UK Tax Bulletin

January 2019

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at January 2019

Current Rates	
Retail Price Index: December 2018	285.6
November 2018	284.6
Inflation Rate: December 2018	2.7%
November 2018	3.2%
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 3.25% from 21st August 2018

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.75% from 13th August 2018

Repayment supplement

Interest on overpaid tax is payable at the same rate from 21st August 2018

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

Except IHT where the rate is 0.75%

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%

Spring Statement

It may be remembered that for centuries we had a Budget in March or April. It came to pass that Chancellors of the Exchequer wanted to make a statement in the autumn to outline their economic projections. We all got used to that.

However, Mr Hammond decided that from 2018 we were only going to have one statement each year, which would be a Budget in the Autumn. And we did – on 29th October 2018.

The Treasury have now announced that there will be a Spring Statement on March 13th. Plus ca change.

Security for PAYE/NIC

I have previously made reference to the power of HMRC to require security for PAYE and NIC under Part 4A of the PAYE Regulations and the corresponding part of the NIC Regulations. This is an awesome power. There are also analogous provisions for VAT in Schedule 11 VAT Act 1994.

The general idea is that 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 tax obligations or HMRC have reason to believe that he might fail to do so. It is extremely serious because it is a criminal offence to continue to make taxable supplies for VAT if you have not provided the security demanded by HMRC. That means you must cease to trade if you want to avoid committing a criminal offence.

This is generous compared with the rules for PAYE and NIC. You don't get out of this penalty by ceasing to trade. It is a strict liability criminal offence not to pay the amount of security demanded by HMRC.

Last year, I mentioned some Tribunal decisions which contained a number of curious inconsistencies on this subject. This month we have two decisions on security from the FTT. The first relates to VAT: *CNM Estates (Tolworth) Ltd v HMRC TC 6941.*

In this case the Tribunal took the view that on the evidence, it seemed very likely that the debt claimed by HMRC was either substantially overstated or non-existent and that the decision of HMRC to require the security was flawed because they took into account irrelevant information or at least information about which they knew very little.

Did that matter? No. The Tribunal concluded that even though HMRC's decision was flawed, if they had approached the matter correctly, they would have still come to the same conclusion. The amount of the security was upheld.

The second case concerned PAYE and NIC: *Smith v HMRC TC 6936.* HMRC required Mr Smith to provide security of £31,000 in respect of PAYE and NIC. This was seriously excessive as it turned out. HMRC said that this did not matter because the Tribunal had only a supervisory jurisdiction and should confirm the Notice unless the decision was flawed at the time when the officer issued the Notice.

However, the Tribunal decided that they had jurisdiction to consider the effect of hardship on the taxpayer, deriving considerable support from the case of *D-Media Communications Ltd v HMRC [2016]* where it was held that a policy for requiring security which does not have regard to the ability to pay is inconsistent with the scheme of the legislation. If the level of security required is unlikely to be provided, the giving of a notice is unlikely to provide the protection of the Revenue that the regulations are designed to secure. Furthermore:

> "If the only likely result is that the recipient of the Notice will inevitably fail to provide the security and thus will inevitably be liable to a criminal penalty as a matter of strict liability, that in my view cannot have been the purpose of Parliament in making these regulations".

The Tribunal acknowledged that it was a proper exercise of the powers of HMRC to require security in this case, but determined that the amount of the security should be reduced to less than £9000.

The Tribunal also confirmed that the penalty for this offence is an UNLIMITED fine – not a maximum of £5,000 which has often been suggested.

EBT Loan Charge

Many people are acutely aware that on 6th April 2019 a charge will arise where a loan from an EBT remains outstanding – the charge being the full amount of income tax and NIC which HMRC claim has been avoided.

This has been a controversial matter for some time and Parliament has called on the Treasury to revisit the position.

The Treasury have an odd stance. They say that it is only right for this charge to be imposed because the loans were taxable when they were made. Er …

If that is right, why is there going to be a tax charge imposed on 6th April. This would be a second charge on a receipt which was already taxable. Even if HMRC are right that the loans were always taxable, and some people have not paid the tax when they should, the answer cannot be to introduce a new law to tax them again.

MPs have suggested that this charge is grossly unfair having regard to its retrospective nature. One MP said that:

> "It is the sort of taxation that led the Barons to rebel against King John and gave birth to Magna Carta. It is simply not acceptable for a Government to introduce a law that makes illegal something someone did years ago when that action was considered legal".

Accordingly, Parliament has required the Treasury to assess the likely effect of the loan charge policy before it comes into force and to present a report to Parliament. by 30th March.

It will be interesting to see what they say. Whether the report by the Treasury will give rise to any meaningful change is open to question, but we shall soon see.

Annual Investment Allowance

Writing in the ICA Tax Faculty journal, Anita Monteith draws attention to a rather capricious effect of the revision to the Annual Investment Allowance. This capital allowance for small businesses was £200,000 but it was increased in the Budget to £1 million for expenditure in the period 1st January 2019 to 31st December 2020.

Anita Monteith highlights the trap that can catch smaller businesses which, while they are unlikely to spend anywhere near £1 million, they could find themselves disadvantaged if they spend a comparatively small amount.

Let us suppose a company with a year-end of 31st March 2021 incurs qualifying expenditure of £60,000 on 1st February 2021.

It would be reasonable to assume that for this accounting period there would be a limit of £1 million (reduced pro rata) applied for the period to 1st April to 31st December 2020 and £200,000 (reduced pro rata) for the period from 1st January to 31st March 2021. Unfortunately not. He will only get relief for £49,000, even though the expenditure for the period would be well within the £200,000 allowance and of course, well within the £1 million allowance.

To restrict the relief in this way can hardly be fair and reasonable – and is surely not be what Parliament intended. It would be interesting to see whether a Court or Tribunal would seek to apply the intention of Parliament in priority to the express wording of the legislation. I appreciate that is a novel idea – and that nobody has ever thought of such an approach before.

Trust Protections- OIGs

I have said a great deal about offshore income gains and the trust protections in recent Bulletins and why the trust protections do not apply to them – at least that is the view of HMRC.

The CIOT provided HMRC with a detailed technical analysis of the legislation explaining that the trust protections do apply. Nobody has ever suggested that there was any reason, policy or otherwise, why they were excluded, and it was hoped that HMRC would see the force of this analysis and conclude that the protections ought to apply – even though an alternative interpretation may be possible.

Unfortunately, however, HMRC have now responded publicly to the CIOT analysis and have rejected it completely. The problem remains, awaiting Parliamentary time apparently, so I am sure that the responsible Minister of State, Mr Godot, will deal with it promptly … as soon as he arrives at his office.

Territoriality

Last year in the case of *Jiminez v FTT and HMRC [2017] EWHC 2585* the High Court held that an information notice under Schedule 36 Finance Act 2008 sent to a person in Dubai was unlawful because it was issued to a person outside the jurisdiction. The Court explained that unless the contrary is expressly enacted or plainly implied, there is a presumption that Parliament does not enact statutes to operate on its subjects beyond the territorial limits of the UK.

The matter has now come before the Court of Appeal who have held that the legislative grasp of Schedule 36 does indeed extend beyond the jurisdiction and that such an interpretation does not offend international law.

It was acknowledged by HMRC and by the Court that neither the notice, nor any penalty, could be enforced – and some may wonder whether Parliament would really have enacted legislation which cannot be enforced. The answer seems to be the legislation can be enforced if the recipient comes to the UK.

The unanimous judgment of the Court of Appeal set out in great detail the principles involved in determining the wide territorial reach of Schedule 36 and would seem to put the law on this subject beyond doubt.

NR CGT – UK Land

It will be well known that on 6th April 2019 the Non Residents Capital Gains Tax charge is being extended to capital gains on all UK land held by non residents.

This is not a simple charge on gains made by non-residents from the disposal of UK land; well it is, but it is much more than that. It also applies to the disposal by non residents of shares in companies (both resident and non resident) where 75% of the gross asset value of the company is derived from UK land.

This gives rise to the possibility of an indirect charge on some exempt funds who hold UK land indirectly. I do not suppose they are much comforted by the fact that the charge is "indirect". There is also the probability of a double charge on non exempt shareholders. There will be a charge on the company on the disposal of the land and the shareholders will be exposed to a charge on a disposal of their shares - which is of course the same gain. There seem to be no proposals for any kind of relief, so this is going to give rise to some difficult issues.

The rate of capital gains tax will be 20% (which is obviously better that the 28% rate which applies to the NR CGT on residential property – so opportunity knocks) and there are naturally a few complications where the UK land falls partly within the existing rules.

I wonder whether planning to pay the tax once instead of twice on the same gain represents unacceptable tax avoidance requiring a DOTAS notification and counteraction by the GAAR?

A NR CGT return will need to be filed (and the tax paid) within 30 days of completion of the sale – but only by non residents who are liable to capital gains tax. Non resident companies are chargeable to corporation tax so they are not subject to this obligation; they must file a corporation tax self assessment return in the normal way.

In advance of this new legislation HMRC have published a draft appendix to their Manuals to assist our understanding. Their explanations are indeed to be welcomed.

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