UK Tax Bulletin

November 2019

Field Court Tax Chambers

FIELD COURT TAX CHAMBERS

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Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: October 2019	290.4
September 2019	291.0
Inflation Rate: October 2019	2.1%
September 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 0.50%

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%

Automatic Issue of Notices

Over the last year there have been a series of decisions by the First Tier Tribunal to the effect that notices sent out automatically were invalid – for example notices to file tax returns under Section 8 TMA 1970.

The cases of *Claire Platt* TC 7171, *Craig Shaw* TC 6547, *William Hutchings* TC 7293, *J Hulbert* TC 7278 among others, all decided that notices sent to taxpayers automatically by computer without any significant intervention by a human, did not satisfy the requirements for a valid notice under Section 8. It followed that any penalties for failing to comply with such a notice was also invalid.

HMRC had to prove that the notices were sent – the onus is on them to do so – and they were short of evidence to prove their case.

One of the particular problems was the claim by HMRC that all the tax return notices were issued on the same date of 6th April; the Tribunal held that this was unlikely to be true. Accordingly, there was no good evidence to show that a notice had been sent to the taxpayer.

Having regard to the sheer volume of tax returns and other notices which need to be sent to taxpayers (we know from *Tinkler v HMRC [2019] EWCA Civ 1392* that sending them to the agent is unlikely to be valid), it is clear that the provisions in the TMA are not up to date with the current technological capabilities. HMRC really ought to be entitled to send these things out automatically which is obviously the most efficient thing to do. However, the taxpayer needs some safeguards – and that is where the tension arises.

HMRC say that they use automated processes to carry out routine tasks such as giving statutory notices where making individual decisions on individual cases will be impractical and resource intensive. That is all very well but what about the statutory requirements? Complying with the law is often resource intensive – especially for the taxpayer – but HMRC never think that is much of an excuse if the taxpayer fails to comply with the law.

It is therefore no surprise that HMRC have announced that the next Finance Bill will provide authority for a large scale automated process to serve certain statutory notices.

It is proposed that the legislation will be retrospective to validate notices already issued – but they will not upset a settled judgment from a Court or Tribunal prior to the date of the announcement on 31st October 2019.

Personal Service Companies: IR35

Hot on the heels of the decision of the Upper Tribunal in *Christa Ackroyd* last month, we have yet another decision on the application of the intermediaries legislation – but with an opposite result: *Canal Street Productions Limited v HMRC TC 7422.*

This is a virtually identical case involving a contract entered into between Canal Street and ITV Breakfast Limited for the provision of the services of Helen Fospero.

Under the intermediaries legislation it is necessary to disregard the real contract between the company and the client (in this case ITV) 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 Foster to ITV had been provided under a contract directly between her and ITV (rather than between ITV and her company), she would have been regarded as an employee of ITV under this hypothetical contract. Yes, Yes, I know - please don't shoot the messenger.

I have mentioned personal service companies so many times that you may be spared any further explanation regarding the various issues involved. Suffice it to say that this case examined all the various indicators of self-employment (mainly concentrating on control and mutuality of obligation) and concluded that all the factors pointed towards Miss Fospero being regarded as self-employed and not an employee even if she had been engaged directly by ITV.

As I write, another decision on this subject appears: *RALC v HMRC TC7474* although this involves an IT consultant rather than a TV presenter. Same arguments – and the same result. In a lengthy judgment the Tribunal analysed the position in great detail and again concluded that the taxpayer would have been regarded as self-employed and not an employee even if he had been engaged directly by the clients.

Will this never end – and will we ever get some clarity? Not for a while, I think.

Crypto Currencies

There are people who know a lot about crypto currencies (and make money from them). I am afraid I am in neither category. I know that any money I may invest in a crypto currency would be lost by ineptitude or fraud.

However, I accept that crypto currencies probably represent the future – although probably not until crypto asset exchange tokens (such as Bitcoin) are backed by the Bank of England. After all, what is a £5 note other than an exchange token – it only has value because it is supported by a promise to pay by the Bank of England.

However, this must be a complete nightmare for HMRC because (as I understand it) there is no way to trace any of these crypto assets. There are no names, there are only strange long numbers which are unable to be traced to any particular person. So, unless the investor notifies HMRC of the existence of their investment (or gains), how on earth can HMRC become aware its existence. Clearly that must be corrected and no doubt a system will develop before long.

In the meantime, HMRC have published a guidance note explaining how transactions involving crypto currencies by businesses should be taxed. (They published guidance for individuals last year). This is very welcome – but I must admit I am still struggling with some of the concepts.

HMRC do not consider that any of the current types of crypto assets are money or currency. (It is not entirely clear why not – I thought that this was exactly what they are; but what do I know). Anyway, this means that our tax rules on Forex have no application – nor for the same reason can the loan relationship rules apply. The position for stamp duty is equally troublesome because if crypto currencies are not money then they are unlikely to be regarded as consideration for stamp duty purposes – although they could be money's worth for SDRT and SDLT. And apparently the European Court has decided that buying and selling crypto currency is a financial transaction which is exempt from VAT.

Buying and selling crypto currencies could be a trading activity – but the authorities generally do not support that conclusion that as far as individuals are concerned and HMRC take the view that any profits are likely to be subject to capital gains tax. (To be within the scope of capital gains tax they would need to be "assets", but this would seem to be the case according to a recent Legal Statement issued by the UK Jurisdiction Taskforce who said that crypto currencies should be regarded as property under English Law.)

But when the guidance tells me that "the transactions have to be converted to sterling in cases where the exchange does not have a sterling value (for example where it is exchanged for ether)" I start to lose my way – or wonder whether there has been a typing error. And when I read that "crypto assets may be awarded to miners in return for verifying additions to the distributed ledger" then I pretty much surrender.

I think this is going to get much more interesting – or much less interesting – depending upon your point of view.

Offshore Investment Funds

HMRC have published a fact sheet which indicates that they are sending letters to anybody they can think of, explaining the taxation of offshore investment funds – and in particular the distinction between reporting and non-reporting funds.

The letters set out in brief terms how offshore investment funds are taxed and how they should be disclosed on tax returns.

They are proposing to send these letters out ahead of the self-assessment filing peak so that the "nudge" will alert investors to their responsibility without being too burdensome.

The idea is to ensure that everybody gets their tax returns correct when reporting gains on offshore investment fund investments. However, it also has the (purely incidental) effect if they do get it wrong, they will have no defence to any penalties which would arise, because they have been told all about it well in advance by HMRC.

Security for Tax

I have previously made reference to the power of HMRC to require security for VAT or for PAYE and NIC. This is a truly awesome power.

The general idea is that HMRC are entitled to seek security from the taxpayer if they think it is necessary for the protection of the Revenue – for example, if he has failed to comply with his tax obligations in the past or there is reason to believe that he might fail to do so in the future. It is extremely serious because it is a criminal offence to continue to make taxable supplies for VAT if you have not provided the security demanded by HMRC. That means you must cease to trade if you want to avoid committing a criminal offence.

This is generous compared with the rules for PAYE and NIC. You don't get out of this penalty by ceasing to trade. It is a strict liability criminal offence not to pay the amount of security demanded by HMRC and carries an *unlimited* fine.

The ability for HMRC to require the provision of security can therefore make the taxpayer criminally liable in very short order. Given the immense seriousness of the matter, it is no surprise that the Tribunals have tended to approach the matter with great sensitivity. Anybody faced with such a demand can confidently expect that it will be seriously scrutinised by the Tribunal before they are put out of business or confirmed as a criminal – or both – by a demand for security from HMRC.

In the recent case of *Tower Hire and Sales Limited v HMRC* TC 7423 the Tribunal again examined very carefully the security which had been demanded by HMRC.

They found that HMRC had taken into account irrelevant factors in making their decision to issue the notices for security and accordingly, their decision was unreasonable and should not have been made.

The Tribunal has a limited jurisdiction in this matter and if they had found that HMRC would inevitably have come to the same decision even if they had not considered the irrelevant matters, the security notices would have been confirmed. However, the Tribunal said that there was nothing to support a finding of inevitability and the requirement for security was invalid.

In *D-Media Communications Ltd v HMRC [2016]* Judge Berner held that for HMRC to demand security without regard to the ability to pay is inconsistent with the legislation. If the level of security required is unlikely to be provided, the giving of a notice for the provision of security does not provide the protection of the Revenue which is the purpose of the legislation. More specifically:

> "If the only likely result is that the recipient of the Notice will inevitably fail to provide the security and thus will inevitably be liable to a criminal penalty as a matter of strict liability, that in my view cannot have been the purpose of Parliament in making these regulations".

The case of *Bluechipworld Sales and Marketing Ltd v HMRC TC 7477* published this week expressly contradicts this approach. The Tribunal said the fact that the taxpayer does not have the means to pay is irrelevant.

This is very uncomfortable reading for anybody interested in safeguards for taxpayers. It is right that the Revenue must be protected where there is danger of loss to the Crown, but for a taxpayer to be guilty of a criminal offence (where there is no defence) at the instance of HMRC, without any right of appeal, must surely be unacceptable.

Where the security is for VAT this problem does not arise because there is a defence; the taxpayer can stop trading. However, this is not a defence to a notice for security for PAYE and NIC which is a strict liability offence of simply failing to pay.

In *Bluechipworld* the authority cited for this conclusion was *Highlake Ltd v HMRC TC 5533* but in that case the judge was specifically referring to the requirement to stop trading (the VAT test) and did not address the automatic strict liability offence which applies in connection with security for PAYE.

It will be interesting to see what happens next.

Acquisition Date: Section 28 TCGA 1992

Section 28 TCGA 1992 provides that for capital gains tax purposes, a person acquires an asset at the time the contract is made and not at the time that the asset is conveyed or transferred to him.

In the context of a purchase of land, the contract will generally be made when contracts are exchanged, not when it is completed. This can give rise to difficulties – and did so in the case of *Higgins v HMRC* which has recently been heard by the Court of Appeal: [2019] EWCA 1860.

In October 2006 Mr Higgins entered into a contract for the purchase of a flat, off plan, with completion taking place when the building had been finished. Completion occurred in January 2010 and Mr Higgins moved in and used the property as his main residence. He subsequently sold the flat and claimed the main residence exemption under Section 222 TCGA 1992.

That seems all straightforward. However, that HMRC argued that his period of ownership started on the date of exchange in October 2006, but as he did not move in until January 2010, this period could not qualify for the exemption because the property was not his residence.

HMRC seemed to have a seriously powerful case. At the date of exchange, the purchaser acquired at least an equitable interest in the property and his period of ownership looks like it must have started on that date. (One would need to overlook that at the date of exchange, the property did not actually exist but don't let's worry about that).

However, the Court of Appeal drew attention to the fact that such an interpretation did not make sense in the context of a property transaction. Exchange and completion rarely take place on the same day and on this interpretation, the exemption from capital gains tax would never exempt all the gain in the typical case. The period from exchange to completion could never qualify for relief and would always be chargeable to capital gains tax – and Parliament could not have intended to deny complete relief from capital gains tax for this reason.

The Court of Appeal said this reasoning strongly suggested that the interpretation put forward by HMRC was wrong. They said that as a matter of ordinary language, a purchaser would be described as the "owner" only once the purchase had been completed. And it is the "period of ownership" which is the test for the exemption.

The Court of Appeal referred to a number of circumstances where the Courts have limited the application of Section 28. They mentioned *Chaney v Watkis [1986] STC 89* and *Jerome v Kelly [2004] UKHL 25* (to which I would add *Campbell Connolly v Bartlett 66 TC 380.)* This case is another one and the Court of Appeal explained that:

> "The fact that using section 28 to fix a "period of ownership" for the purposes of sections 222 and 223 would neither afford total CGT relief in the paradigm case, nor sit comfortably with the ordinary meaning of the words "period of ownership", indicates that the provision should not be applied in that context".

Accordingly, Mr Higgins' period of ownership was regarded as commencing when he moved in on completion with the result that full relief was available.

Although the result is clearly how the relief ought to apply, it does not sit comfortably with the words of Section 28 which are obviously in need of some revision. I would suggest that it is no more acceptable for a relief to be given by squeezing the wording of the legislation into a more desirable shape than it is to impose a charge to tax by the same process (with which we are more familiar).

Allowing reliefs in difficult circumstances used to be dealt with by Extra Statutory Concessions so that the problems of interpretation could be acknowledged, whilst allowing fairness to be achieved by the concession. But sadly, we are not allowed to have those any more.

Corporation Tax Rate

The current rate of corporation tax is 19% and it has been planned for it to be reduced to 17% next April.

Not any more. One of the election pledges of the Prime Minister is that this rate reduction is cancelled. Of course, he has to win the election first before honouring his election pledges – but if he loses, it would seem unlikely that Mr Corbyn would support a corporation tax cut.

The reason for this change of mind is of course that the rate reduction would cost a lot of money and that money would be better used in other ways. It would be interesting if we were to discover that a rate reduction would in fact increase the tax receipts – which seems to have been the position in other countries.

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