UK Tax Bulletin

March 2017

FIELD COURT TAX CHAMBERS

Contents

March 2017

Current Rates... Latest rates of inflation and interest

New Non Dom Rules …....................................More changes announced in the Finance Bill

Claims by Executors ………………………..… Executors cannot claim s131 relief on shares

CGT Hold over relief………...……… Abandon hope if any family member is not resident

Domicile of Choice ………………………………..….. Further guidance from the courts

QROPS………...………………………..……...HMRC impose a new tax charge on transfers

FIELD COURT TAX CHAMBERS

Latest Rates of Inflation and Interest

The following are the current rates at March 2017

Current Rates	
Retail Price Index: February 2017	268.4
Inflation Rate: February 2017	3.2%
Indexation factor from March 1982: to February 2017 to January 2017	 2.379 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 6th April 2014: 4%

To 6th April 2015: 3.25%

To 6th April 2017: 3%

From 6th April 2017: 2.5%

New Non Dom Rules

The Finance Bill was published on 20th March and, would you believe it, the proposed rules relating to the non doms have been changed yet again. They have fiddled around with the wording of the provisions quite a lot and although the main thrust of the proposals continues, some have been substantively changed and others have been removed altogether. These will be included in a future Finance Bill - and with luck, they will not be retroactive.

There are very few changes to the new rules which bring UK residential property into charge to inheritance tax, where it is held though an offshore company or other vehicle. However, the value threshold for the shares in the offshore company, below which the new rules have no application, has been increased from 1% to 5% which is clearly very helpful.

Another change of some significance is the abandonment of an exit charge in the event that a trust disposes of an interest in a company which owned a UK residential property. This was going to give rise to an immediate exit charge – but it is now proposed that the proceeds of any disposal (or the repayment of any loan which is caught by the loan rules) will remain outside the excluded property rules for two years from the disposal or repayment – similar to the proposals in respect of individuals.

The rules relating to the trust protections have been revised - particularly in connection with tainting of existing trusts. This would occur, for example, if the settlor makes an addition to the trust after 5th April.

If a settlor has made an interest free to a trust which continues after 5th April 2017, this will be regarded as an addition to the settlement and therefore cause the trust to be tainted. (Surely a sense of proportion was required here. There are pages and pages of legislation dealing with this point – which surely can hardly be of major significance). Anyway, the previous suggestion that a payment of commercial interest on such loans was necessary for the current year has been dropped. HMRC has confirmed that from m6th April 2017, the loan will be regarded as arm's length (and therefore not be regarded as tainting) if the official rate of interest is paid annually.

It is no longer proposed that distributions from trusts to non-resident beneficiaries will not reduce the trustees stockpiled gains. Similarly, it was proposed that where a benefit is received by a beneficiary who is a close family member of the settlor but who is not liable to CGT on the payment or benefit received, the charge would be made on the settlor. This too has been abandoned (at least for the moment), along with the recycling rule where a distribution is made to a beneficiary and the funds are given to a third party within three years. It was proposed that the remittance of those funds by the third party would be regarded as a remittance by the original recipient – but this is still OK for a while.

There are a whole load of new rules relating to the valuation of benefits – apparently to give more certainty to individuals receiving benefits about how they will be taxed. In many cases, the benefits will be based on the official rate.

There are likely to be more changes before the rules are finally enacted and let us hope we will have until Royal Assent (rather than 5th April) to take all necessary precautions.

CGT Hold Over Relief

There are some interesting legislative interpretations this month. One of these arose in the case of *Reeves v HMRC TC 5680* in which the Tribunal was concerned with a claim for holdover relief for capital gains tax. Mr Reeves made a gift of an asset to a UK company and claimed holdover relief. However, section 167 TCGA 1992 provides that holdover relief is not available if the company is controlled by non-residents.

Mr Reeves owned the shares in the company but he was married and his wife was non-resident. Husbands and wives are connected persons. So, if we consider the position of Mrs Reeves, she was connected with Mr Reeves and his shareholding could therefore be attributed to her. She was non-resident so it was possible to say that the company was controlled by a non-resident. Can you believe this? Try as they might, counsel for Mr Reeves could not get past the clear analysis of the legislation which denied holdover relief.

The definition of *connected person* is very wide. It is a spouse, brother, sister, ancestor or lineal descendant so if virtually anybody in the family is non-resident, holdover relief would be denied because that non-resident person could have the whole of the shares attributed to him.

The intention of Parliament seems to have gone a bit AWOL here. It might of course be said that this extraordinary result was exactly what Parliament intended – but that may be a minority view. If one looks at the reasoning of Lord Reed in UBS and DB in the Supreme Court, his formulation that if the construction makes no sense and could not be what Parliament intended, a purposive construction should be available to assist the taxpayer. Or to use the words of the Supreme Court more precisely, an appropriate purposive construction could be adopted to interpret the legislation in the light of the transaction which took place.

It seems to me that the effects of this decision are so startling that some kind of HMRC practice or relieving procedure might be forthcoming.

No, I don't think so either.

Claims by Executors

Section 131 ITA 2007 provides income tax relief where a person subscribes for shares in an unquoted trading company which subsequently become of negligible value. The recent case of *HMRC v Leadley*, [2017] UK UT 0111 considered such a claim and the issue was simply this: if the owner of the shares dies before making a claim, can the claim be made by his executors.

Mr Leadley had invested in a company and by 5th April 2010, his shares had become valueless. His tax return for the year 2009/10 would ordinarily be filed by 31st January 2011 – but tragically he was killed in May 2010. He had not of course filed his tax return by then.

In January 2011 when his executors submitted his tax return, they included a claim for the relief. HMRC refused the relief on the grounds that only the person who owned the shares can make the claim; he was dead, so bad luck.

The executors said OK, we owned the shares in the company when the claim was submitted, so please can we have the relief. Er no; by the time the executors acquired the shares, they had already become of negligible value so the executors could not make the claim either.

The First Tier Tribunal decided that the executors had a valid claim because executors stand in the shoes of the deceased and were therefore able to make such claims as the deceased could have made had he lived. The Tribunal expressed the position as follows:

> "By virtue of their common law legal status as his personal representatives, the executors stand in the shoes of Mr Leadley and are treated, and were intended by Parliament to be treated, in so far as Mr Leadley's chargeability is concerned as if they were Mr Leadley".

The FTT may have had in mind the following extract from the judgment in Rickless v United Artists [1987] 1 All ER 679:

> "Personal representatives are not the agents of the deceased; their powers rest not on the authority given to them by the deceased but on a quite separate authority given to them by the law to stand in the place of the deceased"

The Tribunal might also have had regard to the case of Otter v Church, Adams, Tatham & Co [1953[1 All ER 168 in which it was said that:

> "what vests in the personal representatives is the right of action which was previously vested in the deceased"

and in which reference was made to Raymond v Fitch [1842] which showed that:

> "as a matter of common law all choses in action which are not of a purely personal nature such as an action for slander, survive and pass to the personal representatives".

HMRC appealed against the decision and during the course of the hearing before the Upper Tribunal, they produced an internal HMRC memorandum which contained the following passage:

> "we have the situation where if a taxpayer is knocked down on her way to her accountant's office to sign a negligible value claim, no one can make a capital loss on the asset whereas if she is knocked down after signing the claim a capital loss will be available. This seems extremely harsh".

I am sure everybody would agree that this is extremely harsh - but what on earth has an internal HMRC memorandum got to do with it? Is this memorandum relevant to the court in determining the meaning of section 131? What if the taxpayer had produced a letter from his adviser, or even perhaps counsel's opinion, saying that relief was available. Would that have been relevant to the court in interpreting the provision?

Anyway, the essential point, however harsh, is reasonably clear. To make a valid claim under section 131 it is necessary for the person who owns the shares at the relevant time to make the claim. Accordingly, the executors need to be treated as the person who owns the shares for this purpose. If they cannot be so treated, they cannot make the claim.

The FTT said that they could – but the Upper Tribunal held that this was mistaken. They said that they deceased and the executors cannot be equated. In support of this conclusion they explained that the TCGA treats the two as distinct and provides in section 62 for personal representatives to be deemed to acquire the assets of a deceased person on his death for consideration equal to their market value without a disposal.

We hear a lot about purposive interpretations when HMRC seek to deprive a taxpayer of a relief – but sadly, they never seem so keen on purposive interpretations when they benefit the taxpayer. The FTT thought that a purposive interpretation was appropriate here but, unfortunately for the executors, the Upper Tribunal took a different view.

Domicile of Choice

The recent decision of U v J (2017) EWHC 449 (Fam) was a family law case where the point in issue was the appropriate jurisdiction for a divorce. This depended on the domicile of the parties.

Both parties had foreign domiciles of origin and the question was whether either of them had acquired a domicile of choice in the UK.

The court considered the relevant test for the acquisition of a domicile of choice, specifically Rule 10 of *Dicey* which states as follows:

> "Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence but not otherwise".

Accordingly, as each of them had a foreign domicile of origin, this was the relevant test: had they been residing in the UK with the intention of permanent or indefinite residence here.

Naturally, the court conducted a detailed examination of the underlying facts. The judge explained that both parties had lived peripatetic lives for much of the last twenty years; he particularly made reference to "the fact that the Petitioner has lived in England only very temporarily and now some time ago". She was a student in 1995 – 1997 and then in a house with the Respondent in multiple occupancy for about a year in 2001/02. Nevertheless, the court decided that she had lived in the UK sufficiently to acquire a domicile of choice here. Furthermore, the court decided that she had not lost her domicile of choice notwithstanding her subsequent residence abroad.

This is an interesting conclusion and will be of value to anybody seeking to establish a domicile of choice outside the UK. However, I imagine that someone with a UK domicile of origin would find it to persuade HMRC that they had acquired a domicile of choice in another country on these grounds.

As far as the Respondent was concerned, despite the judge being "satisfied that he did not see England as the place where he would ultimately retire" it was held that he too had acquired a domicile of choice in England.

With the particularly high profile given to domicile matters just at the moment (see also the FTT decision TC5712), this reasoning could prove useful in many cases. On the other hand, I guess there may be an appeal.

QROPS

Qualifying Recognised Overseas Pension Schemes got a bit of a going over in the Budget. Any transfers to a QROPS after 8th March 2017 will now be subject to a 25% tax charge (deducted by the scheme administrator) unless both the individual and the QROPS are in the same country, or both are within the EEA, or if the QROPS is an occupational pension scheme sponsored by the individual's employer. You might call it a sort of Quexit.

In addition, following a transfer to a QROPS after 5th April 2017, the UK tax rules will continue to apply for the following five years, wherever the individual is resident.

If, following a tax free transfer the individual becomes resident in a country outside the EEA within five years, a charge will arise on that occasion – and conversely, if a charge to tax arose on the transfer and within five years the individual begins to qualify for an exemption he will get a refund.

An important issue here is to find out whether HMRC accepts that the transferee scheme is QROPS. This is smore difficult that it may seem. HMRC may have confirmed that your scheme is a QROPS – but that is of no value because they say they will not honour any such confirmation.

The same applies even HMRC show it as a QROPS on their website – they still say that no reliance can be placed on the fact that it is on the website. (What purpose the website is supposed to serve by publishing such a list is therefore unclear).

However, HMRC confirm that if you make a transfer from something which you think is a QROPS and which is shown on their website, and you check their website within 24 hours of making the transfer, they will accept that the transfer is not an unauthorised transfer. (Mind you, if they are not prepared to honour a confirmation that your scheme is a QROPS, I guess there is no reason to suppose that they will honour this confirmation either).

There are perfectly good reasons why people living abroad wish to transfer their UK pension fund to a QROPS. They may have continuing connection with the UK and their pension scheme could conveniently be situated in a jurisdiction closer to where they live, or in some other more appropriate jurisdiction. However, HMRC are alert to any abuse in this area and serious problems (ie the possibility of a serious tax charge) will arise if they can suggest that any of these conditions are not satisfied.

Peter Vaines
Field Court Tax Chambers
31st March 2017

FIELD COURT TAX CHAMBERS

Contact
Peter Vaines
Field Court Tax Chambers
3 Field Court
Gray's Inn
London WC1R 5EP

Tel: 020 3693 3700
pv@fieldtax.com
www.fieldtax.com