UK Tax Bulletin

October 2017

Field Court Tax Chambers

Contents October 2017

Latest Rates of Inflation and Interest

The following are the current rates at September 2017

Current Rates	
Retail Price Index: September 2017	275.1
Inflation Rate: September 2017	3.9%
Indexation factor from March 1982:	
to August 2017	2.433
to September 2017	2.463

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 Bills

No more news yet – but we have a Budget in three weeks' time so maybe there will be some clarification.

No, I don't think so either - except there must be something, sometime … surely.

Non Resident CGT Returns

Hot on the heels of the case of *Rachel McGreevy* which I mentioned last month, where HMRC failed (spectacularly) to impose a penalty for the late submission of a Non Residents CGT return, we have another one: *Patsy-Anne Saunders v HMRC* TC 6173.

I guess the situation will be familiar. Miss Saunders sold a UK residential property at a loss. She was not resident in the UK (obviously not – otherwise she would not have been subject to the Non Residents CGT charge) but she was aware that capital gains tax can now be charged on non-residents who sell UK residential property. However, she did not know that it was necessary to submit a Non Residents CGT return within 30 days of completion, even if she made a loss – failing which there would be a penalty. Bad luck.

Well, actually not bad luck. She should have known, there was no excuse for not knowing, so here is a penalty of £1300 which is a sort of aide- memoire. HMRC are all heart. I think it is called Customer Service. The irony is almost too much to bear – particularly as the HMRC Update on the subject included a technical error about when the form needed to be submitted. You could hardly make this up.

I would add that it is particularly irritating (and beyond belief) to non-resident clients, when they find that if they make a capital gain and submit an ATED- related CGT form in respect of the gain - and pay the tax - they also have to submit another form for the Non Residents CGT charge; or be subject to a penalty.

As it happens, the Tribunal took the view that Miss Saunders had no obligation to submit a Non Residents CGT return at all. The reasoning – which I guess will inevitably be appealed to the Upper Tribunal – was that you only have to make a return if you are the taxable person.

The taxable person is:

> *"the person who would be chargeable to capital gains tax in respect of any chargeable NRCGT gain."*

In this case the taxpayer made a loss and was not therefore a "taxable person" because there would not have been any chargeable NRCGT gain.

More of this argument anon. The Tribunal went on to consider whether or not Miss Saunders would have had a reasonable excuse if there was an obligation to file a Non Residents CGT return.

HMRC argued that she had no excuse, on the following grounds:

- non-resident individuals have an obligation to stay up to date with legislation in the UK.

- Ignorance of the law is no excuse and she should have been aware of the changes effected by section 12ZB TMA 1970.

- The obligation to file a non-resident capital gains tax return within 30 days of a disposal is not obscure or complex law.

Er: no, No and NO. The Tribunal rejected all these arguments for reasons similar to those expressed by the FTT in *Rachel McGreevy* – not least the view of Judge Thomas that HMRC's argument about knowledge and awareness of the law was "claptrap" (a technical term derived from ancient texts) and to suggest that the new legislation was not obscure or complex was preposterous.

I wonder whether these bits will also subject to appeal. That would be fun. (You have to take your fun where you can find it in this business). Anyway for the moment, both these decisions will be very helpful in preventing the obvious unfairness which would otherwise arise.

IHT Charity Exemption

The well-known exemption for gifts to charities for IHT is provided by section 23 IHTA 1984. The basic condition is straightforward – that the property given has to become the property of a charity or held on trust for charitable purposes only.

This condition was examined in detail by the High Court and now the Court of Appeal in the case of *Routier v HMRC* [2017] EWCA Civ 1584 which concerned a bequest in 2007 to a trust for the benefit of a hospice in Jersey. There was no dispute that the objects of the trust and of the hospice were charitable purposes under English law. However, the trust was subject to Jersey law.

The High Court rejected the claim for inheritance tax inheritance exemption on the grounds that the trust did not qualify as a charity because it was not subject to the jurisdiction of the UK courts. The reasoning derived from the decision of the House of Lords in *Camille & Henry Dreyfus Foundation Inc. v HMRC* (1956) AC 39. Accordingly, bona fide charities doing undoubted good and exclusively charitable works in other countries, simply did not qualify.

Schedule 5 Finance Act 2010 introduced a new definition of charity to include charities established in the EU and this definition was applied to inheritance tax on 1st April 2012 – although of course its purposes have to be exclusively charitable under English law. This new rule did not apply to *Routier* because it was not established in the EU – and in any event, it was established before 2012.

The Court of Appeal have recently considered the position further and concluded that the underlying policy requirement is that the UK authorities must be able to identify whether the entity was properly charitable. This requires them to have the ability to obtain information about the charity sufficient to reach that conclusion – and they have no enforceable information powers in respect of charities outside the UK.

(It is not immediately clear why this information requirement is necessary. It would be possible, and indeed reasonable, for HMRC simply to deny the relief in respect of a foreign charity unless it could be shown that the conditions are satisfied. If the information for this purpose is not forthcoming, then no relief would given. Why is that not enough?)

HMRC based their arguments on the question of enforceability and that the interpretation of charity for this purpose should depend upon whether HMRC had the machinery to obtain information about the foreign charity. This may be thought to be a surprising argument because we know from the House of Lords in *Agassi v Robinson* [2006] UKHL 23 that lack of enforceability is no impediment to the proper interpretation of a statute.

However, the Court of Appeal concluded that HMRC are entitled to refuse relief on gifts to non-UK charities unless there is a mutual assistance agreement between the UK and the country in which the charity is based. There are lots of such agreements now, and there is also the OECD Convention on Mutual Administrative Assistance in Tax Matters. (Double Taxation Agreements do not help, despite the obligations under the information exchange articles, because apart from a few exceptions, they do not cover inheritance tax.) This is a rather different test from that established in *Dreyfus*, because the opportunity to obtain information does not make the charity subject to the jurisdiction of the UK courts. It merely enables HMRC to judge whether it would satisfy the tests of charitable purposes under English law.

There are lots of issues here, and it is not at all clear whether we still have the Dreyfus test based on jurisdiction. However, it is certainly possible that the widespread Tax Information Exchange Agreements and the OECD Convention mean that the opportunities for claiming tax relief on gifts to foreign charities are considerably enhanced.

IHT: Excluded Settled Property

In 2015, the High Court examined a long standing area of uncertainty relating to excluded settled property. This has now been considered by the Court of Appeal: *Barclays Wealth Trustees (Jersey) Ltd v HMRC* [2017] EWCA civ 1512.

Section 48(3)(a) IHTA 1984 provides that where settled property is situated outside the UK, the property is excluded property for inheritance tax purposes unless the settlor was domiciled in the UK at the time the settlement was made. A question arises about what happens if property is added to the settlement after the foreign domiciled settlor has acquired a UK domicile. Does that added property qualify as excluded property?

It all depends upon what is meant by when "the settlement was made". It can be powerfully argued that the settlement was made at the time it was originally established in which case the added funds would qualify as excluded property. However, HMRC took the opposing view, that a new settlement is made when funds are added – so that if the additions take place when the settlor had become UK domiciled, those assets would not qualify as excluded property.

There are some real difficulties with the HMRC interpretation. A settlement can be constituted by a number of separate dispositions which is in clear conflict with the idea that a second disposition is a separate settlement. It is also relevant that section 67 IHTA 1984 provides detailed rules for the treatment of added property. That legislation would be completely unnecessary if added property represented a separate settlement.

The High Court concluded that the words "at the time the settlement was made" were capable of describing both the making of the original settlement and the subsequent addition of property to that settlement. However, the Court of Appeal has now considered the position further.

In this case, a settlement was established when the settlor was not UK domiciled. A second settlement was established after the settlor had become UK domiciled to which a transfer was made from the original settlement. HMRC argued that the assets in the new settlement did not qualify as excluded property as the settlement was made after the settlor had become UK domiciled.

The Court of Appeal held that it was excluded property. A crucial part of their reasoning derived from section 81 which provides that where property ceases to be comprised in one settlement and becomes comprised in another, the property is treated as remaining comprised in the first settlement. Accordingly, the settled property continued to be excluded property and the fact that the transfer took place after the settlor had acquired a UK domicile did not interfere with that conclusion.

Interestingly, the Court of Appeal declined to express a view on the position where section 81 is not engaged – that is to say in the simpler circumstances where an addition is made to an excluded property settlement by a settlor who has subsequently become UK domiciled. They said it may arguably seem anomalous that the property should qualify as excluded property merely because the settlor was not UK domiciled when the settlement was originally made. However, they did not need to consider this point as it was unnecessary in the resolution of this case.

Nevertheless, it is not easy to see how a different conclusion could be reached on this point having regard to the carefully considered views of the Court of Appeal on all of these aspects.

Given the significance of this point, I think we might hear some more about it in due course.

Reasonable Excuse

It is perhaps a sad fact of life that I keep banging on about reasonable excuses – but they are needed so often. With about half the appeals to the Tribunals being about penalties, it seems rather an important topic.

It is possible to take comfort from the recent case of *Northam v HMRC* TC 6125 because where HMRC act unreasonably, there is an increasing likelihood of redress before the Tribunal. I need not dwell on the detailed facts; what was important (and what may be helpful more widely) is that Mr Northam was let down by his accountant and his tax return was not sent in on time. This is familiar theme.

HMRC rejected his arguments. They said (as they always do) that relying on a professional advisor is not a reasonable excuse (on the grounds that relying on a third party is no defence), although there is lots of authority now that such reliance can represent a reasonable excuse. HMRC also said that there were no special circumstances in the case of Mr Northam which merited any reduction in the penalties.

However, the Tribunal found that HMRC were wrong on both counts. They decided that Mr Northam did have a reasonable excuse as he had been let down by his accountant and that his reliance on his accountant was reasonable. They set out the test from *Anderson* that it was necessary:

> *"to consider what a reasonable taxpayer exercising reasonable diligence in the completion and submission of the return would have done."*

The Tribunal concluded that Mr Northam had exercised reasonable diligence and satisfied this test.

They then went on to consider the position if they had found that Mr Northam did not have a reasonable excuse – that is to say whether Mr Northam could be relieved from a penalty because of special circumstances. HMRC said that were no such special circumstances – but the Tribunal considered that HMRC's conclusion was flawed. There were special circumstances and even if there had been no reasonable excuse Mr Northam should be excused from a penalty on this ground.

Although we might exult in our enjoyment for Mr Northam, in reality this is not good at any level. It is a waste of the resources of HMRC and the Tribunal (let alone the taxpayer) and what is worse, if HMRC continue to impose penalties which are clearly unjustified, the number of appeals to the Tribunal will go up and up.

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