UK Tax Bulletin

May 2018

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

Contents May 2018

Latest Rates of Inflation and Interest

The following are the current rates for April 2018

Current Rates	
Retail Price Index: April 2018	279.7
Inflation Rate: April 2018	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 present rate of 3% from 21st November 2017

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% - but this was increased to 1.50% from 13th November 2017

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%

Security for PAYE

I mentioned some time ago that the power of HMRC to require security for PAYE and NIC is truly awesome. The principle is fair enough and we have seen it in the context of VAT for many years. Under Schedule 11(4) VAT Act 1994, HMRC are entitled to seek security from the taxpayer if they think it is necessary for the protection of the Revenue, for example if he has failed to comply with his VAT obligations or HMRC have reason to believe that he might fail to do so. It is really serious because it is a criminal offence to continue to make taxable supplies if you have not provided the security demanded by HMRC.

Of course, if a person is unable to pay his current VAT bill, he is hardly going to be able to pay a security representing a few months' VAT liabilities in advance. So to avoid criminal liability, he must cease to trade.

The rules for security for PAYE are more recent – and are much worse. Regulation 97N of the PAYE Regulations provides that where an officer of HMRC considers it necessary for the protection of the Revenue, he may require the company, or the directors, to provide security for payment of the PAYE in the future. The failure to provide security is a strict liability criminal offence and ceasing to trade offers no defence.

Fortunately (and unlike the position for VAT), there is a right of appeal against a security notice for PAYE and NIC. The Tribunal is entitled to form its own view and to confirm, set aside, or vary a security notice.

These issues were considered in detail last year in the case of *D-Media Communications Limited v HMRC TC 5183* where the Tribunal suggested that hardship should be a factor in the decision of HMRC to require security. They said that for HMRC to determine the amount of the security without regard to the ability to pay, is inconsistent with the legislation. If the taxpayer cannot pay, and HMRC know they cannot pay, for HMRC to require the taxpayer to provide security which they would inevitably fail to do and be criminally liable, can do nothing to protect the Revenue and cannot have been the purpose of Parliament in making these regulations.

Another case has arisen recently which seems to justify the requirement for security: *Crays Support Services Ltd v HMRC TC 6456*. However it contains some curious elements.

Mr Holt was the director of a company which provided management services to other businesses under his control. He was previously a director of other companies which had failed, owing substantial amounts of tax. HMRC considered there was a risk that the company would not pay its PAYE. So they issued a notice to Mr Holt personally to provide security for an estimated four months PAYE, explaining that it was a criminal offence not to give security when required to do so.

Mr Holt appealed against the notice for security claiming among other things that if required to provide the security, the company would be forced into liquidation.

The judge observed that the legislation is concerned with the protection of the Revenue and there is no requirement for this to be balanced against enabling the company to continue to trade. In any event, the notice for the provision of security was not directed at the company but to Mr Holt personally and there was no evidence that he was unable to meet this obligation. Tax and NIC had been deducted from the employees and it was not paid over to HMRC. Indeed, the company had defaulted on its PAYE payment for the 7 months ended February 2018.

Under the circumstances, one can understand why HMRC took the view that the Revenue needed to be protected and that robust steps were required to ensure that the PAYE would not again go unpaid. It is no surprise that Mr Holt's appeal against the notice for security was dismissed by the Tribunal.

However, parts of the judgment are a bit puzzling.

It was suggested by HMRC in the Notice of Requirement for security that the criminal liability only arose if the security was not paid and the company carried on trading. However, the legislation does not provide any defence to the criminal charge by ceasing to trade – and this was made clear in the judgment in *D-Media*. The criminal offence is committed by failing to pay the security – and whether or not the company carries on trading has nothing to do with it.

It was also said in *Crays Support Services Ltd* that the fine for failing to provide the security was £5000. However, the Tribunal in *D-Media* had analysed the position very carefully and explained that the £5000 limit does not apply to these provisions and that the offence is punishable by a fine of unlimited amount.

Although we would all welcome the views expressed in *Crays Support Services Ltd* as they are much more reasonable than the severe position explained in *D-Media*, it does look like the position set out in *D-Media* is right. It is tempting to suggest that HMRC should make it clear that their approach in *Crays Support Services Ltd* is their practice in this area – but that is obviously impossible. HMRC cannot reasonably be asked not to apply the law just because it is harsh. A court decision confirming their approach, or a change in the law, might be a good idea.

Trust Notifications

I have refrained from commenting on the new requirements for trust notifications because the whole thing is so chaotic and confused, that any comment may be of little value.

However there have been two recent developments which are perhaps worth highlighting.

The rule is that notification is required for the tax year in which a trust was liable to tax. This includes not only the taxes you would expect, but would also include SDLT if it purchased a property during the year – or more unexpectedly stamp duty or stamp duty reserve tax, which would arise from the sale and purchase of investments by the fund managers who look after the trust investments. Charities get caught by this too. And of course there are penalties.

This is not a tax issue – there is no tax involved – and the submission of tax returns to HMRC by the trust every year does not absolve the trustees from notification. Why on earth not? Because HMRC want more information – for reasons that passeth all understanding.

So what about shares in offshore companies where the value of the shares is attributable to UK residential property under Schedule A1 IHTA 1984 and therefore subject to a 10 year or exit charge to inheritance tax. (This charge is a complete mystery to trustees in overseas jurisdictions who are suddenly exposed to taxes which they find almost impossible to understand – you try explaining the implications of *relevant loans* to a trustee of a foreign trust and see what reaction you get – and now this). Anyway, these were said to be caught too.

Fortunately STEP have stepped in. They have explained (and HMRC have accepted) that the rules for trust notification are not engaged by Schedule A1 IHTA 1984. This is because the trust does not have an "asset in the UK on which it is liable to pay [UK] tax": see regulation 42(2)(b). The liability to tax is not on a UK asset but on the value of the shares of the foreign company which is attributable to the value of the UK property. That does not make the shares a UK asset and the liability is not within the new regulations. Well done STEP.

One of the (many) problems with the Trust Notification obligations has been that form SA900 requires the trustees to say whether the online Trust Register has been updated. Unfortunately, it is impossible to do this, a fact which HMRC now acknowledge and they have issued a circular saying that the box should be left blank. Oh, thanks. How was anybody supposed to know that? And with unconfined generosity they will not impose a penalty for failing to answer the question. (I am afraid that anybody who thinks I am being sarcastic is not up to date with their reading of tax cases). However, be that as it may, this is of course very welcome.

Substantial

The Finance (No 2) Act 2017 introduced some welcome relaxations to the Substantial Shareholdings Exemption with effect from 1st April 2017. It will now be capable of being utilised in a much wider set of circumstances which will be extremely helpful.

One of the conditions for the relief is that the disposing company held a "substantial shareholding" in the company being sold. The definition of *substantial* in this context means a holding of at least 10% of the shares (and the usual extension to include economic rights): see paragraph 8 Schedule 7AC TCGA 1992.

There is another condition which is that the company being sold must be a trading company. That is defined in paragraph 20 Schedule 7AC TCGA 1992 as being a company:

> "carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities."

The legislation does not specifically define *substantial* for this purpose (or *activities* either, but never mind) and seeing as how this is the *substantial shareholdings* legislation and "substantial shareholding" is defined as being at least 10%, one might have thought that a second definition would be unnecessary. You would not expect the same term to have two different meaning in the same few paragraphs of the same schedule.

However, HMRC take a more generous view which is most helpful. They say that the reference to *substantial* in paragraph 20 means 20% - just as they do for Entrepreneurs Relief. There is no authority for this figure, but it is their preferred practice – and it is explained in detail in the Manuals – with the answer being found (by a multi factorial analysis if course) of the sales, income, assets, expenses and management time of the various activities.

It will be interesting to see how the Tribunals and the Courts see this in due course, because although there are clearly grounds for suggesting that *substantial* means rather less than 20%, there are some good reasons for arguing that it means something even higher than HMRC suggest.

Time Limits for Claims

The possibility of missing a time limit for making a claim for a relief from tax is a source of anxiety for everybody – not least a tax adviser. It is not quite so bad when HMRC have a discretion to extend the time limit with such words as "or such later time as HMRC may allow" – but where no such cover exists, HMRC are not in a position to offer any anything other than sympathy.

However, the recent case of *Dundas Heritable Limited v HMRC TC6476* highlights an opportunity for relief for claims which may be thought to be out of date – or indeed claims which are definitely out of date.

This case concerned claims by a company for capital allowances which were submitted late – and HMRC rejected them.

However, HMRC subsequently commenced an enquiry into the company's affairs and this brought into operation section 82 FA 1998 which says that a claim for capital allowances may be made at any time up to whichever is the last of the following dates:

a) The first anniversary of the filing date of the company's tax return for the relevant accounting period;

b) If a notice of enquiry is given into that return, 30 days after the enquiry is completed;

c) If after such enquiry HMRC amends the return, 30 days after notice of the amendment, and

d) If an appeal is brought against such an amendment, 30 days after the date on which the appeal is finally determined.

Section 82(2) provides that a claim for capital allowances may be made at a later time "if an officer of HMRC allows it" but in this case, HMRC did not see fit to allow the late claim.

HMRC were not particularly pleased to find that by making an enquiry into the return, section 82(1)(b) above effectively validated the out of date claims which they had rejected. So off they all went to the Tribunal.

The Tribunal said that the provisions were perfectly clear. There are four possible dates and the claim will be made in time if it was lodged at any time before the last of them. The reference to a claim being made *at any time* meant there was no scope for HMRC to argue that it only applied to a new claim lodged after the notice of enquiry was served. (But even if it did, the whole appeal process in this case could have been avoided by the taxpayer making a new claim because they would have been in date anyway by reason of subsection (d)).

It is perhaps ironic that HMRC's enquiry caused the out of date claims to become in date claims, but the overall result is not really very surprising. It corresponds to the procedure in section 43C TMA 1970 (and explained in detail in the SAC Manual paragraph 9005) and paragraph 65 Schedule 18 FA 1998 – the idea being that if there is an enquiry into a return, and profits are brought in to charge to tax, it is only reasonable for any relevant reliefs against those profits to be allowed. It would be absurd to suggest that the taxpayer should make a claim for reliefs in respect of a liability which does not exist – just because in one (or 4 or 6 or 20) years time, HMRC might allege that a liability does arise.

It is perhaps a little surprising that the case was brought at all, having regard to the clarity of the legislation and the HMRC Manuals (not to say the opportunity for a new claim to be made) – but it does highlight a welcome opportunity for the taxpayer to obtain relief for a claim where a time limit has been missed.

It is interesting to speculate whether, if somebody was out of date in making a claim, they could provoke HMRC into starting an enquiry into their affairs thereby enabling the claim to be made in time. This sounds a bit like playing with fire /or putting head in lion's mouth (or any other preferred metaphor), but sometimes I guess you have no choice.

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