# UK Tax Bulletin

## June 2018

FIELD COURT TAX CHAMBERS

FIELD COURT TAX CHAMBERS

# Contents June 2018

FIELD COURT TAX CHAMBERS

# Latest Rates of Inflation and Interest

## The following are the current rates for June 2018

| Current Rates | |
|---|---|
| Retail Price Index: May 2018 | 280.7 |
| Inflation Rate: May 2018 | 3.3% |
| Indexation factor from March 1982:<br>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%

# Requirement to Correct

In the December 2017 Bulletin I mentioned the details of the Requirement to Correct which was introduced by the Finance (No 2) Act 2017.

This new obligation applies in respect of undeclared offshore income and gains for years up to 2016/17. There is an opportunity to come clean before 1 October 2018 and accept a reduced penalty – and failure to do so exposes the taxpayer to eye watering penalties of up to 200% of the tax (plus the tax and the interest of course).

There is a defence of reasonable excuse but the new rules impose serious restrictions to a reasonable excuse where the taxpayer is relying on a professional advisor. However, even if you were acting on the basis of competent professional advice, that will not help if the advisor advised on the arrangements which are found to be incorrect.

The CIOT have recently had a meeting with HMRC where they asked whether the taxpayer would be subject to a penalty if they received professional advice about their residence position under the Statutory Residence Test which is later successfully challenged by HMRC.

Yes they would. HMRC explained that this is because:

> "On residency, the SRT now makes this black and white so advising a customer (*sic*) that they are not resident could constitute avoidance if this position is incorrect"

Such a comfort to know that the SRT is black and white – which I understand from the Oxford English Dictionary to mean:

> "Clear, definitive, and unambiguous; not admitting of compromise or doubt."

I doubt whether these are words that anybody would ever expect to be used to describe the Statutory Residence Test – but what would I know?

# Absolute Power?

I may have been a bit slow on the uptake but I was surprised to read the arguments of HMRC in the recent case of *Patel v HMRC TC 6426*. The case had to do with an enquiry with Mr Patel's tax return. That is not particularly noteworthy – enquiries are quite properly being made by HMRC all the time. However, what caught my eye was HMRC's claim that Section 9 Commissioners of Revenue & Customs Act 2005 gave them power to do anything they like. If this is not a chilling prospect for any citizen, then I do not know what is.

The Tribunal referred to the submissions of HMRC as dramatic and disturbing. It is difficult to disagree with that view – but that does not make them wrong.

Section 9 provides as follows:

> 'the Commissioners may do anything that they think:
>
> (a) necessary or expedient in connection with the exercise of their functions or
>
> (b) incidental or conducive of the exercise of their functions

You see what I mean – anything that they *think* is expedient. What protection does a taxpayer have? Not a lot; there is no reasonableness test or even any objective requirement here. If HMRC think something is expedient, they have statutory power to do it. If that is not the definition of doing whatever you like – or alternatively, absolute power – I do not know what is.

The Tribunal took the view that section 9 did not go so far as to allow HMRC to make up their own facts – which is hardly a surprise because that really would be the end of the world as we know it. Can you imagine? However, this particular genie is now out of the bottle and I am sure we have not heard the last of this argument.

The judge suggested that this power might not be a great deal more than the familiar responsibility for care and management of the revenue by HMRC. I am not sure anybody ever thought this is what care and management meant – but even if it did, that does not make it any better.

Parliament is of course supreme, and this is the law of the land – but can any MP really have thought it is appropriate to give such power to HMRC. If not, they might wonder how on earth such a law came to be passed in their name – and who

thought it was a good idea.

## Notice to File Tax Returns

HMRC send out notices all the time requiring people to send in tax returns. That is how the system works. The authority is Section 8 Taxes Management Act 1970 which provides that:

> "**For the purposes of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount of tax payable by him** by way of income tax and capital gains tax for that year, he may be required by a notice given by an officer of the Board to make and deliver to the officer a return containing such information as may reasonably be required in pursuance of the notice".

This is all numbingly familiar to anybody concerned with tax so why am I making a big deal about it?

It is because of the interesting decision in *Mansoor v HMRC TC 6518*. In this case Mr Mansoor received a notice under section 8 TMA 1970 requiring him to file a self-assessment tax return. He failed to do so and incurred various penalties. This still looks pretty ordinary and not in the least interesting. Stay with me.

Mr Mansoor was employed in a fish and chip shop and also worked as a driver. His earnings were paid after deduction of tax under PAYE. HMRC became aware that insufficient tax had been deducted by his employer from his salary – so in order to collect the tax, HMRC served a notice on him to file a tax return. This is where the fun starts because the Tribunal decided that the notice under section 8 to file the tax return was invalid – and it followed that so were the penalties.

The Tribunal said that a notice to require a taxpayer to file a tax return under section 8 may only be issued for the purpose of establishing the amount of income tax and capital gains tax owed by the taxpayer. It may not be issued for the purpose of collecting amounts of income tax of which HMRC are already aware. The judge said that the words of the section are exceedingly clear – and highlighted those which I have highlighted above.

They drew attention to the guidance provided in 2012 by the Supreme Court:

> "The long established principle of the UK public law is that statutory powers must be used for the purpose for which they were conferred and not for some other purpose".

The Tribunal considered that the purported use of section 8 to demand returns was a serious breach of public law amply justifying treatment of the notices as a nullity.

However, I wonder how often this happens.

What is puzzling is why this case ever got to the Tribunal in the first place. Before the case was heard in May 2018 the case of *Lennon v HMRC TC 6453* had already been decided (and was published on 17th April) dealing in detail with this very point, and similarly the decision in *Goldsmith v HMRC TC 6284* published on 3rd January 2018. In both cases the Tribunal held that HMRC were wrong to issue a section 8 notice for this purpose. Maybe HMRC thought it would be third time lucky.

This seems rather inappropriate conduct in a matter which the Tribunal described as involving a serious breach of public law on the part of HMRC. Of course, decisions of the FTT are not binding but that is hardly a good reason to put Mr Mansoor to all the trouble and expense (let alone the anxiety) of a Tribunal hearing having regard to the recent decisions on the same point.

## Non Residents CGT Returns

Another subject upon which there has been multiple tribunal hearings relates to the failure to submit a non-residents capital gains tax return.

The irony is almost overwhelming. HMRC take the view that people who live in (say) Thailand have no excuse whatsoever (and should be penalised) for not complying with the new NR CGT rules - but judges in the UK cannot agree what the legislation means.

The latest in this series is *Wong v HMRC TC 6516* where Mr Wong disposed of a UK property which was within the scope of the non-residents capital gains tax charge but failed to submit the necessary return within the time limit, incurring significant penalties as a result.

The property was sold at a loss and Mr Wong claimed that he had a reasonable excuse for the late return because when he bought the property and put it on the market, the new rules had not come into force and it was reasonable for him to assume that a normal self-assessment annual tax return would suffice. He said he was resident abroad and he had no knowledge of the new regime.

However reasonable that may be, the argument never really stood a chance – because the rules expressly (and only) apply to people who reside abroad. There is a clue in the name – the Non-Residents CGT Charge.

The question then arose whether he had a reasonable excuse because he did not know about the new rules and he submitted a return as soon as he discovered his error.

The Tribunals decided in *Rachel McGreevy* and in *Patsy-Anne Saunders* that ignorance of the law could represent a reasonable excuse. It may be remembered that the Tribunal in *Rachel McGreevy* described HMRC's arguments on the matter as "preposterous" and "claptrap". However, another Tribunal, in the cases of *Welland* and *Hesketh*, said that was wrong; ignorance was only a defence available in the criminal law – a view which was followed in *Wong*. The Tribunal suggested that Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed. (That sounds compelling - but of course, if it was right, ignorance of the law could not apply to the criminal law either).

After having written the above, another case was published, *Sowcroft v HMRC TC 6525* in which the Tribunal decided that ignorance of the law in connection with NR Cl GT returns can be a reasonable excuse after all. For goodness sake!

I don't know what taxpayers are supposed to do with all this; they just want to know what the rules are, so they can meet their obligations – not have a great big penalty which they do not deserve. If the judges keep making conflicting decisions, then the law is obviously far from clear – and it would be a good idea to clarify it to avoid these pointless arguments. It would save an awful lot of time and money – which I am led to believe is needed elsewhere. And, what's more, it would be fair.

# UK Source Income: Ardmore

The Court of Appeal have now heard the case of *Ardmore Construction Limited v HMRC [2018] EWCA Civ 1438* which was concerned with the meaning of UK source income – and therefore whether interest paid by the company was subject to deduction of tax at source.

There are some really difficult issues here and the decisions of the Upper Tribunal and Court of Appeal (which upheld the decision of the Upper Tribunal), do not make it very easy to find the answer.

In this case there was a loan from a foreign company enforceable only in a foreign jurisdiction and repayable outside the UK. It was not secured on any UK assets. On the other hand, the company paying the interest was resident in the UK and the interest was paid out of funds generated in the UK. The Upper Tribunal said that it was necessary to consider all the relevant facts, and that the residence of the debtor was not the most important factor. However, having looked at all the other factors, the Upper Tribunal decided that the proper law, the jurisdiction of enforcement and the place of payment were of little or no weight. So the matter was determined by reference to the residence of the debtor after all. Sounds like a pretty important factor to me.

The heavy reliance on residence creates a difficulty where the debtor is dually resident. However, The Court of Appeal said that dual residence did not arise in this case, so it could be disregarded.

However, they went on to say that if Ardmore had defaulted on the loan, the assets against which the obligation would be enforced would be those in the UK. (I cannot resist the observation that this did not occur either – so why not disregard this too).

One would have thought that looking at the position in the round, or taking a practical approach, or divining the underlying commercial reality (or any such formulation of a purposive test), one might say that a foreign loan from a foreign person, with interest and principal being payable and enforceable abroad has got quite a lot going for it. Be that as it may, it now seems to be almost conclusively settled that the residence of the debtor is the conclusive factor.

However, perhaps enforceability is really the clue here. The whole idea of residence being an important determinant seems to be based on the idea that a loan will be enforced where the debtor is resident and that is what should determine whether it is a UK or foreign loan. The Court of Appeal highlighted that not only was

Ardmore resident in the UK, but its assets were in the UK, so for all practical purposes the UK would be the place of effective enforcement of the loan. The fact that there was an exclusive jurisdiction clause for the loan only to be enforced elsewhere, did not override this practical consideration.

That sounds fair enough as an underlying basis for the conclusion – but the difficulty with this argument is that in the classic, celebrated and authoritative case of *The National Bank of Greece*, the loan was only enforceable in the UK, but that did not make the interest on the loan UK source income. Lets not dwell on that.

**Peter Vaines**
**Field Court Tax Chambers**
**30th June 2018**

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