UK Tax Bulletin

September 2017

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at August 2017

Current Rates	
Retail Price Index: August 2017	274.7
Inflation Rate: August 2017	3.9%
Indexation factor from March 1982:	
to August 2017	2.433
to July 2017	2.435

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

More draft clauses for the Finance Bill were published on 8th September but unfortunately, they did not add much (if anything) to the previous draft clauses; nor did they provide any answers to outstanding questions. We also had some draft clauses for the 2018 Finance Bill published on 13th September. No, I don't know why either.

Things may get clearer on (or shortly after) 22nd November when Mr Hammond is delivering his newly timed Budget – but I am not holding my breath. Some substantive law would be nice.

Main Residence Exemption

What you have to do to qualify for the CGT private residence exemption in section 222 TCGA 1992 continues to be a matter of uncertainty.

It will be remembered that there are a number of hopelessly conflicting cases on the circumstances and length of time that somebody has to occupy a property to qualify for the exemption and it is impossible to divine any general principle. There are a few themes, the main one being the celebrated test from *Goodwin v Curtis* [1998] STC 475 that there must be "*some assumption of permanence, continuity, some expectation of continuity*" but such things as the nature, quality, length and circumstances of the occupation are just impossibly variable.

HMRC and the tribunals have traditionally put some weight on the existence of evidence which supports (or otherwise) the expressed intention of the taxpayer – for example whether they notified anybody of the change of address, where their post was delivered and where all official communications were sent, like letters from HMRC. (Utility bills are also an interesting source of information as they can provide an indication whether anybody actually lives there).

The recent case of *Bailey v HMRC* TC 6085 does not really help our understanding.

Mr Bailey acquired a property which was intended to be a family home for him and his children. After a few months in the property, he moved out. He let it to a friend and after the friend died, he moved back but within a couple of weeks he decided

to sell it. There was no evidence (apart from his oral testimony – although that is of course good evidence) to support his occupation of the property a as a residence - nor was anybody notified of his change of address; he was hardly there long enough to do so. His arguments were not helped by the fact that his representative explained that Mr Bailey moved in and "did decorating and landscaping himself with a view to selling the property".

It might well have been concluded that Mr Bailey's occupation of this property had not assumed the necessary degree of permanence or continuity – but the Tribunal were more sympathetic and held that he had established his intention to occupy the property as his main residence and allowed his relief.

Having regard to the authorities which are equally surprising in the opposite direction, this is a useful analysis of how the evidence of the taxpayer regarding his intention can overcome the lack of any other evidence (or indeed the evidence to the contrary) to show that the property was a residence, and was intended to be his main residence on a permanent or continuing basis – even though things may have happened to frustrate that intention.

Entrepreneurs Relief

Last year I made reference to the case of *McQuillan v HMRC* TC 5074 which concerned the entitlement to Entrepreneurs' Relief and whether the 5% shareholding requirement was satisfied.

Mr and Mrs McQuillan each held 33% of the (full strength) ordinary shares in a trading company. Some other shareholders had 30,000 non-voting shares which had no rights to dividends.

The problem here was that if these 30,000 non-voting shares were "ordinary shares" for the purposes of Entrepreneurs Relief, the taxpayers would obviously not have the necessary 5% of the ordinary share capital and would therefore not qualify for the relief. The definition of ordinary share capital for this purpose is provided by section 989 Income Tax Act 2007 as follows:

> *"all the company's issue share capital (however described) other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits".*

The non-voting shares were obviously share capital and would only be disregarded if they had a right to dividend at a fixed rate. The First Tier Tribunal therefore had to decide whether having no right to dividend was the same as having a right to a dividend at a fixed rate – ie a rate of 0%.

HMRC said that the shares did not have a right to a dividend at a fixed rate – they did not have a right to a dividend at all – and could not therefore be excluded from the definition of ordinary share capital.

The fact that this gave rise to a grotesquely unfair result which could not possibly have been intended by Parliament (does this resonate with anybody?) made no difference.

It seemed to me that the taxpayer had a really difficult argument. How can the absence of a right be equivalent to a right at 0%? For example, if I buy a car, the purchase would obviously not give me the right to a refund on my TV Licence fee. However, nobody in their right mind would say that the purchase of my car gives me "a right to a TV Licence refund at a rate of 0%".

However, the First-tier Tribunal was clearly seized by the need for justice and fairness and found that in these circumstances a right to a dividend was a rate to a dividend at a fixed rate for the purposes of the definition and allowed the relief. Obviously, a triumph for common sense (and fairness) even if the analysis was difficult to follow.

The matter might have been left there ….. but unfortunately not. The matter proceeded to the Upper Tribunal who concluded that having no right to a dividend cannot be regarded as a right to a dividend at a rate of 0%.

The Upper Tribunal were really sympathetic and tried their best to find a purposive construction but could find no purposive construction that could prevent the shares from being ordinary share capital within the definition. They recognised that this was the sort of case for which Entrepreneurs' Relief was devised and that this interpretation appeared unfair but they found it impossible to conclude that Mr and Mrs McQuillan were entitled to Entrepreneurs' Relief.

I wonder if there should be a campaign for a "reverse GAAR".

Deliberate Behaviour

Whether a taxpayer has acted with reasonable care, carelessly or deliberately in connection with his tax affairs has important implications as far as his liabilities to tax and penalties are concerned. For example, a discovery assessment can only be made outside the four year window if the taxpayer has been careless, that is to say has failed to take reasonable care, and can only be made after six years if the taxpayer's conduct is deliberate in connection with the irregularities in his tax affairs. Furthermore, the penalties for deliberate conduct are rather higher than those for merely careless conduct.

Unfortunately, there is no statutory definition of deliberate behaviour so it was interesting to read the recent tribunal case of *Dr Baloch v HMRC* TC 6092 where the meaning of deliberate behaviour was examined.

Dr Baloch had decided, following advice from his accountant, that he should conduct his company and duly did so. Well, sort of.

Unfortunately, he failed to undertake any of the necessary procedures or deal with any paperwork which would evidence (or indeed cause, as a matter of fact) the business to be carried on by the company. HMRC successfully argued that Dr Baloch simply carried on the same business and merely paid his income into a company with a view to saving tax. Leaving all that aside for the moment (which would divert us for a few pages), my interest is with the nature of his conduct.

HMRC raised the appropriate assessments on Dr Baloch and sought a penalty on the basis that his failures in connection with his tax affairs were deliberate. Interestingly, HMRC said that his behaviour was deliberate because they had guidelines which said so – and furthermore the inspector had taken advice from an HMRC accountant and had been told that a deliberate penalty was appropriate. (Well, I expect so, but I am not sure that "because I say so" is a good enough reason for a penalty to be imposed).

The Tribunal, noting that there was no statutory definition for this purpose, examined a number of tribunal decisions which provided helpful guidance on the matter.

(There is a bit of a difficulty here because almost anything somebody does wrong will be deliberate – unless it is done by accident. Er, I did not mean to send in my tax return - I must have done it accidentally when I was asleep or something).

However, that would mean that conduct would be regarded as deliberate and worthy of increased penalties when it did not even reach the threshold of being "careless". If you do something wrong even if you were not careless, it would still be deliberate. Clearly that would be a bit perverse.

The Tribunal got to grips with this and said that in order for the taxpayer to have acted deliberately he must have submitted an incorrect document knowing that it did not represent the true position – and he must have intended HMRC to accept the incorrect position as being correct. They also said that HMRC were wrong to suggest that a failure to check the correctness of something amounts to deliberate behaviour – although it may well indicate careless behaviour.

Moving from this helpful statement of the general principles to the particular case of Dr Baloch, the Tribunal concluded that the inaccuracies in Dr Baloch's tax returns were deliberate in the sense that he knew that the income shown did not reflect the reality and he intended HMRC to rely on them as if they correctly stated the position.

Reasonable Excuse

It may come as a surprise that HMRC are still arguing that if they do not receive something by the due date because of postal delays, that is the fault of the taxpayer who should therefore be penalised.

I thought that this point had been conclusively determined by a number of cases (among others, the decisions *Trustee of the de Britton Settlement v HMRC* and *Browns CTP Limited v HMRC)* but it seems that HMRC are continuing to argue the point. One wonders why they need to do so because postal delays are not the fault of the taxpayer and it can hardly assist the drive for compliance by penalising people for factors outside their control.

Anyway, the recent decision in *Akhtar v HMRC* TC 6078 is another example. The taxpayer submitted her tax returns by properly stamped first class post on 29th October. HMRC said that they did not receive the returns until 10th November. They charged a penalty saying that she should have allowed sufficient time for the return to reach HMRC – and only if the return was posted in good time and there was a disruption such as a fire or flood at the Post Office would there be a reasonable excuse.

We know that this is wrong so it is a surprise that this point was argued again – and perhaps even more surprising that the previous authorities were not cited by HMRC. The Tribunal had this to say:

> *"That is not the correct test, as this tribunal has frequently reiterated: see for example Electrical Installations v HMRC 2013 UK FTT 419 and numerous other judgments*".

The Tribunal also drew attention to section 7 Interpretation Act 1978 which provides that service is deemed to be effected by properly addressing, prepaying and posting the letter containing the document in the ordinary course of post. The Royal Mail website states that first class post is delivered the next working day including Saturdays in the ordinary course of post.

You would have thought this would not have been controversial because HMRC accepted in *Browns CTP Limited v HMRC*, that the ordinary course of first class post is delivery next day, excluding Sundays.

HMRC also suggested that they would consider the matter further if there was a certificate of posting. The Tribunal dismissed that suggestion, observing that obtaining a certificate of posting is not a legal obligation. That is not new either; it is exactly what the Tribunal said in *Kestral Guards Limited v HMRC* TC 3324.

Accordingly, the Tribunal set the penalty aside. We might hope that this issue is now concluded.

While we are on the subject of a reasonable excuse I hope I will be forgiven for sharing the views of Judge Thomas in the case of *Rachel McGreevy v HMRC* TC 6109. Miss McGreevy was charged a penalty for failing to submit a Non Residents CGT return. HMRC said that the taxpayer should have been knowledgeable about the law in this area – and that ignorance of the law is no excuse.

Judge Thomas thought that this well known maxim was being overstated. Indeed, he went on to say:

> *"I consider I have a better than average grasp of tax law and how it is constructed and interpreted. But as I have read section 7A and 12ZA to 12ZI and the NRCGT provisions in TCGA 1992 my eyes have glazed over and my senses reeled…. The arguments advanced by HMRC about knowledge of the law are little short of preposterous ….it is also claptrap*".

I think these comments might come in useful.

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