UK Tax Bulletin

April 2019

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the current rates at March 2019

Current Rates	
Retail Price Index: February 2019	285.0
March 2019	285.1
Inflation Rate: February 2019	2.5%
March 2019	2.4%
Indexation factor from March 1982: Frozen at December 2017	2.501

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 3.25% from 21st August 2018

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.75% from 13th August 2018

Repayment supplement

Interest on overpaid tax is payable at the same rate from 21st August 2018

The formula is Bank base rate minus 1% but with an overriding minimum of 0.5% which applies at the present time.

Except IHT where the rate is 0.75%

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 Residents CGT

It is possible that this unhappy episode could be coming to a conclusion.

It will be remembered that non residents must file a non-Residents Capital Gains Tax return within 30 days of completion of the sale of a UK residential property, even where there is a loss, and penalties have routinely been imposed by HMRC for failure to do so. This has given rise to a degree of dissatisfaction – and appeals to the Tribunal.

Some Tribunal judges have taken a firm view that being unaware of the requirement to submit a NRCGT return within the 30 days can (in appropriate circumstances) represent a reasonable excuse.

HMRC have argued that there can be no reasonable excuse because:

a) Non-residents have a duty to stay up to date with UK legislation.

b) Ignorance of the law is no excuse

c) The obligation to file the NRCGT return is neither obscure nor complex.

One judge rejected these arguments as "claptrap" and "preposterous" – even pointing to the fact that the judge himself had difficulty understanding the position. He also drew attention to the fact that HMRC explained the requirements incorrectly in their published materials, which rather supported the suggestion that the law must be obscure or complex if HMRC did not get it right themselves.

On the other hand, another group of Tribunal judges have taken the opposing view - that ignorance of the law was no excuse and that failure to abide by these statutory obligations inevitably gave rise to a penalty.

There has been another case *Kirsopp v HMRC TC 7064* which might be thought to be just another one in the growing catalogue of conflicting decisions … but perhaps not. This case might just bring the debate to a close.

The distinguished Upper Tribunal Judge Charles Hellier (sitting in the FTT for this case) explained that there was a divergence of opinion among FTT Judges on the matter. However, he drew attention to the decision of the Upper Tribunal in *Perrin v HMRC [2018] UKUT 156* which held that it was a matter for the judgment of the FTT in each case whether it was objectively reasonable for the particular taxpayer to have been ignorant of the requirements in question.

Judge Hellier specifically rejected HMRC's argument that a taxpayer has an obligation to keep up to date with the law. He held that there is no such obligation. A penalty may arise from an inexcusable breach of the law, but not from the failure to keep up to date.

In the circumstances of Mr and Mrs Kirsopp, Judge Hellier concluded that they had displayed a reasonable regard to complying with their tax obligations and remedied their failure within a reasonable time after they discovered the true position. They therefore had a reasonable excuse.

I would respectfully suggest that this must be right. It surely cannot be reasonable for HMRC to suggest that non-resident individuals have a duty to keep up to date with all aspects of UK tax legislation which could possibly affect them; and must regularly read all HMRC publications and be completely familiar with the HMRC website. It would follow from this reasoning that everybody in the world must have this duty. And there is no reason why this obligation not extend to all UK legislation – not just tax.

Can you imagine what the Chairman of HMRC would say if he went to Sweden and was immediately fined a large sum of money by the authorities there. Why have I been fined? Because you have contravened one of our rules. You have a duty to be up to date with Swedish law (and with all the materials published by the government – all in Swedish). So pay up. But that is just silly, he would say.

Well, yes.

Personal Service Companies

A year ago, the case of *Christa Ackroyd Media Limited v HMRC TC 6334* was decided by the First Tier Tribunal. It concerned the use of a personal service company by a TV presenter and whether the income of the company fell within the intermediaries legislation in section 48 – 61 ITEPA 2003.

Last month I mentioned the case of *Albatel Limited v HMRC TC 7045* in which the circumstances of another TV presenter Lorraine Kelly were similarly challenged but the FTT held that she was not caught by the intermediaries legislation – in considerable contrast to the decision in *Christa Ackroyd*.

This month we have another one – *Atholl House Productions Limited v HMRC TC 7088*. This company was the personal service company of Miss Kaye Adams who was a presenter for the BBC.

Under the intermediaries legislation we have to disregard the real contract between the company and the client (in these cases, TV companies) and to assume a hypothetical contract (with different parties) and then work out what the relationship would have been, had those different parties entered into such a contract.

Accordingly, the crucial issue was whether, if the services provided by Miss Adams to the BBC had been provided under a contract directly between her and the BBC (rather than between the BBC and her company), she would have been regarded as an employee of the BBC under this hypothetical contract.

The facts were not precisely the same as the other cases (they never are), but there were some marked similarities.

The Tribunal found that the BBC had ultimate editorial control over the content of the programme, and although any disagreements between Miss Adams and the editorial team were resolved collaboratively, the BBC had the contractual right to exert that control. Furthermore, although the contract between the parties would have provided for a right of substitution, the Tribunal found that as a question of fact, there was no genuine right of substitution and she had to perform the relevant services herself.

The BBC did not have the first call on Miss Adams' services, but she was required to attend editorial training, and all intellectual property in relation to the programme and content belonged to the BBC.

This does not look good – even though Miss Adams was not entitled to holiday pay, sick pay, maternity leave or any pension entitlement and the BBC were obliged to pay a minimum fee in the event that they did not call upon her to prevent a programme which she was willing and able to present.

However. the Tribunal said that it was inappropriate to focus solely on the two tax years of assessment in question – they needed to be considered in the context of Miss Adams' career as a whole. Her engagements with the BBC were just part of her overall professional career which should not be disregarded. The Tribunal formed the impression that Miss Adams carried on her profession as an independent provider of services and not as an employee.

It is perhaps unnecessary to delve too deeply into the factual distinctions in these three cases (nor the other recent case of *Big Bad Wolff v HMRC [2019] UKUT 0121* which applied exactly the same tests for the purposes of NIC) because it gets you nowhere. They are just in conflict – although I dare say there will be many hours oiccupied in identifying real or illusory differences, probably in the appeal court where some clarity on this issue is seriously required.

Until such clarity is forthcoming, anybody who has been using a company as a means of providing their services to third parties will continue to be justifiably anxious.

CGT Main Residence Exemption

There seems to be a lot of confusing cases this month. (I hope it is not just me who is confused).

The entitlement to the only or main residence exemption under section 222 TCGA 1992 is another one. I have highlighted numerous conflicting cases on this exemption in earlier Bulletins. They all set out the same tests for the exemption and then apply the facts of the instant case in a manner which sometimes defies belief - some in favour of the taxpayer, and some not. The result is that with any claim for this exemption the taxpayer has some really good reference points (you cannot regard them as precedents if they are decisions of the First Tier Tribunal, but they are still helpful).

Unfortunately, HMRC has an equally good reservoir of reference points from all the cases decided in their favour. So firm advice (and a confident client) is hard to come by. In other words, nobody knows where they are.

The case of *Davidson* adds fuel to this fire. The case was reported in *Taxation* recently with a reference TC 6639 but unfortunately the FTT website has no record of it – nor does Google. When it comes to light it will be an interesting read.

Apparently Mr Davidson bought a flat which was let until March 2011. He then moved in and stayed until May 2011. He then moved out and it was let until December, and later sold.

Nevertheless, Mr Davidson was able to persuade the FTT that he was entitled to the exemption - that is to say the property was his "residence" and not just

temporary accommodation, and furthermore it was his only or main residence even though he had only occupied it for 79 days. I think congratulations are in order here.

I look forward to reading the reasoning of the FTT.

Discovery Assessments

There is yet another case concerning discovery assessments which may have become stale: *Hargreaves v HMRC TC 7090*

The facts were complex, and the case initially focused on whether there had been a discovery, but the key issue was whether the discovery had become stale, thereby invalidating the discovery assessments.

The delay between the discovery and the assessments in this case was at least three years and in the judgment of the FTT, the discovery had lost its essential quality of newness and had become stale by the time the assessment was made. It therefore could not stand.

In the absence of the Court of Appeal saying that the Upper Tribunal decisions in *Patullo*, *Tooth* and *Beagles* are wrong, there cannot be any lingering doubt that a discovery can become stale. The challenge by HMRC in *Beagles* that all the cases with which HMRC did not agree were wrongly decided, was not repeated in *Hargreaves,* the question being confined to the exact period of the delay between the making of the discovery and the issue of the discovery assessments.

We do not yet know how quickly HMRC must issue an assessment following the making of a discovery, i.e. how long it is before the discovery loses its essential newness so that assessment is no longer valid. It seems clear that this will depend upon the circumstances of each case – although we know from *Patullo* that a period of 18 months will always be enough to make a discovery stale.

Image Rights

The taxation of image rights agreements entered into by footballers and those engaged in other sports have been the subject of much professional debate – especially with HMRC. Where the footballer's image rights are owned by a company, the taxation of the income derived from the image rights agreement is likely to be comparatively low – and of course free of National Insurance Contributions. The tax may be even lower if the company or other entity is resident outside the UK.

HMRC sometimes challenge image rights agreements and one such challenge took place in connection with an agreement entered into between Hull City Football Club and Mr Geovanni Gomez: *Hull City AFC (Tigers) Ltd v HMRC TC 7074.*

Mr Gomez was born in Brazil and prior to joining Hull City he had played for various clubs such as Cruzeiro, Barcelona, Benfica and Manchester City. He had also played for Brazil. (Wow. Not a bad CV if you are a footballer, I guess)

HMRC argued that although the image rights agreement was genuine, the realistic conclusion was that the payments to his image rights company were earnings for his services as a footballer and chargeable to income tax.

The FTT decision is lengthy and sets out the background to this subject in a manner which is well worth some careful study. (It is interesting to note that there was a general understanding among Premier League clubs about the treatment of image rights by HMRC; however, apparently they were all mistaken as HMRC had never agreed such an approach).

Anyway, the FTT accepted that the image rights agreement granted genuine rights to Hull City to exploit Mr Gomez's overseas image rights – but the judge went on to find the following facts:

a) There was no clear plan to exploit the rights.

b) There was no reliable evidence about how the Club arrived at the figure paid for the rights.

c) They did not obtain any valuation or opinion regarding the value.

d) They did not have the resources to exploit the rights.

e) They did not have any real interest in exploiting the rights.

f) There was little prospect of them exploiting the rights.

g) The rights were never commercially exploited.

h) The rights did not have any commercial value.

i) Nobody at the club could reasonably have believed they had any value.

j) Nobody at the Club considered whether the rights could realistically be exploited.

As a result of the above, the Tribunal concluded that the payments were made to secure the services of Mr Gomez as a footballer and formed part of his earnings.

Having regard to the facts found by the Tribunal, this decision seems inevitable However, had the Club been able to demonstrate that it had investigated the potential of the rights, valued the rights, had a business plan to exploit the rights and shown that the payment for them was commercially viable (all of which might be possible in another case), the outcome might have been different.

Tax and the Wealthy

HMRC has published a Research Report No 537 entitled: *Researching the drivers of tax compliance behaviour among the wealthy and ways to improve it.*

It is based on a very small (indeed miniscule) sample but makes interesting reading. Nothing earthshattering but some of the findings could prove useful.

Peter Vaines
Field Court Tax Chambers
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FIELD COURT TAX CHAMBERS

Contact
Peter Vaines
Field Court Tax Chambers
3 Field Court
Gray's Inn
London WC1R 5EP
Tel: 020 3693 3700
pv@fieldtax.com
www.fieldtax.com