UK Tax Bulletin

February 2018

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at January 2018

Current Rates	
Retail Price Index: January 2018	276.0
Inflation Rate: January 2018	4%
Indexation factor from March 1982: to December 2017 to January 2018	 2.501 Frozen at December 2017

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 3% from 21st November 2017

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% - but this was increased to 1.50% from 13th November 2017

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%

Non Doms: IHT and UK Residential Property

HMRC have published a Guidance Note on the new inheritance tax rules relating to excluded property and how it applies to shares in offshore companies which hold UK residential property. I fear it contains an error.

It is well known that where a foreign domiciled person has shares in an offshore company which owns a UK asset, the shares have always been excluded property. The shares are foreign assets in the beneficial ownership of an individual not domiciled in the UK: see section 6(1) IHTA 1984. Analogous rules apply for settled property.

Not any more – at least not quite. Since 6th April 2017 the shares in the offshore company are no longer excluded property to the extent that their value is attributable to UK residential property.

It is not always easy to identify how much of the value of a company's shares is attributable to the UK residential property; you have to enter the dim world of share valuation - but the general idea is clear enough. In a simple case where you have an offshore company which holds a single asset being a flat in the UK worth £2m (and no loans), the value of the shares in the company will probably be about £2m. The whole of that value will be attributable to the UK property and the shares will no longer be excluded property.

It was with these thoughts in mind that I read the HMRC Guidance Note of 2nd February 2018.

The Note gives an example of a non dom who owns all the shares in a Jersey company which has only one asset, a flat in London worth £2 million. HMRC explain that the whole of the value of the shares in the company is attributable to the UK residential property and the shares are not excluded property since 6th April 2017. OK – fine. No surprises there.

However, they go on to say:

> *" if the company had other assets that were the same as the UK residential property then the amount attributable to the UK residential property would be halved and only £1m …. would be within the scope of IHT".*

I think something has gone wrong here.

If the company has other assets that were the same as the UK residential property, which would seem clearly to mean other assets worth £2m, then the company would have assets of £4m. So how much of the shares in this company worth £4m is attributable to the UK residential property? Leaving aside refinements over valuations, that would still be £2m.

Unless I have misunderstood, the Guidance Note has gone a bit awry and a correction will be along soon.

However, if the Guidance Note is correct, an odd conclusion arises. If immediately before an occasion of charge you add lots of other assets to the company, the proportion relating to the UK residential property goes down. Following the HMRC example, if you put in other assets totalling £10m then the proportion of the assets representing UK property goes down to 16.67% - which would be just about the amount of the nil rate band, which might be rather helpful.

But, like HMRC are fond of saying: if it looks too good to be true – it probably is.

What seems to be missing here is to identify the proportion of what? The proportion may have gone down but it is a smaller proportion of a correspondingly more valuable company – so you end up with the same value attributable to the residential property.

Deliberate Conduct

Some time ago I wrote about the case of *Tooth v HMRC TC 5452*, where the taxpayer had filled in his tax return incorrectly by putting figures in the wrong box. HMRC claimed that he did so deliberately in which case they would be entitled to raise discovery assessments going back 20 years.

The FTT did not think much of the HMRC argument describing it as:

> *About as convincing as Eric Morecambe's repost to André Previn about playing all the notes, but not necessarily in the right order.*

HMRC appealed to the Upper Tribunal- but they did not do much better there.

That is not particularly noteworthy, but there were some interesting passages in the judgment of the Upper Tribunal which may be of wider importance. The Upper Tribunal said a great deal about the meaning a deliberate inaccuracy within the meaning of section 21(4) TMA 1970 which has become an increasingly important topic.

The Tribunal started by saying that an allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud.

The view of HMRC seems to be that if there was an error in the return, it must be deliberate because the taxpayer did not send in his return by accident. (I guess they mean that it was lying around the house enabling his children to complete it in crayon and the dog picked it up and gave it to the postman). The Tribunal explained the position as follows:

> *'Self-evidently the mere completion of a return- whilst a deliberate act, in the sense that the taxpayer deliberately fills it in and submits it- cannot of itself amount to a deliberate inaccuracy in a document. The deliberation must relate to the inaccuracy not merely the completion and submission of the document….The mere inclusion of a figure into a document that is inaccurate may be a deliberate act, but it is not, necessarily, a deliberate inaccuracy'.*

The Tribunal went on to say that there was no evidence of any intent on the part of the taxpayer to bring about an insufficient assessment of tax or to give HMRC a deliberately inaccurate document.

Another key issue here, apart from the requirement for dishonesty and the intention of the taxpayer deliberately to mislead HMRC by submitting a document or information they know to be incorrect (which was also highlighted in the case of *Dr Baloch v HMRC TC 6092*), is that the deliberate conduct must actually relate to the inaccuracy.

The Upper Tribunal also made some helpful comments regarding the meaning of a discovery. This is of particular interest because it is virtually impossible to challenge a discovery- which means little more than the inspector taking a different view, but in *Tooth*, the Upper Tribunal reinforced the concept of staleness - that HMRC must act expeditiously in issuing an assessment when they have made a discovery. In other words, the assessment must be issued whilst the discovery is 'new'.

The Upper Tribunal went on to say that the same officer cannot make the same discovery twice. He can make a discovery which goes out of time and then make another discovery on a separate point, but he cannot make the same discovery twice - or arrange for a colleague to take over the case and make the old discovery again.

Discovery Assessments

The case of *John Hicks v HMRC TC 6301* also dealt with discovery assessments but in this case the issue was whether Mr Hicks had been careless.

Mr Hicks had been involved in a tax avoidance scheme and the tribunal decided that he had acted in a manner consistent with that of a reasonable and prudent taxpayer and did not fail to take reasonable care in dealing with his tax affairs.

He relied heavily on his advisers, but did so responsibly. Although there were a number of failures or shortcomings in the manner Mr Hicks attended to his tax affairs, it was not enough for HMRC simply to identify that he had been careless. They had to show that the careless conduct was relevant to the insufficiency.

None of the failures identified by HMRC 'brought about' the insufficiency in his tax return and HMRC were therefore unable to make a discovery assessment beyond the 12 month window.

Non Resident CGT Return: Penalties

We have yet another of these cases where HMRC were claiming a substantial penalty for the failure to submit a Non Residents Capital Gains Tax Return within 30 days of completion of the sale, notwithstanding that no capital gain had been made: *Jackson v HMRC TC 6329*

The trouble with legislation which is unreasonably harsh and capricious, is that the courts bend over backwards to do something about it. Whilst one might say that that is a good thing, the courts cannot override the express legislation, so they try to find a way round it which is sometimes a bit imaginative - or sometimes they do their own researches into the law.

So it was with the latest incarnation, the penalties for failing to submit a Non Residents Capital Gains Tax Return and the case of *Jackson* where the Tribunal went to some trouble to relieve the taxpayer after HMRC had charged penalties of £3,200. Mr Jackson did not realise that there was a 30 day time limit; he was expecting to submit his tax return in the normal way. However, he did submit the returns immediately he was told that the time limit was 30 days from completion, notwithstanding there was no gain and no tax to pay.

The Tribunal explained that the penalties are laid down in legislation and they have no power to amend the penalties even if they were disproportionate, harsh or unfair; there were no special circumstances and generally it was really difficult to see why the penalties should not apply. The taxpayer acknowledged that he had missed the 30 days submission deadline and that it was his intention to submit these details in accordance with his normal tax return by 31st January in the following year.

However, the Tribunal observed that HMRC had overlooked paragraphs 1(3) and 17(3) of Schedule 55 Finance Act 2009 which say that where there are multiple penalties, the aggregate of those penalties must not exceed 100% of the liability to tax. In this case the tax was zero so the penalties were reduced to nil.

These penalties should obviously not have been imposed in the first place, and it is indefensible for HMRC to overlook the relieving provision and continue to charge the penalties which are contrary to the law.

There is nothing amusing in the irony that HMRC were claiming that the taxpayer had made an error and should therefore be harshly penalised - but where HMRC make an error, this of course, goes unpunished.

Accelerated Payment Penalties

If all this isn't bad enough, you should read the case of *Onillon v HMRC 6313* - this one will really make you hair stand on end.

Mr Onillon had entered into some tax scheme and had made the necessary returns and everything – but he had not received the relief claimed and therefore did not owe any tax even if the relief had been denied.

HMRC issued an Accelerated Payment Notice demanding that he pay the sum of £260,000, failing which there was a whole list of unpleasant consequences. The taxpayer knew he did not owe the £260,000 - and HMRC accepted that the APN should not have been issued and no further tax was due from him. Unfortunately, there is no right of appeal against an APN so there was nothing the taxpayer could do.

Notwithstanding all this, and the fact that he did not owe a penny in tax, HMRC charged him a penalty of £100,000 for not paying tax which he didn't owe and for failing to respond to a document that they should never have issued. You would have thought that they might have said: sorry, our mistake, case closed, but no, they took him to the tribunal to try and get their £100,000 penalty.

(It is well known that before a case goes to the tribunal, it is subject to an HMRC review; it was in this case – and the review officer upheld the penalty. That turned out not to be surprising because when reviewing the penalty, the reviewing officer said that the validity of the APN and the amount charged did not form part of his review. Regrettably this is not some kind of joke).

It is virtually inconceivable that Parliament when enacting this legislation could have thought it reasonable to enable HMRC to issue notices wrongly to a taxpayer charging huge amounts of tax which are not due and penalising the taxpayer for not paying the tax or dealing with documents which should never have been issued in the first place - and giving him no right of appeal either.

A defence that this is the will of Parliament is laughable in this context. I think we would be hard pushed to find any MP who would admit that this is what he intended the law to be when he voted for it – or indeed, would support it now that it has been brought to his attention.

Something is going seriously wrong here. Nobody wants a tax authority operating Soviet style in this way but unless HMRC appreciates the impropriety and acknowledges that actually they are going too far, it seems there will be no check on these excesses.

Fortunately the court did not uphold the penalty – but that is no justification for the penalty being imposed in the first place.

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