UK Tax Bulletin

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Latest Rates of Inflation and Interest

The following are the current rates at September 2016

Current Rates	
Retail Price Index: August 2016	264.4
Inflation Rate: August 2016	1.8%
Indexation factor from March 1982:	
to August 2016	2.328
to July 2016	2.316

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%

Partners Expenses

For those who are following this matter, it may be of interest to know that the Court of Appeal has given leave to appeal from the decision of the Upper Tribunal in *HMRC v Vaines*.

For those who are not following it, the issue is whether business expenses incurred by a partner personally can be deducted from his share of the partnership profits. This depends on the more profound issue of whether the partners in a business are carrying on the trade, or whether it is the partnership itself which is carrying on the trade. Stay tuned.

Finance Acts

The Finance Act 2016 was enacted on 15th September and is said to be the second longest ever – and we are expecting the draft Finance Bill 2017 to be published on 5th December. You would think that we (and HMRC) could do with a rest. Bad luck.

The Finance Act 2016 contained a huge load of new stuff. Regrettably, very little of the March Budget proposals were lost by reason of the Brexit debate and consequential fall out – they just got a bit delayed.

At least when we get the Finance Bill we should have the final elements of the building blocks in place for the changes in the taxation of non doms which are due to come into force next April. There are a few missing pieces relating to rebasing which are eagerly awaited and also what is meant by loans from connected persons. There are a number of definitions of connected persons and it would be nice to know which one they have in mind. It would also be helpful to know whether we will able to rearrange loans before 6th April to limit the potentially very serious position which can arise in some cases – which I highlighted last month.

I have a feeling that Mr Hammond will have some more delights in store for us in his Autumn Statement on 23 November. I can't wait.

Offshore Disclosure Facility

Emboldened by the avalanche of financial data which is (or will soon be) flowing into HMRC regarding foreign accounts, they are offering (another) last chance to come clean in respect of offshore money. It is called The Requirement to Correct. The unspoken point is that HMRC will be informed of all the relevant details soon enough and if you do not make a voluntary disclosure by September 2018, you will only have yourself to blame.

The penalties will make your eyes water – like 200% of the tax – in addition of course to the tax and interest. And just for good measure there is a proposal for a 10% asset based penalty – and publication on the list of deliberate tax defaulters.

This will apply to income tax, capital gains tax and IHT. It will be a statutory regime and the details will be included in the Finance Act 2017.

HMRC say that they want to give:

> "an unambiguous and clear message that if you do not come forward and put your offshore affairs in order before the end of the requirement window you face serious consequences".

The opportunity provided by this new facility is not generous. In fact, it does not seem to be a "facility" at all; it is just a threat. You must make a full disclosure, pay the tax and the interest and a serious penalty – gone are the days when the penalty was only nominal – and by the way, there is no undertaking by HMRC that they will not prosecute.

There is a defence of reasonable excuse, but how that is to be framed has not yet been revealed. It would be no surprise if the defence of relying on professional advice is strictly curtailed – just as HMRC are proposing in other areas.

Whether they have judged it right, or whether the penalties are so harsh that they will prove counterproductive, is a matter capable of legitimate debate – although HMRC might suggest that they have offered so many carrots that the taxpayer is in danger of carotene poisoning. It is now time for the big stick.

It may be pretty aggressive but the target here is people who have broken the rules – and those who break the rules can reasonably expect a penalty. It is those who do not break the rules but HMRC still want to penalise, where the controversy continues.

Trading Losses

The case of *Leekes Ltd v HMRC* in 2015 was concerned with the carrying forward of losses in circumstances where one company ceases to carry on a trade and another company begins to carry it on.

The general rule is clear enough. A company can carry a trading loss forward to be set against the future profits of the same trade. Where one company ceases to carry on the trade and another company begins to carry it on, the losses are not lost but can be carried forward and relieved against the profits of the successor company.

Unfortunately, this can prove a bit difficult if the transferee company has an existing trade which is combined with the transferor's trade so that each trade loses its separate identity.

That is what happened in the case of *Leekes* and they claimed relief for the losses of the predecessor's trade against the total profits of the successor company.

HMRC said that you cannot do that. The whole idea is to preserve losses against the property of the same trade even where the trade is taken over by another company; the rules are not intended to allow relief against the different trade carried on by the transferee.

That seems fair enough but how on earth are you supposed to know. It seems contrary to any kind of commercial sense to suggest that the trades of the transferee company must be kept separate – and that may not be possible anyway. The FTT concluded that it was impossible to give any practical effect to the HMRC interpretation and on these grounds the losses of the previous trade which had been subsumed into the successor's trade were available for relief against the combined profits of the successor company.

However, the Upper Tribunal have reviewed the whole thing and come to the opposite conclusion: [2016] UK UT 0320.

The key provision was section 343(3) Taxes Act 1988 (which is now found in Chapter 1, Part 22 Corporation Tax Act 2010) which reads as follows:

> "the successor shall be entitled to relief under section 393(1) as for a loss sustained by the successor in carrying on the trade, for any amount for which the predecessor would have been entitled to relief if it had continued to carry on the trade".

The predecessor would only have been entitled to relief from profits of the same trade so it would go beyond the scope of section 343 for the losses to be set against the total profits of the successor company, some of which would not have been from the same trade.

The Upper Tribunal disagreed with the FTT about the relevance of the commercial reality of a succession where it is difficult to identify the predecessor's trade as a discrete part of the whole. They said you cannot disregard the words of a statute because of a perception of practical difficulty – particularly if the difficulty can be avoided or minimised by careful record keeping.

Issue of Shares

A question which arises frequently in connection with tax reliefs is the date when shares are issued – or indeed, whether they have been issued at all. If you want to claim a tax relief based on the fact that you own some shares, it is obviously quite important that you can prove that they were issued to you in the first place.

We know from the House of Lords in *National Westminster Bank Plc v Inland Revenue Commissioners [1994] STC 580* what is required for shares to be issued:

> "shares are issued when an application has been followed by allotment and notification and completed by entry on the register. Once the shares have been issued, the shareholder is entitled to a share certificate."

The two recent cases of *Alberg v HMRC* TC 5357 and *Murray-Hession v HMRC* TC5348 indicate that there are additional factors which may be relevant.

In *Alberg v HMRC*, the appellant believed he had invested £250,000 in a catering company and when it failed, he sought loss relief under s.131 ITA 2007. Unfortunately, upon examination, it was discovered that the only evidence for his belief was that his solicitors had prepared a draft shareholders agreement making reference to such an issue. There was no other evidence and the FTT was not prepared to infer that the shares had actually been issued.

In *Murray-Hession v HMRC*, the taxpayer had invested in a company which subsequently became worthless. He too made a claim under section 131 for his loss. Again the question arose whether the shares had been issued to him. The FTT found that the appellant had an agreement with the other shareholder that he would invest £270,000 by way of subscription for shares and had paid the money to the company. This was reflected in the accounts. Shares had been issued to one of the other shareholders and the FTT were persuaded that he held them as nominee for the taxpayer. All the necessary conditions for the issue of shares were present and Mr Murray-Hession was entitled to his relief.

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