UK Tax Bulletin

June 2012

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Latest Rates of Inflation and Interest

The following are the current rates from June 2012

Current Rates	June 2012
Retail Price Index: May 2012	242.4
Inflation Rate: May 2012	3.1%
Indexation factor from March 1982:	
to April 1998	1.047
to April 2012	2.053
to May 2012	(not yet published)

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

From 6 April 2010: 4%

Introduction

I suppose I ought to make some comment on the regrettably ill informed furore over the payment of taxes.

I will make only a short point. I think the rule of law is rather important. Whatever view one takes of tax schemes there is something rather misguided about describing people who go to (extreme) lengths to obey the law, as "morally repugnant".

The alternative is for tax to be charged (i.e. for the State to take away your money) on the basis of what somebody thinks is "morally right". No idea what this means - and of course there could be no appeal. For Mr Cameron or Mr Milliband simply to say: I think you should pay £X (or maybe £Y - because they would never agree on the same figure) without regard to the law, might not be widely accepted as such a good idea.

This would be a regime where the politicians are able to confiscate the property of the citizens without regard to any rule of law. There are regimes like that -but I don't think anybody really wants the UK to be one of them.

Statutory Residence Test

Last week HMRC published a summary of the responses to the proposals for the statutory residence test which is intended to come into force next year. This is an impressively weighty document of 130 pages which summarises all the responses and includes the draft legislation.

Some of the criticisms have been accepted, but most have been rejected and apart from one or two areas where they say they are still thinking (such as whether a work day should be 3 hours or 5 hours) everything else looks concluded and we now have a clear idea about how the rules will be next year.

The main changes which arise as a result of the consultation process are as follows:

a) The 10 day rule in Part A (conclusively non resident) is being increased to 15 days; they are wondering whether to increase the 20 working day limit to 25.

b) This increase to 15 days is also reflected in the day count for Part C in respect of a leaver.

c) HMRC have accepted the need to include an exclusion for exceptional days – those spent in the UK for reasons outside your control – but the test is not the same as applied for IR20 and HMRC6.

   The statutory rule will be:

   i. The individual would not be present in the UK but for exceptional circumstances beyond his control that prevent him from leaving the UK; and

   ii. He intends to leave the UK as soon as those circumstances permit.

The legislation refers to "examples of circumstances that may be exceptional" which are national or local emergencies such as war, civil unrest or natural disasters, or a sudden or life threatening illness or injury. These are only examples and I wonder whether the previous examples which had long been accepted by HMRC – that is to say illness of the taxpayer or a member of his immediate family, will still apply.

Interestingly, the new rule will apply for all day counting tests even where the 182 day limit is exceeded – quite right too, having regard to the grotesque unfairness which occurred in the case of Ogden. However, no more than 60 exceptional days will be permitted.

d) The definition of a working day was always problematic – whether it is 3 hours or 5 hours the problems are the same. The question is what constitutes work? Does it include travelling to a meeting, what about lunch or dinner with a client and what about using your Blackberry. Regrettably, HMRC seem not to understand any of these difficulties. They are going to exclude travelling from the definition of work – unless during your travels you are sending emails. What about receiving emails, working on your emails, drafting documents, or being on the telephone for the entire journey? The idea of explaining to a visiting businessman that you can do all these things on your journey from Gatwick to London, but if you send an email you will be in trouble. It may be laughable - I don't think that it helps to laugh at HMRC any more than it does at passport control.

More importantly perhaps, if it takes more than 1.5 hours from Arrivals to your meeting (and inevitably 1.5 hours back) a 5 minute meeting will breach the 3 hour limit. This is all completely ridiculous and they might as well say that being in the UK for the purpose of work of any description for any period is going to count as a day. At least everybody would know where they were instead of thinking they have a 3 (or 5) hour time limit when obviously they don't.

e) There was no definition of "home" in the original proposals – but we have one now. Actually we don't just have one – we have lots. (Be careful what you wish for). The idea is that a home is anywhere where the individual can live and is available for a continuous period of more than 90 days (and he actually spends 1 night there) during the year. A hotel room will not be a home but it can be counted as accommodation, as long as it is booked.

Furthermore, the continuous period is not really a continuous period – it includes gaps of up to 15 days between visits. So if a person has a hotel room booked for him 1 day a fortnight for 3 months and turns up only for 1 of those days, he will breach the 91 days rule because this would be regarded as a continuous period of more than 90 days. Only HMRC could regard the booking of a hotel room for 7 separate days, and only occupying the room once as equal to a continuous period of 91 days.

How about a holiday home? Better not to ask. For the purposes of Part B a holiday home is to be ignored – although there is nothing to support that in the draft legislation. However, for Part C a holiday home is to be counted (and that is in the draft legislation). For goodness sake – is this what you call clear and consistent rules.

Let us hope that some revision will be forthcoming in respect of all these matters before the end of the year.

f) It is now clear that ordinary residence as a concept is going to be abolished – at least for income tax and capital gains tax. It will continue to apply for NIC purposes and also for inheritance tax, for example in respect of exempt gilts. HMRC acknowledge that by removing the ordinary residence test, some rules (for example those relating to transfer of assets abroad which only apply to persons who are ordinarily resident) will now have a much wider catchment area.

Olympic Torches

Things must be a bit slack at HMRC because they have been devoting their time to the tax implications of Olympic torches. Apparently people have been selling them so HMRC have rushed out a press release setting out the tax consequences of selling your Olympic torch. I don't know how you get an Olympic torch and I don't suppose you were meant to sell them – but what do I know.

Anyway, an Olympic torch is a chattel and if you sell it for more than £6,000 a chargeable gain will arise. This seems hardly likely. I understand there are 8,000 torches and they cost £495 each so you would do well to get £6,000 for it, except at a charity auction. If you do sell it and give the proceeds to charity, it would not affect your capital gains tax position, but you could claim income tax relief under Gift Aid. Alternatively you might just give it to a charity in which case there would be no charge to tax at all.

Welcome though this advice is to the very small number of people who will be affected (but it surely cannot be expected to give rise to any tax), it does not sit well with HMRC's reluctance to provide advice or clarification on other matters of significance on the grounds that the tax involved does not justify the use of such resources.

Termination Payments : Pilons

If somebody is employed under a contract of employment which includes a provision for payment in lieu of notice, it is well settled by *EMI v Coldicott (1999)* that if such a payment is made on the termination of the employment, it is taxable because it forms part of the rewards for the performance of the duties of the employment. It does not qualify for the £30,000 exemption.

A variation on this argument has recently been considered by the Tribunal in the case of *Goldman v HMRC TC 1999*. Mr Goldman's contract of employment included an entitlement to a payment in lieu of notice but there was a dispute and a compromise agreement was entered into. Mr Goldman agreed to receive a sum of money (rather less than the amount of his Pilon entitlement) on various terms in full settlement of all his claims.

The Tribunal decided that the payment was taxable on the grounds that if the company had paid him an amount in lieu of notice in accordance with the contact it would have been taxable as earnings. [Well yes – but they didn't. They might have made a payment on account of injury or disability in which case it would have been completely exempt under Section 406 ITEPA 2003 – but they didn't do that either].

The Tribunal observed that the negotiations between Mr Goldman and the company concentrated a great deal on his entitlement to a Pilon and decided it should be treated in the same way. They acknowledged that Mr Goldman settled for less money rather than entering into litigation to enforce his full contractual entitlement and that the payment made under the compromise agreement was not in any realistic sense, damages for breach of the agreement. It did not relate in any way to the economic consequences of the breaches committed by the company.

However, the Tribunal then went on to say that:

"*if Mr Goldman's argument were correct, it would be open to anyone entitled to a contractual payment in lieu of notice to accept less in settlement of his claim to enforce a contractual entitlement and thus achieve exemption from tax in respect of the first £30,000.*"

The point is clear enough – but surely it goes too far. Anybody entering into a contract of employment does so in the knowledge (express or implied) that all the employment protection legislation applies to him. One might say that the legislation represents parts of the terms upon which he works for the company. Even if the document is silent, he knows that he is entitled to a certain number of weeks notice; he knows he is entitled not to be unfairly dismissed and a whole load of things, the breach of which carries a financial consequence. Although these are rights provided by law and not by the contract, it can hardly be denied that they are part of the package of entitlements that an employee has when he is working for the company. All the more so when the contract of employment recites all the various statutory references.

On this basis, any payment in compensation of any of these rights would be in respect of (or instead of) a contractual payment and it would be taxable – in which case the £30,000 exemption would never apply.

There is a clear distinction between a Pilon right contained within the express terms of the contract and one which is not – the former requiring no proof of damage or duty of mitigation - but it would seem that this distinction is rather blurred by the decision in Goldman.

A wider danger from this argument would be that if a compromise agreement sets out all the rights for which the employee is to be compensated, they must be rights which arise out of, or derived from his contract of employment – and that would put them at risk as being fully taxable and disqualified from the £30,000 exemption. It would be an unusual compromise agreement which acknowledges that the employee is not entitled to be paid for any rights – but seeks a substantial pay-off anyway.

Discovery Assessments

I am always on the lookout for developments relating to discovery and have made frequent references in earlier Bulletins to various cases which have eased the harsh approach enunciated in *Langham v Veltema*. It would be boring to go through all those points again – but the recent case of *While v HMRC TC 1755* is interesting.

The facts of this case do not raise any particular point of principle but they do highlight one aspect of the information requirement in Section 29(5) TMA 1970 which may be of wider application. The issue was whether Section 29(5) TMA 1970 had been satisfied – that is to say whether the Inspector of Taxes could have been reasonably expected, on the basis of the information made available to him, to be aware of an insufficiency in the assessment.

Section 29(6) sets out the information which can be taken into account for this purpose.

The information does not have to be submitted to the particular Inspector dealing with the issue. The test in Section 29 is submission to a hypothetical officer, not to any officer in particular. However, in the case of *While*, the Tribunal said that:

"*It cannot have been in the contemplation of Parliament that Section 29(6) will be satisfied by a taxpayer based in Devon sending information to an HMRC officer in the Highlands of Scotland."*

Whilst this is of course an extreme example, one has to ask why not. The information has to be submitted to HMRC – not to any particular officer and although it would seem rather perverse to send it to some far distant officer, it is difficult to see where one can draw the line. If Scotland is too far, what about Manchester – or an Inspector in the office next door? With modern communications, I cannot see that it should (or can) make any difference.

The Tribunal also suggested that the taxpayer should have notified HMRC of the relevance of the information to his affairs. We know that this is the view of HMRC (and what they would like the rule to be) because they say so in SP1/06, but this requirement has been rejected by the Tribunal before. In any event, it defies common sense to say that the lay taxpayer must, as a condition of providing the information, explain the relevance of the information to acknowledged experts. What if the taxpayer notified the Inspector that it was relevant to a particular point in dispute and he was mistaken; it was not relevant to that point at all but extremely relevant to a separate point. Would this be adequate notification?

The Tribunal justifies this by saying that the statute requires the taxpayer, when providing information, to notify HMRC not just of the existence of the information but also of its relevance to the insufficiency for the period in question. With all due respect, this is not what the statute requires. Section 29(6)(d) refers to the information the existence of which, and the relevance of which, could reasonably be expected to be inferred by an officer of the Board from the information falling within the earlier paragraphs – or is notified by the taxpayer to the officer. If it is evident to an ordinarily competent Inspector of Taxes, there is no requirement for the taxpayer to notify HMRC of the relevance of the information provided.

We do not seem to be getting any nearer to a consistent or comprehensible code for Discovery – which is a pity having regard to the fundamental importance of this subject to the protection of the taxpayer.

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Schedule 36 Information Powers

While on the subject of discovery, some reference ought to be made to the new HMRC information powers in Schedule 36 FA 2008. This is intended to be a comprehensive set of information gathering powers covering all taxes which can apply even before a tax return is filed.

HMRC can issue a notice requiring documents to be provided or information to be supplied for the purposes of checking the tax position of the taxpayer. It can be directed to the taxpayer or to those parties in respect of any "past, present and future liability to pay any tax". This is incredibly wide – but perhaps not wide enough to involve transactions which have not even taken place which has sometimes been suggested. There must be a liability – not just the possibility of a liability, otherwise they do not need Schedule 36. They would just have to say "HMRC can require anything from anybody for any purpose at any time".

A concern has been raised about the effect of these provisions on the ability of HMRC to make a discovery assessment. However, I cannot see that the rights of HMRC to obtain information affect the position. There is nothing in Schedule 36 which affects the meaning of "discovery" and if the taxpayer is claiming that the Inspector could reasonably be expected to be aware of an insufficiency on the basis of information provided, he is only protected if he provides information himself. Information obtained by HMRC under their Schedule 36 powers would not help him.

HMRC may be able to obtain information outside the enquiry window by the use of these powers, but that is not going to make any difference to their ability to make a discovery assessment if a full disclosure has been made.

Liechtenstein Disclosure Facility

The co-operation between UK and Liechtenstein has been developing (following the success of the LDF) and the Facility is to be revised in a number of ways. The details of the LDF may be found in the Memorandum of Understanding in August 2009 and much of the vagueness of the memorandum has been clarified by a series of lengthy FAQs.

The revisions to the LDF are broadly as follows:

a) The facility is being extended to 5 April 2016.

b) A single charge rate of 50% is to be available for 2010/11 (and maybe for subsequent years – but not for 2009/10) as an alternative to the statutory basis. Details of this single charge rate are to be announced soon but it looks a bit like the Composite Rate which applied up to 5 April 2009.

c) Capital losses may be claimed even though they might otherwise have been out of time.

d) A Confirmation of Relevance is required to be provided by the Financial Intermediary that the individual has relevant property in Liechtenstein.

Anybody who has not dealt properly with their tax affairs and has any passing connection with Liechtenstein should not overlook the possibility of regularising their tax affairs on very generous terms.

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