SQUIRE PATTON BOGGS

UK Tax Bulletin

June 2015

SQUIRE PATTON BOGGS

Introduction

Current Rates: .....Latest rates of inflation and interest

Reasonable Excuse:.....The Tribunal provides some further guidance

Bearer Shares: .....Bearer shares are abolished in the UK

Penalties: .....A charge on non existent persons

Accelerated Payment Notices:.....Some judicial and HMRC guidance

Disallowable Expenditure:..... Duality of purpose for accommodation costs

SQUIRE PATTON BOGGS

Latest Rates of Inflation and Interest

The following are the current rates at June 2015

Current Rates	June 2015
Retail Price Index: May 2015	258.5
Inflation Rate: May 2015	1%
Indexation factor from March 1982:	
to April 2015	2.248
to May 2015	2.254

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%.

There is one exception: Quarterly instalments of corporation tax bear interest at only 1.5%.

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 6 April 2014: 4%

To 6 April 2015: 3.25%

From 6 April 2015: 3%

SQUIRE PATTON BOGGS

Reasonable Excuse

There are lots of Tribunal cases where HMRC have imposed a penalty for a failure to comply with the tax legislation and the taxpayer has claimed a reasonable excuse - with varying degrees of success. The recent case of Optrak Distribution Software Limited v HMRC TC4471 is such a case, but it contains some interesting (and unusual) features.

The case involved the late payment of PAYE liabilities but the precise details do not matter. The taxpayer claimed that (for various reasons) the imposition of the penalty was unfair. However, the Tribunal explained that:

> *"In the light of the Upper Tribunal's decision in Hok, we have no choice but to find that unfairness cannot be a ground on which to allow the appeal".*

The taxpayer then argued that the penalty was disproportionate and unduly onerous. The Tribunal said that they had sympathy for the appellant's arguments but explained that the penalty could not be set aside for being disproportionate or unduly onerous either.

Whatever the merits of this particular case, these conclusions seem in stark contrast to the HMRC consultation paper on penalties in February in which they explained the "underpinning" principle that penalties ought to be fair and proportionate.

It may be that there is nothing the Tribunal can do about it – but this seems a bit off. I thought the whole idea was for the Courts to protect the taxpayer from unfair, disproportionate and onerous impositions by the executive. In any event, having regard to their public statement one might have thought that HMRC's duty of care and management would have inhibited them from pursuing these arguments quite so vigorously.

(I noticed that on 17 June HMRC announced a relaxation to PAYE late filing penalties but this seems to be confined to delays in reporting information and not applicable to late payment of tax.)

Anyway, moving on, it may be remembered that there used to be an issue about postal delays – where the taxpayer posts a cheque for the tax in good time, but the payment does not reach HMRC until after the due date. That issue seems to have been resolved (at least there has been a series of cases on the subject) but in the case of Optrak, the circumstances were slightly different. The company did not post a cheque to HMRC; they paid by bank transfer. There was a three day banking delay (unless "faster payment" applies – which apparently HMRC do not use). The Tribunal held that the taxpayer should have known the payment would have taken three days to reach HMRC so it could not reasonably have been expected to have arrived earlier. This is an interesting variation on the postal delay cases.

The next point of interest was the possible application of "Special Circumstances" which seems to be arising more regularly.

HMRC have power under schedule 56(9) FA 2009 to reduce a penalty because of "special circumstances". This is a discretion given to HMRC and cannot reviewed by the courts unless the approach of HMRC was flawed – or if it should have been considered and HMRC failed to do so.

However, the special circumstances must be "special" to the particular taxpayer and something more than the general circumstances that apply to many taxpayers by virtue of the scheme of the provisions themselves.

There was no special circumstance which operated in the particular circumstances of Optrak and so no reduction on this ground was appropriate – but it is interesting that this issue is being raised increasingly by taxpayers as an alternative to a reasonable excuse. A reduction for special circumstances only applies where there is no reasonable excuse but the effect on the taxpayer may well be the same.

SQUIRE PATTON BOGGS

Bearer Shares

It may be of interest to know that the Small Business, Enterprise and Employment Act 2015 abolished bearer shares for UK companies with effect from 26 May 2015. Bearer shares are shares which are unregistered and able to be transferred by delivery. They are not (as some people suggest) a means of putting the ownership of the shares into a kind of limbo so that they do not belong to anybody. Bearer shares belong to the beneficial owner and the fact that they are unregistered and the ownership can therefore be transferred more easily, does not affect the beneficial ownership; it just makes it more difficult for others to find out.

However, in these days of transparency, the ability to transfer the ownership without the transfer being reflected in a register, is no longer acceptable, quite apart from the opportunities they present to those who wish to behave improperly.

The general rule is that bearer shares are treated as situated in the territory where they are physically located. This means that they would be foreign property if they are kept abroad and therefore excluded property for IHT in the ownership of a foreign domiciled person. A similar situs rule applied for capital gains tax so that foreign property could be created subject to the remittance basis when sold by a foreign domiciled person. (It may be remembered that this is what *Harben Barker v Mehjoo* was all about).

The capital gains tax treatment was changed in 2005 by the introduction of section 275(1)(da) which caused bearer shares in a UK incorporated company to be regarded as situated in the UK for capital gains tax purposes.

It is now not possible for a UK company to issue bearer shares. Furthermore, the holders of bearer shares must surrender their shares or convert them into registered shares. If they do not do so by 26 December 2015 they will lose all their rights and the shares will become untransferable. Companies which still have some bearer shares in February 2016 will be required to cancel them and to pay into court an amount equal to the nominal value of the shares.

This will certainly put paid to bearer shares in UK companies but bearer shares still exist in companies in some other jurisdictions. However there are not many left having regard to the present hostility towards anybody seeking confidentiality regarding their affairs.

SQUIRE PATTON BOGGS

Penalties

Every now and then you read a tax case and it makes all the hours of tedium worthwhile. Such a case was *AEI Group v HMRC TC 4483*.

(Of course we must beware of the words of Singleton J in *Brigginshaw v Crabb* who said:

> *"If you go on spending your time on Finance Acts and the like, it will drive you silly.*")

In the case of *AEI Group*, the Tribunal introduced a new dimension to the exposure of a company to a penalty.

HMRC issued a notice to a company to file a return and when they did not do so, a penalty was charged. The Appellant seemed to have a really good defence; the company was not incorporated at the relevant time and did not exist. Defence? Reasonable Excuse? Dream on.

The First Tier Tribunal had this to say:

(a) A notice will not be invalid simply because the company was not incorporated for the period in question.

(b) The power of HMRC to require a return is not limited to returns for periods when the company was incorporated.

(c) It cannot be the case that HMRC is required to verify the existence of the taxpayer before issuing a notice.

I promise you that I am not making this up.

I see a few issues here … just a few …

But it must also represent a huge opportunity. Why don't we get HMRC to send everybody in the country a penalty notice for not filing tax returns for periods before they were born. The deficit would be gone in a trice.

Accelerated Payment Notices

Things do not improve much on this subject.

An Accelerated Payment Notice can be issued (and these are now being issued) by HMRC to those who have participated in a tax scheme to which a DOTAS scheme reference number has been issued and where there is an open enquiry by HMRC.

The APN requirement is broadly that the taxpayer must pay the tax as if he had not entered into the scheme in the first place. There is no right of appeal and if you do not comply there are penalties. You have a right to make representations – but that does not help you much.

The legislation is seriously harsh and it is no surprise that it has given rise to applications for Judicial Review. These have included applications for interim relief – specifically to defer the date of payment until the conclusion of the proceedings because otherwise an application for Judicial Review would carry a substantial risk of penalties if it fails. There are quite a lot of arguments against that.

The taxpayer complained that if he applies for Judicial Review on the grounds that the tax should not be paid on the due date, but he is obliged to pay tax on the due date anyway, the Judicial Review would have no real purpose. However, the High Court in *Dunne and Gray v HMRC* would have none of this. The Court said the law was clear and the will of Parliament would be frustrated by the granting of such relief.

While on the subject, it may be of interest to know that HMRC has recently issued fresh guidance regarding Accelerated Payment Notices (and Follower Notices) following the introduction into the regime of National Insurance Contributions on 12 April 2015. The guidance is virtually identical to the old guidance, although of course it now includes references to NIC.

That is not as simple as it seems because there is no NIC equivalent of an open enquiry. However, they seem to make do.

Interestingly, an APN for NIC will be possible even though there may have been no DOTAS requirement in respect of the NIC liability. If the tax arrangements had been designed to avoid tax and NIC then HMRC have power to issue an APN.

Disallowable Expenditure

The First Tier Tribunal has revisited the issues in *Healy v HMRC TC 4425* which related to the cost of accommodation by an actor during a period when he was performing in a musical in London. He rented a flat near the theatre and claimed a deduction for this expenditure as being wholly and exclusively incurred for the purposes of his profession. The FTT decided that the sole purpose of renting the flat was for Mr Healy to carry on his profession and they allowed relief for the expenditure. The FTT made a finding of fact in the following terms: “I do not find that there was a duality of purpose”.

The Upper Tribunal said that the FTT applied the wrong test and remitted the case to them for reconsideration. They said that the FTT should also have considered whether the provision of warmth, shelter and comfort was merely incidental to that business purpose or whether this was another, non-business, purpose.

Second time round, the Tribunal found as a fact that there was a dual purpose for his expenditure – there was a business purpose but there was another purpose of having accommodation where he could receive visitors. That was clearly fatal to any claim for relief.

(I did not think that the purpose of remitting a case to the First Tier Tribunal was to get them to amend their findings of fact. I thought that Section 12 of the Tribunals, Courts and Enforcement Act 2007 allowed the Upper Tribunal to remit the case to the FTT with direction for its reconsideration, if they found that the FTT had made an error of law).

Be that as it may, there was another issue which is really too difficult to understand.

Mr Healy rented the flat but he could have paid for hotel accommodation for exactly the same purpose. They were direct alternatives. There is no doubt that the hotel expenditure would have been deductible. But why? The Tribunal referred to this point and explained that a duality of purpose will not exist where the provision of warmth and shelter are purely incidental to the business purpose.

OK – fine, except that the only purpose of staying in a hotel is for warmth and shelter. The warmth and shelter could hardly be an incidental purpose like the example given by the House of Lords of the doctor going to the Riviera in *Mallalieu v Drummond.* The warmth and shelter is the whole essence of the contract.

I can see no distinction between expenditure on hotel accommodation and Miss Mallalieu's sombre clothing (which was purchased and worn solely for business purposes) but which was disallowed because of her sub-conscious purpose that she needed clothing for warmth and decency, thereby contaminating the expenditure with a duality of purpose. One would have thought that warmth and shelter were rather more than a subconscious purpose when booking a hotel room.

Anyway, the fact that I do not understand why expenditure on hotel accommodation is deductible does not make it wrong. It just means that I do not understand.

I think my old school friend F. Nietzsche had a view about all this when he was "Grasping the Limits of Reason". You don't understanding something? Just get over it. He is such a comfort.

P S Vaines
Squire Patton Boggs (UK) LLP
30 June 2015

Contact

Peter Vaines
T +44 20 7655 1780
peter.vaines@squirepb.com