents a repayment of such a loan.

Everybody knows about the tax implications of loans by a close company to participators and their associates. If a company makes a loan to a participator, section 455 CTA 2010 requires the company to make a payment equal to 33.75% of the loan to HMRC. The company can recover the amount from HMRC under section 458 if the loan is repaid to the company, or if the debt is released or written off. And if the loan is repaid within 9 months of the end of the accounting period , the company does not have to pay the section 455 charge at all.

Sometimes the loan is said to have been repaid but all that has happened is that debtor balances have been moved around a series of associated companies. HMRC say (on the authority of Collins v Addies TC 65 190) that:

> "the substitution of a fresh debtor (for the original debtor) does not constitute repayment."

Collins v Addies explains that you cannot just transfer liabilities around; liabilities have to be novated which is a tripartite contract whereby the existing debt is released and substituted by another. HMRC say that this does not represent repayment, so no relief is allowed under section 458. That is because Collins v Addies says that a release of a loan by way of novation does not represent repayment. That makes sense - except that Collins v Addies expressly held that a novation was a release, so a refund under section 458 would be available to the company (and of course a corresponding charge on the participator).

HMRC also express their concern (with some justification), that repayments are said to have been effected by circular or recycling transactions. They specifically highlight the position where a shareholder borrows £2 million from company A and just before the repayment deadline, he borrows from company B to repay company A. When the deadline for repayment to company B is approaching, he borrows (again) from company A to clear his debt in company B – and so on every year. On each relevant date (nine months from the end of the accounting period) the loan has been repaid and no section 455 arises.

These arrangements clearly deserve to be challenged because the reality of the situation is clear. However, the reason given by HMRC for challenging such arrangements does not really stand up to scrutiny. They say:

> "looking at the legislation as a whole and its purpose there is no repayment and section 455 should apply to the amounts withdrawn from the companies".

This is hardly adequate as a technical challenge because the legislation (however you look at it) does not provide any grounds for saying that there has been no repayment.

What HMRC are really saying is that the legislation does not catch such recycling arrangements, but it jolly well ought to, so we are going to say it does. Not good enough I am afraid. What matters is whether there really has been a repayment. Obviously to be effective, the recycling arrangements must be genuine otherwise they would fall down on any number of grounds, but it is difficult to say that a loan to company A has not genuinely been repaid if a genuine repayment has actually been made. And the same with company B.

These chickens were bound to come home to roost – a change in the law was inevitable – and indeed is now contained in the Finance Bill. The draft legislation is (of course) rather difficult to follow but the intention is clear from new sections 464ZA and 464ZB that any such recycling which occurs after Budget Day will no longer be effective.

The existing rules prevent a company having their loan repaid shortly before the deadline and then making another loan shortly thereafter; these new rules essentially extend those provisions to arrangements involving other companies as well.

SDLT and Sub Sales

The recent case of *Murphy v HMRC TC 9328* involved a tax scheme involving sub sale relief under section 45 FA 3003, but unfortunately it all went rather pear shaped, with the result that SDLT was payable on the full purchase price of the property and also on the sub sale – a rather higher liability than would otherwise have arisen. I don't suppose that there will be much sympathy here because the taxpayer was clearly playing with fire.

An analogous misfortune befell the taxpayer in the case of *Goldsmith v HMRC TC9323* where he ended up paying SDLT twice by failing to obtain sub sale relief – but there was no tax scheme involved here, just an unfortunate failure to make the appropriate claim.

It is difficult to draw many lessons from these two cases but, whether playing with fire or not, in both cases the taxpayer ended up paying tax which was clearly

not “the right amount of tax” - the mantra which is so beloved by HMRC.

We do not know whether HMRC have chosen not to claim from the taxpayers any more than the right amount – but it would be to their credit if they did so. At the very least it would be some evidence that they really do want to charge only the right amount of tax – rather than the opposite which is often suggested.

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