# UK Tax Bulletin

October 2015

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# Latest Rates of Inflation and Interest

## The following are the current rates at October 2015

| Current Rates | October 2015 |
|---|---|
| Retail Price Index: September 2015 | 259.6 |
| Inflation Rate: September 2015 | 0.8% |
| Indexation factor from March 1982: | |
| to August 2015 | 2.270 |
| to September 2015 | 2.268 |

### 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%

## Non Doms : 2017 Proposals

HMRC have announced that the draft clauses for the Finance Bill 2016 will be published on 9 December together with the responses to the consultations.

The consultation period on the proposals for the taxation of non doms only ends on 11 November, so somebody is going to be busy.

Anyway it will be good to see the draft clauses which may resolve some of the uncertainties which are causing such anxiety.

## Residence

The case of *James Glyn* is of considerable importance because it is virtually the only case in living memory where the taxpayer has won a case on residence – leaving aside the admirable efforts of Mr Grace before the Special Commissioners, which went down in flames on appeal.

Residence cases are notoriously fact dependent and only occasionally do any new principles (or refinements of existing principles) arise.

So it was with Mr Glyn. In very broad terms, Mr Glyn left the UK in 2005 to take up residence in Monaco and the First Tier Tribunal had to decide whether he had made a distinct break. The Tribunal reviewed all the facts and conducted the necessary multi factorial evaluation, concluding that he had indeed made a distinct break by substantially loosening his social and family ties.

A great result for Mr Glyn and for those representing him. However, the Upper Tribunal did not see matters quite the same way: *HMRC v James Glyn [2015] UKUT 0551*.

The Upper Tribunal did not decide that Mr Glyn had retained his UK residence – but they did find serious fault with the decision making process of the First Tier Tribunal with the result that the case has now been remitted to the First Tier for a re-hearing. So after a number of years, and two seriously demanding appeal hearings, the unfortunate Mr Glyn is right back where he started.

The Upper Tribunal said that the First Tier Tribunal had drawn conclusions which were impermissible from the evidence; furthermore they took into account some irrelevant factors and had generally left undone some things they ought to have done. For example, they had concentrated wrongly on whether Mr Glyn's visits to the UK were for a settled purpose and had focused on his reason for retaining his London house rather than the quality of his use of that property.

I expect we will have rather a long wait for the next instalment in this case.

This may seem to be only of tertiary relevance now because of the introduction of the Statutory Residence Test in 2013, but I understand there are many cases still to be determined under the old rules, so the future of this case is therefore likely to be of real significance.

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# SRT : Spouses and EIS

In earlier Tax Bulletins I mentioned that your residence position under the Statutory Residence Test might be seriously compromised if you marry someone without proper regard to their previous residential history. You could find yourself with a Family Tie making you resident in the UK because of the number of days your new friend spent here, years before you met.

It seems to me that this falling in love business could screw up your Enterprise Investment Scheme relief too. If you are unlucky enough to get together with someone who happens to have invested in the same company under the EIS you would become associates and this could make you connected with the company for the purposes of the EIS under Section 170 Income Tax Act 2007 and you would both lose your relief.

Match.com should perhaps contain the bold legend :

**Warning : Your non resident status and your EIS relief may be at risk.**

# Secured Loans and Remittances

Where a loan is taken out offshore, secured on foreign income or gains, it was generally accepted that bringing the loan monies to the UK did not represent a taxable remittance. This was understood to be the view of HMRC as well. However, in August 2014 HMRC announced that this was never their view, it was just a concession – and by the way, the concession is being withdrawn … retrospectively.

The HMRC view is that in these circumstances, bringing the loan monies to the UK is a remittance of the foreign income and it is also a remittance when the loan is repaid out of the foreign income. So the same income is taxable twice.

HMRC generously suggest that by concession, they will only charge the tax once.

(However, I am not sure how comforted we should feel in the light of this announcement about their suggestion of a concession on this point).

HMRC offered some transitional relief if the loan is repaid before 5 April 2016 or if the original security for the loan is replaced by other assets to which these rules would not apply, before 5 April 2016.

As you may imagine, there has been a degree of criticism of all this, particularly by (or on behalf of) those people who had arranged their affairs in the light of HMRC's previous published guidance and have no opportunity to restructure things.

HMRC remain steadfast in their view that their interpretation is correct. However, they have now confirmed that such loans taken out and used in UK before 4 August 2014 will not be regarded as a taxable remittance. The professional bodies are to be applauded for their efforts in securing this change.

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# Excluded Property

The recent decision in the High Court in *Barclays Wealth Trustees (Jersey) Limited v HMRC [2015] EWHC 2878(Ch)* examined a long standing area of uncertainty relating to excluded settled property.

Section 48(3)(a) IHTA 1984 provides that where settled property is situated outside the UK, the property is excluded property for inheritance tax purposes unless the settlor was domiciled in the UK at the time the settlement was made. Where a foreign domiciled settlor establishes a settlement but subsequently becomes UK domiciled (or deemed domiciled) and adds funds to that settlement, are those added funds excluded property?

It all depends what is meant by when "the settlement was made". It can be powerfully argued that the settlement was made at the time it was originally established in which case the added funds would qualify as excluded property. However, HMRC takes the opposing view suggesting that a new settlement is made when the funds are added – so if the additions take place when the settlor had become UK domiciled, those assets would not qualify as excluded property.

There are some real difficulties with the HMRC interpretation. For example Section 44(2) IHTA 1984 provides that where more than one person is a settlor in relation to a settlement, the settled property is treated as comprised in separate settlements. One might reasonably conclude that Section 44(2) does not apply where the existing settlor adds property to a settlement – it could easily have said so and one might assume that this was intended. After all, this would seem entirely consistent with Section 67 which provides a detailed procedure for the calculation of the 10 year and exit charges where property is added to the settlement by the settlor. On the HMRC interpretation, this could never happen so Section 67 and the surrounding legislation would be completely redundant. Can Parliament be presumed to have passed legislation which is of no effect? A difficult judgment because the High Court said that Parliament could not have intended additions to a settlement after the settlor had acquired a UK domicile to have the character of excluded property, describing such a conclusion as "a little striking".

There can be no doubt (because Section 43(2) says so) that a settlement includes a disposition and an addition would indeed be a disposition, but that does not seem to get us past the express words of Section 48(3) nor indeed Section 67.

In a very careful and detailed judgment (which interestingly contains no reference to Section 67), the High Court concluded that the words "the time the settlement was made" are capable of describing both the making of the original settlement and the subsequent addition of property to that settlement. Accordingly, the subsequent additions to the settlement by the settlor did not have the character of excluded property.

Having regard to the importance of this matter, I imagine we shall be hearing more about it in due course.

# CGT : Flip Flops

The Upper Tribunal has allowed the taxpayer's appeal in the case of *Bowring v HMRC [2015] UKUT 0550* which concerned an arrangement known as a flip flop. The history of flip flops is really interesting – well, maybe that's going a bit far, so I will spare you the details. However, some broad explanation is called for.

Where non resident trustees make a capital gain it cannot be taxed on the trustees by reason of their foreign residence but it is still possible, inter alia, by the application of Section 87 TCGA 1992 for the trustees gain to be taxed on beneficiaries to the extent that they receive capital payments (such as distributions or the conferring of any benefit) from the settlement. If there have been no

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capital payments in the past, the gain is held on suspense (and stockpiled with any other gains), ready to be matched with any capital payment made to a beneficiary in the future. Alternatively, if there has been a capital payment in the past, the gain can be matched against that capital payment when the gain arises.

So far so good. However, what if the trustees borrow lots of money and appoint those funds to a new settlement for the benefit of the same or similar beneficiaries. It is then argued that the capital payment from the second settlement cannot be matched with a gain from the first settlement and of course, the gain from the first settlement will not be distributed to any beneficiaries because the loan will have stripped out all the value.

The legislation at first caused the gain to follow the money but subsequently the rules were changed so that the gain stays in the first settlement. (I suppose I should make the obvious point that whichever settlement the legislation caused the gain to be located, arrangements would be made for capital payments to be made from the other settlement).

This idea has been around for almost as long as I can remember and there have been numerous variations to take into account the increasing number of statutory amendments. My above summary does not do justice to the ingenuity of all this thinking.

In the case of *Bowring*, the arguments followed (very broadly) the above lines and the question was whether the capital payment in the second settlement could be treated as if it had been made from the first settlement. The taxpayer and HMRC agreed that the capital payment could not be made from both settlements but the First Tier Tribunal took a different view, holding that it could.

The Upper Tribunal (supported by both sides) disagreed and held that the capital payment had to come from one of the settlements – the question being which one. They concluded that the capital payment made by the trustees of the second settlement could not be treated as having been made by the first settlement and as the trustees of the second settlement had no trust gains, there was nothing to be matched to the capital payment to the beneficiaries.

The Ramsay doctrine had a bit of an outing here (as you might expect) but to no effect. The Upper Tribunal said the legislation was clear about where the gain fell and there was no scope for any purposive interpretation.

I think we may hear more of this one too.

## US LLCs

In the UK we pride ourselves on the rule of law. Parliament passes laws and whether we like them or not, it is generally recognised that they must be respected. The law applies to individuals, companies and even Government departments. If the law is unclear the Courts decide what it means – and the ultimate authority is the Supreme Court. A judgment of the Supreme Court is the law of the land – even if we don't like it, or think we have good reason to disagree with it.

With these high sounding principles in mind I have been considering the Supreme Court decision in the case of *Anson v HMRC.* The Supreme Court decided that the approach of HMRC to US LLCs was wrong and that Mr Anson was entitled to a credit for the tax paid by the US LLC on the profits which were treated for UK tax purposes as taxable on him.

It is relevant that cases do not get to the Supreme Court unless they involve a point of law which is of general public importance. If there is no such important point of law, leave to appeal to the Supreme Court will invariably be denied.

However, in the case of Anson, having lost the case and the Supreme Court determining as a matter of law that their approach was wrong, HMRC have issued a press release saying that they will continue to treat US LLCs as companies and will continue its existing approach regarding US LLCs. I guess I will not be the only person raising my eyebrows.

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The matter is of course not anything like as simple as this. There are some serious implications for companies who have relied on the previous HMRC Practice that distributions from the Delaware LLC are exempt from corporation tax. It would seem that this treatment will continue and presumably the substantial shareholders exemption will also continue to apply where appropriate. It would also be interesting to know whether HMRC consider that a Delaware LLC will continue to be regarded as a member of a group for UK tax purposes.

These are really difficult issues, but the situation is hardly unique and surely the answer is a Statement of Practice whereby HMRC set out how they propose to deal with matters – rather than to suggest that the law does not apply to them.

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**31 October 2015**

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