UK Tax Bulletin

November 2017

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at October 2017

Current Rates	
Retail Price Index: October 2017	275.3
Inflation Rate: October 2017	4%
Indexation factor from March 1982: to October 2017 to September 2017	 2.465 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%

The Budget

Having a full blown Budget in November is a bit of a shock to the system after a lifetime of Spring Budgets - but I am sure we will get used to it.

The financial situation is pretty serious but poor Mr Hammond could not afford to do anything of substance. If he did, it would mean that people would have to pay something – and that would be the end for him. However, he knows that everybody will support extra taxes – providing they are paid by somebody else. Preferably by Lewis Hamilton.

And so it came to pass that there is to be an increase in Air Passenger Duty for private jets. (I am sure that will fix the deficit in a trice).

And how about extending the non residents capital gains tax charge to sales of all UK land and property (not just residential property) by non residents. Charging tax on non residents is just about the most popular tax of all. Who needs inward investment anyway. This new rule will not only apply to UK property but also to shares where the non resident has held (at any time in the last five years) more than 25% of the shares in a "property rich" close company – that is a company where at least 75% of the gross asset value of the shares is attributable to land or property in the UK. This will not come into force until April 2019 and will only apply to increases in value from that date. It is proposed that there will be forestalling rules to catch arrangements on or after Budget day designed to avoid the charge, but only if the arrangements involve taking advantage of a double tax treaty.

There will also be a tiny (and I mean really miniscule) increase in the ATED charge – so small that it will probably yield less than the cost of printing the announcement.

And next up we have Stamp Duty Land Tax. The Treasury are reaping the consequences of their policy of increasing SDLT (they should have been careful what they wished for) and now propose the abolition of Stamp Duty Land Tax on residential property up to £300,000 and for the first £300,000 of homes costing up to £500,000. This will apparently leave the present SDLT burden to be paid by only 5% of home purchasers; that will go down well with the other 95%.

It was no real surprise that there was virtually nothing about income tax or CGT (except for non residents) and nothing about IHT except reference to a study on how IHT reliefs influence behaviour. (There may be some speculation about how behaviour is influenced by the issue of such studies; I know what I have done with my copy). There were a few things about corporation tax - like the abolition of indexation relief for companies (to be frozen from January 2018) and a selection of other technical changes.

A new fund-raiser is the proposal for a withholding tax on royalties on UK sales which are paid to a connected party in a country which does not charge much tax. This is specifically targeted at payments by one non resident to another non resident but will be confined to payments to countries with which we do not have a double taxation agreement with a non discrimination article.

It is not immediately clear how this will work because neither the payer nor the recipient will necessarily have anything to do with the UK. But they will still be liable for tax here and subject to detailed reporting requirements. That sounds optimistic. The suggestion is that there will be joint and several liability for a group that is exposed to these rules. It is expected (apparently) that groups affected by this will have some UK presence somewhere in the group and will therefore have assets which HMRC can pursue.

This will go down a treat in the other countries who were probably expecting to receive some tax on their royalty flows or on the profits of the companies in their country; even at a low rate it might still be a lot of money. Their tax might be completely eliminated by the withholding tax paid to HMRC – so they would get nothing and might reasonably claim that the UK is pinching their tax revenues. If the recipient country does not give credit for the tax, then there would be real double taxation and that will be even more popular.

I think the idea of trying to tax foreign residents on their foreign profits does not make a lot of sense at the best of times – and could easily provoke some seriously adverse consequences. (Of course, if another country sought to impose such charges on UK companies it would be regarded as outrageous).

The Finance Bill 2018 is being published very soon and will pick up a few of the measures which were previously proposed but got deferred. However, first we ought to look at the provisions of the Finance (No.2) Act 2017 which includes those provisions that made it into this year's Act.

Finance (No. 2) Act 2017

The Finance (No. 2) Act 2017 was enacted on 16th November and brought into force all the stuff about non doms – and a whole lot else, like the Requirement to Correct, the penalties on advisers for defeated tax schemes, the charge on loans from EBTs in April 2019, and the corporation tax loss carry forward restrictions, to name just a few.

The new deemed domicile rules for the 15 out of 20 year test, the position of returning non doms, rebasing and cleansing as well as all the trust protections are now all enshrined in the legislation. We now know where we are on all this – although there are various anomalies which I thought were going to be ironed out. Obviously, we will have to wait for that. It is going to be a busy time.

HMRC: Litigation and Settlement Strategy

HMRC have published a new guidance note (October 2017) on their Litigation and Settlement Strategy. This sets out their practice in dealing with tax disputes.

The guidance explains that HMRC will seek a collaborative approach to tax disputes and to avoid confrontation. This sounds exactly right – but unfortunately the reality is different.

Collaboration of course means that you cooperate with HMRC (not that they cooperate with you) and similarly *non-confrontation* means that you must agree with them. If you disagree, then you are being confrontational.

The general principle of the LSS is that where HMRC are in a dispute with a taxpayer and they believe they are likely to succeed, they will "settle" the case for nothing less than 100% of the tax interest and penalties.

(This is not a "settlement"; it is the insistence on total surrender by the taxpayer. How very collaborative – and non-confrontational).

One might consider what the reaction of HMRC would be if the taxpayer said he believes he is likely to succeed – so please would HMRC give in. HMRC would assuredly regard such an approach as completely unacceptable.

In the view of HMRC, the LSS positively encourages the reaching of an agreement between HMRC and taxpayers. This must be a modern interpretation of the concept of an agreement. If a man pulls a gun on me and demands my wallet I don't think I would say that he is encouraging me to reach an agreement with him that he should have the money.

Perhaps I would say that, (although he has not established any right to the money) I should still pay it in a spirit of collaboration and non-confrontation. No - I don't think I would say that either.

Contrary to the fine words in the guidance, it does not encourage the reaching of agreement for one side to force the other into giving up a good case; it just creates injustice and resentment which undermines the compliance objective.

Tax disputes are usually complicated and particularly suited to compromise. Of course, a compromise is not always possible (or sensible) but where arguments are finely balanced, to reject any possibility of compromise makes little sense – except to the more powerful party. Many people will think we deserve rather better than that.

On a more positive note, it is good to see that HMRC are firmly committed to the principle that the taxpayer should pay (and HMRC should collect) "the right amount of tax." They do not say so, but I am sure they mean the right amount of tax payable under the law. This is extremely welcome and I would respectfully suggest it is dead right. This is stark contrast to some newspapers and politicians who have scant regard for the law and suggest that anybody with any money (that is, anybody with more money than them) should pay lots more tax, whatever the law says.

HMRC Manuals

If you want to rely on the HMRC Manuals you need to be quite sure that they give you the comfort you require. This was the issue before the Administrative Court recently where the taxpayer sought a Judicial Review to force HMRC to adhere to their Manuals. HMRC said that the Manual was wrong and the taxpayer was not able to rely on it anyway: *R (on the application of Aozora GMAC Investment Ltd) v Revenue and Customs Commissioners [2017] EWHC 2881 (Admin)*

The High Court said that HMRC were obliged to honour their Manuals – but only if:

a) HMRC had made a representation in the Manual.

b) The representation in the Manual was clear, unambiguous and devoid of relevant qualification.

c) The taxpayer relied on the Manual to his detriment.

d) It gave rise to conspicuous unfairness.

These are very tough conditions, although they are not new and do not break new ground.

The High Court found that the first two conditions were satisfied – which is pretty good news for taxpayers generally – but there was no evidence that Aozora actually relied on the Manual (or were even aware of it) before undertaking the relevant transaction. Without such reliance it was a bit difficult to say that it was conspicuously unfair for HMRC not to follow their Manual.

A pity for Aozora, but it demonstrates that you cannot just point at the Manuals and insist that HMTC follow them. If they fail to do so, these conditions will need to be satisfied.

Having regard to the above it is interesting – not to say almost unbearably ironic – to read the decision in *Cooke v HMRC TC 6239* released in the last few days where HMRC claimed that the taxpayer was careless (and culpable) because he had failed to check the HMRC Manuals. What? It is careless not to check the Manual which HMRC might say is wrong and which you cannot rely on anyway? I am surprised that Mr Cooke did not argue that relying on the Manuals should itself be regarded as careless conduct.

Residence – old style

Cases on residence on the rules before the Statutory Residence Test are still arising and we can again consider the terms of IR20 (of blessed memory): *Anthony and Sally Peck v HMRC TC 6179*

Mr and Mrs Peck moved to Monaco in 2006 and claimed to have lost their UK residence status. HMRC did not agree and so Mr and Mrs Peck took the case (themselves) to the Tribunal. In 2006 the relevant guidance was IR20 and they must have thought that they were on good ground. They left the UK and did not return here for more than 90 days in any of the following 5 years. Sounds a bit familiar.

They thought this was the test (like everybody else) but they were mistaken (like everybody else). There never was such a test and anybody who thought so (like everybody) was in for an expensive surprise.

What they had to do to lose their UK residence was to make a distinct break in the pattern of their life. They did not know that – nor would they have known what it meant. They now know that it means they had to loosen their ties sufficiently and that this would be determined by a multi factorial examination of their affairs. What amounts to a sufficient loosening of the ties? It means sufficient to effect a distinct break, of course.

The Tribunal decided that they had not made a distinct break from the UK. Mr and Mrs Peck had a settled abode in the UK and their presence was such as to cause their UK residence to continue.

We have been here before – although it might be said that the analysis in this case seemed to have more of a domicile flavour to it, and on the facts I imagine Mr and Mrs Peck were rather disappointed by the outcome.

Anyway, the case is certainly worth reading if anybody is faced with such a case to see how the arguments were developed by HMRC and how they were approached by the Tribunal.

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