UK Tax Bulletin

May 2017

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at April 2017

Current Rates	
Retail Price Index: April 2017	270.6
Inflation Rate: April 2017	3.5%
Indexation factor from March 1982: to April 2017 to March 2017	 2.390

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%

Finance Bill Update

I am afraid there is still no news – although I understand that it may be of some comfort to know that there is no news.

There is just an increasing list of anomalies if the new provisions relating to non doms and all the other things which were dropped from the Bill are reintroduced and backdated to 6th April 2017 – and another increasing list of the anomalies if they are deferred until 2018. We can only hope that they do the sensible thing and provide a relief for people who have been caught out by the political process.

For the government to encourage people to take a course of action and then penalise them when they have done so, would be shameful. Anyway, we don't have long to wait and let us hope all these uncertainties are resolved with honour.

Discovery Assessments

The law relating to discovery assessments seems to have a never ending supply of "interesting" aspects. The recent case of *Gareth Clark v HMRC* TC 5856 provides a new one.

What happened here is that HMRC issued a discovery assessment because they took the view that there was a liability to tax which had not been assessed. However, in due course, HMRC concluded that there were actually no grounds for the loss of tax they thought existed.

However, HMRC found another area where they thought there was a loss of tax and said that the discovery assessment which had previously been issued was sufficient to cover this as well.

Mr Clark said no. He said that the awareness of the hypothetical HMRC Officer of the possible loss of tax can only refer to that loss of tax.

The Tribunal said that for the purposes of determining whether a discovery assessment had been validly made, it is necessary to identify the loss of tax that has been asserted by the officer and then test whether the further conditions in section 29 have been met by reference to that loss of tax. That sounds fair enough.

However, the Tribunal went on to say that they are entitled to apply the law to the facts as they find them and to form their own view without being confined to the reasons advanced by HMRC nor indeed being constrained by the arguments of either party, before or at any stage in the proceedings.

That is all very well but it surely means that HMRC can issue a discovery assessment and if that is found to be wrong, they can thrash around indefinitely to find something (anything) to which the assessment might apply.

That must be a recipe for abuse. It enables HMRC to keep the time limit for an assessment open indefinitely simply by raising a discovery assessment which is groundless in the hope that something will turn up eventually.

The Tribunal did suggest that there was a limitation on the scope of the discovery assessment. They said that it cannot extend to a loss of tax for which no valid assessment was capable of being made by reason of a specific prohibition under section 29 – for example, if HMRC were already aware of the relevant facts. Unfortunately, a review of earlier cases on the subject indicates that such limitation is largely illusory.

Accordingly, it will be increasingly difficult to close down a discovery assessment because while it is alive, it can cover anything. Some reference to the intention of Parliament might be appropriate here.

Swiss Cooperation Agreement

The UK/Swiss Cooperation Agreement which came into force in 2013 is a draconian piece of legislation – designed perhaps to meet a serious situation. As always, there are innocent casualties. One of these is Karin Vrang who had £57000 removed from her Swiss account and paid over to HMRC pursuant to the Agreement. Her UK tax liability was very small and she asked for her money back.

Bad luck. The Agreement contains no provision for refunds. Her bank had written to her twice telling her about the obligations under the Agreement spelling out the various options and consequences. She did not respond, so they followed the procedure and took the money.

Despite a seriously impressive array of arguments why HMRC should repay the money (which included the rather compelling suggestion that it was surely disproportionate for her to suffer a £50,000 penalty for simply not replying to a couple of letters from her bank), the High Court explained that the Agreement was perfectly lawful.; the bank had followed the proper procedure; the money was not wrongly deducted; everything had been done as laid down in the Agreement – and she had been given clear warnings of the position. The loss of the money was the clear and lawful consequence of her failure – so why should the rules not apply to her.

HMRC do have a discretion under Article 15 to make refunds - although they were not minded to exercise their discretion in this case – and the High Court saw no reason to interfere.

This is not an isolated case and it just goes to show that these requirements for voluntary disclosure (don't you love it …"voluntary") have got real teeth. You may have thought that the bank is looking after your money for you (isn't that what banks are for?) Think again.

EMI Shares: Restriction

Some publicity has recently been given to a change in the HMRC view regarding EMI shares which contain restrictions. Schedule 5(37) ITEPA 2003 provides that the option agreement must contain details of any restrictions on the shares.

It had been the view of HMRC that it was sufficient to state within the EMI Option Agreement that the shares were subject to restrictions in the Articles from time to time.

However, HMRC has now decided that this is incorrect and the employee must be made aware of all restrictions and conditions on the shares and these restrictions need to be specified in detail in the EMI Option Agreement.

It is suggested that options granted after 17th August 2016 are subject to this new rule and if the restrictions were not in the EMI Option Agreement provided to the employee at the time, they ought to be communicated to the employee at the earliest opportunity. Options issued before 17th August 2016 should not be affected.

I can see this new interpretation being the subject of some challenge – but in the interests of a quiet life, it may be as well to follow this approach and only get involved in a fight if you have to.

Penalties

There is an extraordinary coincidence of cases this month involving penalties imposed on people who have been sent to prison. These cases would not immediately appear to have a wide application – but you never know what you find when reading tax cases.

In the case of Graham Pitcher v HMRC TC 5870, Mr Pitcher had a penalty imposed upon him for not dealing with an Accelerated Payment Notice on time. He appealed against the penalty on the grounds that he was in prison (but had been released before the notice arrived) and he did not receive it. These were unexpected or unusual events beyond his control and therefore represented a reasonable excuse for not dealing with it on time.

HMRC was unsympathetic. HMRC said the Appellant could hardly argue that his conviction and imprisonment for fraud were events outside his control. The Tribunal agreed, saying "it is difficult to avoid the conclusion, however harsh it may seem, that all these events were attributable to the Appellants own conduct and were therefore not outside his control". For that reason, the Tribunal found he did not have a reasonable excuse.

However, in the case of Richter TC 5816, Mr Richter had a penalty imposed upon him for not filing his tax return on time. He too appealed against the penalty on the grounds that he was in prison and this was an unexpected or unusual event beyond his control, therefore representing a reasonable excuse for not filing the return before the penalty date.

In this case, the Tribunal said that "going to prison was an unusual event beyond the appellant's control and that being in prison means that it is difficult, if not impossible, for a prisoner to attend to his tax affairs". (As it happened, his default occurred before he went to prison so this did not really help him).

I do not express a view on whether it was reasonable or not - I just wish they would make their mind up.

Another interesting feature in Richter was that the penalty notice was issued by a computer. The Tribunal concluded that this rendered the notice invalid. They said that the amount of the penalty must be the amount to the best of HMRC's information and belief. The Tribunal said that there was nothing to suggest that any officer of HMRC had done that. It was all done by a computer and that did not involve forming a belief about anything.:

> "Computers are able to retrieve information if they are programmed to do so but not even the most sophisticated computers can (yet) form beliefs and certainly not those operated by HMRC".

The legislation indicated that a flesh and blood human being is required for the purposes of the penalty legislation and in the absence of any evidence that a human being formed a belief about the level of penalty appropriate in the case, an automatic charge cannot be valid.

I see an avalanche of cases as a result of the Tribunal's view in Richter because there are many things which are done by HMRCs computers on an automatic basis. I guess we will see an appeal, or a swift change in the law, or probably both.

More Penalties

You cannot resist wry smile reading the case of *Fergus Anstock v HMRC* TC 5784.

Mr Anstock received a letter from HMRC informing him that they were in possession of information giving them reason to suspect he had committed tax fraud. Only a knave or a fool would not treat such a letter with the greatest seriousness. HMRC required him to provide certain documents and when he failed to do so, they imposed a penalty for non-compliance.

The onus of proof is on HMRC to show that the penalty notice had been sent or received by the taxpayer. HMRC provided no evidence in support of their case. Their representative assured the Tribunal that the notice had been sent – but the Tribunal explained that assertions of advocates do not amount to evidence. They concluded that in the absence of any evidence, HMRC's case was bound to fail.

If that was not bad enough the Tribunal went on to say this:

> "Even if the Respondents had overcome the first hurdle, this appeal would still have succeeded. The notice offends just about every tenet for the proper drafting of the document which is intended to have legal effect".

The Tribunal then set out a whole list of drafting defects, concluding that the notice relied on by HMRC was so poorly and inadequately drafted that it failed the requirement of certainty and precision which is a fundamental requirement. These inadequacies robbed the notice of any validity – and the taxpayer could not be in breach of a notice unless it is valid.

This is a very robust judgment – and you can bet that had the taxpayer produced documents of this nature, they would have been roundly criticised (and no doubt would have been penalised) by HMRC for their inadequacy. However, there is no sanction on HMRC – and poor Mr Anstock had to go through all the trouble and expense of a hearing before the Tribunal which surely should have been unnecessary.

It may seem amusing, but it isn't really. For HMRC to behave in this way simply brings them discredit. Such episodes do absolutely nothing to promote the proper respect for HMRC which is so important. The effective operation of the tax system requires compliance by taxpayers and such conduct can only diminish the likelihood of taxpayers wishing to comply. They will look at conduct like this and say why should we not behave in the same way? And although that is completely the wrong question, who could blame them.

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