UK Tax Bulletin

January 2017

Field Court Tax Chambers

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Latest Rates of Inflation and Interest

The following are the current rates at December 2016

Current Rates	
Retail Price Index: December 2016	267.1
Inflation Rate: December 2016	2.5%
Indexation factor from March 1982: to December 2016 to November 2016	 Not yet published 2.342

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 present rate of 2.75% from 23rd August 2016

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% from 16th August 2016

Repayment supplement

Interest on all overpaid tax is payable at the same rate.

The formula is Bank base rate minus 1% but with an overriding minimum of 0.5% which applies at the present time.

Official rate of interest

To 6 April 2014: 4%

To 6 April 2015: 3.25%

From 6 April 2015: 3%

Reasonable Excuses

I am always on the lookout for reasonable excuses and there have been two conflicting cases decided this month.

In *Crossley v HMRC TC 5535* the taxpayer managed to persuade the Tribunal that he had a reasonable excuse for not paying his tax on time because he did not have the money. That is an impressive success because schedule 56(16) Finance Act 2009 specifically states:

> "An insufficiency of funds is not a reasonable excuse, unless attributable to events outside the person's control".

The facts were interesting – but it just goes to show that the words "attributable to events outside the person's control" are sometimes interpreted very sympathetically by the Tribunal.

Mr Crossley had a portfolio of properties funded by RBS. He sold one of the properties (making a capital gain) but RBS insisted on the whole of the sale proceeds being paid to them before they would release their charge and allow the sale to proceed. So of course, Mr Crossley ended up with no money – but he still had a capital gains tax bill.

The Tribunal found that he could only conclude the sale if he could give clean title and he could only do that if all the sale proceeds went to RBS. Accordingly, the absence of the funds to pay the tax was because of an event outside his control. He was subsequently able to get the money to pay the tax, and did so as soon as he could.

HMRC imposed a penalty but the Tribunal concluded that Mr Crossley did the best he could in this unfortunate situation and therefore had a reasonable excuse to relieve him from the penalty.

By way of contrast we have the case of *Coomber v HMRC TC 5534*. Mr Coomber was also late with his tax payment and claimed to have a reasonable excuse from the resultant surcharge.

Mr Coomber sent a cheque to HMRC for the tax - but it was dishonoured by the bank. There was no reason given why the cheque bounced because Mr Coomber had adequate funds in his account to meet the cheque.

When Mr Coomber found out about this, he sent another cheque to HMRC which was duly honoured by the bank on 17th March 2016. The problem here is that this was more than 28 days after the due date and a 5% surcharge therefore arose.

Mr Coomber said that he did not know the bank had dishonoured it – and there was no reason for them to do so – and it was certainly not his fault that payment was delayed beyond 28th February. He had sent another cheque as soon as he found out.

The Tribunal were seriously unsympathetic. They said that it was his responsibility to pay his tax on time. He had chosen to pay the tax by cheque rather than by electronic means and he was therefore taking a risk that if anything went wrong, the clock for penalties would start to run against him.

Mr Coomber said that he could not be expected to contact the bank by telephone on a regular basis to see if cheques had cleared. (Indeed, his agent had spoken to HMRC who told him that the tax had been paid). The Tribunal disagreed. They said that a reasonable taxpayer in these circumstances would have telephoned the bank to find out whether the tax cheque had cleared. His failure to do so was unreasonable and the surcharge was upheld.

Goodness me, that looks harsh. This week, millions of people will have sent cheques to HMRC. They will have sent them first class expecting them to arrive in the normal course of post the following day (as they are entitled to expect under section 7 Interpretation Act 1978). Providing they have ample funds in their account to meet the payment, they may feel it is reasonable to believe that the cheque will arrive and the payment will be made.

Is it reasonable to expect all those millions of people to make millions of telephone calls to their banks this week to make sure their cheques have cleared? Quite apart from the fact that nobody would be able to get through, I cannot imagine the banks would regard that as reasonable. Furthermore, what is the taxpayer then supposed to do. He calls the bank and they tell him that the cheque has not cleared. So what does he do – send another one? He may not have sufficient funds to pay the tax twice. And if he sends a second cheque, it might arrive just as the first cheque is clearing. He could cancel the first cheque, but that would mean that the cheque which was sent on time would certainly not be paid, thereby giving rise to a penalty.

One might have hoped that both HMRC and the Tribunal would have felt that the quality of mercy would not have been too strained by a more sympathetic approach.

Expenses of Employment

I do not (often) get myself concerned about MPs expenses but I noticed a recent Tribunal report on the subject: TC 5606. Mr Liam Byrne MP claimed the expense of producing "contact cards" for use in his constituency to assist his constituents who wished to contact him. The relevant head of claim read as follows:

> "MPs have the right to be reimbursed for unavoidable costs where they are incurred wholly, exclusively, and necessarily in the performance of their parliamentary functions, but not otherwise."

Nobody will fail to recognise that the key element of this test is identical to the well known test for employees' expenses under section 336 ITEPA 2003.

It has always been difficult to meet this test (in my view it is quite impossible) but the Tribunal's comments provide an opportunity for some interesting arguments should the point arise.

As a tax person, one knows that this expenditure could not possibly be deducted under section 336 because it was not necessarily incurred in the performance of his duties. He could carry out his parliamentary functions without this expenditure and not every MP had to lay out a similar sum for this purpose.

In any event, when the expenditure was "incurred" (which must have been when the contract was entered into for the expenditure), it was obviously not in the performance of his parliamentary functions.

However, in the view of the Tribunal, fine distinctions should not be made between expenses that are incurred "in" the performance of parliamentary functions and expenses that are incurred "for" the performance of parliamentary functions, of the kind that taxing statutes frequently make.

Accordingly, as the expense was incurred for no other purpose than to further the interests of Mr Byrne's constituents, the Tribunal decided that it satisfied the test.

Despite the Tribunals disclaimer, this looks pretty useful to me.

Loss Relief

The recent case of _Scrambler v HMRC [2017] UK UT 001_ provides a helpful analysis by the Upper Tribunal of the test to be applied in determining whether there is a reasonable expectation of profit for the purposes of section 68 Income Tax Act 2007 enabling loss relief to be obtained – and not denied by section 67 where losses have been made for five years.

Mr and Mrs Scrambler had a dairy farming business. The price of milk was volatile during the relevant period and the FTT found that a competent farmer carrying on the activities would not have had a reasonable expectation of profit.

The Upper Tribunal explained that the competent farmer needs to demonstrate why, looking at the nature of the activities as they were carried on, they could not reasonably be expected to be profitable until after the end of the five year period.

Unfortunately, although Mr and Mrs Scrambler were competent farmers, throughout the relevant period the falling milk prices (over which they had no control) meant that no matter how competently they conducted their business, they could have no reasonable expectation that profits would arise in due course.

These provisions have been around for a long time, and are naturally intended to protect HMRC from having to give loss relief for an indefinite period; it is helpful to have further clarity on the relevant conditions to be satisfied by the taxpayer.

IHT Omissions

It may be remembered that in 2010, in the case of _Fryer v HMRC TC 398_, the question arose whether the deferral of retirement benefits by a pensioner represented an omission to exercise the right giving rise to a transfer of value for inheritance tax purposes by reason of section 3(3) IHTA 1984.

The taxpayer did not take her retirement benefits at her normal retirement date. She has no immediate need for the income. However, she died shortly thereafter.

HMRC said that there was a transfer of value because there was a deliberate omission to exercise a right (her right to take her pension); her estate was diminished by the omission; and the value of somebody else's estate was increased as a result.

The Tribunal said you just have to read the legislation and there was nothing to suggest that these conditions were not satisfied; the absence of any tax avoidance motive was irrelevant. She did not fail to exercise her rights by accident. A charge accordingly arose.

This matter has recently been revisited by the Upper Tribunal in the case of *HMRC v Staveley [2017] UK UT 004*. The main issue was whether Mrs Staveley's omission to exercise her right to take her pension should be treated as a transfer of value because following her (untimely) death, the proceeds of the pension scheme went to her sons.

The Upper Tribunal noted that although the sons' estates would not have been increased in value but for her omission to take the benefits, that was not enough to satisfy the test. It overlooked the fact that the payments out of the pension scheme were at the discretion of the scheme administrator and there was nothing to suggest that they had not exercised their discretion properly.

The proximate cause of the increase in the sons' estates was the exercise of the discretion of the scheme administrator not the omission by Mrs Staveley to take her pension benefits during her lifetime.

This is a welcome analysis of the position - and of an issue which must occur frequently. Many people do not take their pension rights immediately they hit retirement age and although the inheritance tax issue is only likely to arise if they die before they do so, this would be a real hostage to fortune. They could fall ill at any time – and the last thing they would then need is HMRC telling them to increase their estate for inheritance tax by taking pension benefits that they don't need.

Foreign Tax Investigations

A client recently told me about his experience with the tax authorities in another country. (It was a G7 country - not a country where one might reasonably harbour doubts about their integrity).

He was told by the local equivalent of the Inspector of Taxes that what he had done was indeed authorised by the law but we in the Tax Office think it should not be. So we will tax you. You can fight it in court if you want, with the obvious financial consequences.

So the Inspector thinks that if he does not like the law, he should proceed on the basis of the law as he would like it be. He obviously knows better than Parliament what the law should be. His view therefore takes priority.

So if he is driving down the road and thinks the speed limit should be higher, the law will not apply to him because he takes a different view.

That is obviously completely stupid. But in the case of a government official it is not only stupid – it is tyranny.

We in the UK would say that this is dreadful. It is an abuse, it is an insult to Parliament and a complete denial of the rule of law. It is also important to recognise that this kind of approach brings the tax authorities into contempt – and encourages a culture of non compliance. If the tax authorities are allowed to flout the law – why shouldn't we?

This was not the UK of course ….

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