UK Tax Bulletin

March 2020

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Latest Rates of Inflation and Interest

The following are the latest rates:

Current Rates	
Retail Price Index: February 2020	292.0
January 2020	290.6
Inflation Rate: February 2020	2.5%
January 2020	2..7%
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 ought to give a rate of 2.6% from 19th March 2020 but HMRC's updated statement yesterday says it is still 2.75%

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.25% from 23rd March 2020

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.

Official rate of interest

To 6th April 2015: 3.25%

To 6th April 2017: 3%

To 6th April 2017: 2.5%

From 6th April 2020 2.25%

Note

Given the present extraordinary circumstances, it is a surprise to find anything happening in the tax world, apart from the Chancellor's announcements for supporting those who are seriously affected by the virus and its widespread consequences.

However, there are a few developments which may be of interest – particularly the HMRC announcement about exceptional days which is really important, and oh so welcome.

There was also the publication of the Finance Bill on 18th March (mercifully short at a mere 186 pages – 105 clauses and 14 Schedules). Be still, my beating heart.

Those of us are who are able to work from home with varying degrees of efficiency must count ourselves extremely fortunate, and should rejoice daily.

UK Residence – Exceptional Days

I am not alone in receiving lots of enquiries about the meaning of Exceptional Circumstances for the purpose of the Statutory Residence Test - and whether the day count rules will be relaxed having regard to the Coronavirus.

There is not much help from the legislation. Under the Statutory Residence Test, when counting the number of days spent in the UK, Schedule 45 paragraph (22)(5) says you can exclude those days on which you would not be in the UK but for exceptional circumstances beyond your control that prevent you from leaving the UK, and you intend to leave the UK as soon as circumstances permit.

Examples of circumstances that may be "exceptional" are:

(a) a national or local emergency such as war, civil unrest or natural disaster;

(b) a sudden or life-threatening illness or injury.

That is all Schedule 45(22)(5) says; but as these are just examples, there is clearly a wider set of circumstances which would be exceptional. However, paragraph 22(6)

provides a statutory limit of 60 days – whatever the circumstances.

The guidance given by HMRC in the Manuals is pretty strict too – for example that the exceptional circumstances have to arise when you are in the UK and do not apply if you come here voluntarily, for example for medical treatment and are then stuck here. Whether that is a fair interpretation is a matter of debate – and it will no doubt be tested before too long in the context of the Coronavirus as people have come to the UK (as advised by the Foreign Office) and are then unable to leave.

HMRC take the view that birth, death, marriage and divorce are not exceptional circumstances. (Seriously? I would have thought that under any circumstances birth, death, marriage and divorce are clearly exceptional. How often are you born, or die, and although there is a lot of divorces going on, I think that most people only get married once).

On a strict interpretation of the legislation it would be very difficult to satisfy the requirements at all. Unless you are in prison or in a coma it is very unlikely that you will be prevented from leaving the UK. Even if there are no flights, you could always get on the Eurostar to France or Belgium, or a ferry to lots of places. The rule is not that you cannot get home; the rule is that you are prevented from leaving the UK.

Relating all this to the Coronavirus, the only relevant circumstance would seem to be if somebody is in quarantine. You would think that somebody arriving here and being quarantined would clearly be prevented from leaving, and should satisfy the test. Unfortunately not, according to the Manuals. Nor would someone satisfy the test if they are here but cannot go home because their home country is not allowing anybody in – or is an unacceptably high risk area.

However, the cavalry in the shape of HMRC has come to the rescue here, just as they did in 2010 when they said that the flight chaos caused by the volcanic ash from Iceland would be regarded as an exceptional circumstances for anybody who planned to leave the country but was unable to do so. That was of course under the previous regime which was purely concessionary anyway and not subject to the constraints of specific legislation.

On 9th March 2020 HMRC issued a statement. It states that if you:

a) *are quarantined or advised by a health professional or public health guidance to self isolate in the UK as a result of the virus;*

> *b) find yourself advised by official Government advice not to travel from the UK as a result of the virus*
>
> *c) are unable to leave the UK as a result of the closure of intentional borders, or*
>
> *d) are asked by your employer to return to the UK temporarily as a result of the virus*
>
> *these circumstances will be treated as exceptional.*

Although this statement does not cover all circumstances (and in particular those returning to the UK otherwise than at the request of their employer) it will be an enormous relief for many people whose careful day count planning would be completely wrecked by the consequences of the virus.

It is to be hoped that if somebody is trapped here but does not quite fit the terms of this statement, HMRC will be adopting their famous light touch. The financial consequences are likely to be quite serious enough without adding to their problems by getting a great big tax bill from being forced to be UK resident.

Corporate Residence

No HMRC announcement has (yet) been made regarding the effect that the restrictions may have on company residence.

The general rule is that a company will be resident in the UK if its central control and management is situated in the UK. That is a question of fact and will not be affected by the technical residence of its directors; it will be the place where the key decisions are made.

So if the directors, or a majority of them, are actually in the UK (for whatever reason) , they will no doubt have to do whatever is necessary to keep he business running or afloat (obviously involving some really important decisions at the present time), and a clear risk arises that the company will become UK resident. These days, the technology is so advanced that an examination of emails, texts, calls, videos, WhatsApps, Zoom and so on, will be able to paint an accurate picture of what is going on – and where.

It is not so much that the company will become resident and subject to corporation tax on its profits (what profits?), but when the directors can leave, and the company resumes its normal non-resident status, there will be an exit charge under section 185 TCGA 1992 giving rise to a deemed disposal of all its assets for the purposes of capital gains tax.

It may be possible for the UK resident directors to leave everything to their non-resident colleagues and be merely kept informed (just in case). However, the situation may be much too serious for that and there may be few alternatives but to accept this risk. It is likely that there will be many precautions being taken to limit the possible damage here., perhaps by the appointment of some new directors– but they need to be genuine and not just cyphers or it will be a waste of time.

Let's hope that there is some relaxation on this aspect too.

Entrepreneurs Relief

It was widely predicted that the Chancellor might abolish entrepreneurs relief in the Budget and he nearly did so, reducing the lifetime limit from £10 million to £1 million in respect of disposals on or after Budget Day 11th March.

In fact he did abolish it. Entrepreneurs relief no longer exists. Schedule 2 to the Finance Bill provides that it shall now be called "business asset disposal relief".

What is perhaps more of a surprise are the forestalling proposals which are designed to catch people who made a disposal of business assets before the Budget in the hope of obtaining entrepreneurs relief at the pre-Budget level. (Shock horror. You mean people took advantage of a relief provided by Parliament exactly as they intended? Goodness me – that must be the zenith of repugnant tax avoidance).

More seriously, what does a person do if he entered into a contract on the basis of the law and the known tax liabilities which he knew he could satisfy? Suddenly his liability has been retrospectively increased; he cannot pay it because his funding did not allow for it. The emergence of this liability puts him in breach of his covenants with lenders and he is at serious risk of losing his business or his home. If you want a definition of conduct which is "repugnant", look no further.

The proposal is that if anybody had tried to lock in their entrepreneurs relief by an unconditional contract entered into before Budget day, with completion taking place after Budget day, they are going to be in trouble.

They are going to have to demonstrate that they did not enter into the contract with a purpose of obtaining a tax advantage by reason of the timing rule in Section 28 TCGA 1992 which provides that the date of the contract – not completion – is the date of disposal; and if the parties to the contract were connected, the contract must have been entered into for wholly commercial reasons.

When somebody makes a claim to entrepreneurs, they must make an additional claim which includes a statement or declaration that the contract was not entered into with the purpose of obtaining a capital gains tax advantage by reason of the application of Section 28. This may require a declaration to be made jointly with trustees where there was a disposal by a trust.

There are further provisions which apply where there has been a share for share exchange and an election under Section 169Q TCGA 1992 to disapply the rules under Section 127 that such a share for share exchange would not be a disposal for capital gains tax.

Where advance clearance has been received from HMRC that the motive test in section 137 is satisfied in respect of a share exchange that took place prior to Budget day, that would not provide any protection if an election is made under Section 169Q, to disapply the no disposal rule.

Transfer of Assets Abroad

There have been two really important Upper Tribunal cases this month on transfers of assets abroad: *Fisher v HMRC [2020] UKT 0062* and *Andrew Davies v HMRC [2020] UKUT 0067.*

These are very significant cases but you have to be a serious TOAA nerd to get beyond page 1. The whole subject is fiendishly complicated because HMRC has been making the legislation increasingly difficult on a regular basis since 1936 and these cases are pretty good examples. I will not even attempt a detailed analysis but merely set out the broad themes so that if this is an area of interest, you can see that there may be something really worthwhile in a line by line examination of either or both judgments. Or you could effect a speedy self-isolation by reading the

judgments aloud on the train. (Train? How quickly can such comments get out of date).

In *Fisher*, this concerned the establishment of a betting enterprise in Gibraltar and whether this was caught by what is now Section 720. Clearly all the necessary conditions were there for the application of Section 720 in principle, but the matter was nicely complicated by the fact that there were multiple transferors.

The motive defence in Section 741 was considered at length, but the more important aspect was the application of the EU freedoms – freedom of establishment and freedom of movement – which would prevent the legislation from having any application in the UK as being contrary to the EU treaty. In essence, the judgment made it clear that the EU treaty freedoms do apply – but they might not if the arrangements are wholly artificial.

The case of *Andrew Davies*, involved an argument whether the motive defence applied (it didn't – but the discussion is interesting) but more importantly, whether the double taxation agreement with Mauritius protected the taxpayer from the charge. Essentially the point was that if by reason of Section 720 the taxpayer was deemed to be entitled to the income of the company or trust in Mauritius, then he would be entitled to the benefit of the double taxation agreement between the UK and Mauritius to ensure that the income was only taxed in Mauritius and not in the UK.

This matter seemed to have been concluded by the case of *Bricom Holdings Inc v CIR (1997) 70 TC 1511* where Millett LJ held that this was clearly the position. That looked like an open and shut case for the taxpayer – but unfortunately not. The Tribunal acknowledged that the reasoning of Millett LJ supported the taxpayer's case, but they preferred not to consider that reasoning and concluded that the Court of Appeal did not really mean what it said.

Given the clarity of their previous judgment, the Court of Appeal might get a bit cross that such efforts were made to avoid applying their reasoning – if the matter were to find its way to them.

Anyway, all very interesting – if you are interested in that sort of thing.

IHT: UK Residential Property

The professional bodies have published further guidance on the 2017 rules for the IHT treatment of UK residential property under Schedule A1 IHTA 1984 following their discussions with HMRC. (This is version 3 published on 27th February 2020).

The particular issues referred to in this further guidance relate to HMRC's views on collateral and guarantees for relevant loans. A relevant loan (which is, mainly, one which is used to acquire UK residential property) is not excluded property for IHT purposes – and any assets supporting that loan by way of security, collateral or guarantee are also denied excluded property treatment for those who are not UK domiciled.

HMRC confirm that they "would be inclined to agree "that where a guarantee for a relevant loan is completely unsecured and not connected to any particular property of the guarantor, the guarantor's assets remain excluded property. Hardly a ringing endorsement but we should still be grateful.

The second point arising from this updated guidance relates to the position where the collateral exceeds the amount of the loan. Part of the assets supporting the collateral will be chargeable up to the amount of the loan and part will be excluded. HMRC acknowledge that the amount brought into charge to IHT under Schedule A1 is the value of the property plus the value of the collateral (yes – that is a double charge) but they accept (well, nearly) that the amount of the loan should be set against the UK estate rather than deducted from the excluded part of the collateral.

It is difficult to feel good about this. I have a house worth £1m and have borrowed £1m to buy it so why should I be grateful that I am not being taxed on £2m (or even £1m) just because of the way it is financed. It must be the tax equivalent of Stockholm Syndrome to feel that I should say thank you.

Intangible Fixed Assets

The Budget announced a further change to the taxation of intangible fixed assets with effect from 1st July 2020.

At the present time, the intangibles regime in Part 8 CTA 2009 only applies to intangible assets that were created on or after 1st April 2002, or to intangible assets

acquired from an unrelated party on or after that date. Pre-2002 assets are normally dealt with under the corporate capital gains tax rules.

In a move that will be widely welcomed, companies who acquire pre-2002 intangible assets from related parties will be brought into Part 8. There will no longer be any need to consider when the intangible assets were created or acquired from a related party – subject of course, to transitional rules to prevent avoidance in connection with transactions between connected parties.

IR 35 Changes

It has been announced that the changes to the IR 35 regime – which goes by the strange description of "off payroll working" – are being deferred until April 2021.

It will be interesting to see whether this delay will allow time for any of the obvious flaws to be ironed out. More anon.

Peter Vaines
Field Court Tax Chambers
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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

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