SQUIRE SANDERS

UK Tax Bulletin

February 2013

SQUIRE SANDERS

Introduction

SQUIRE SANDERS

Latest Rates of Inflation and Interest

The following are the current rates at February 2013

Current Rates	February 2013
Retail Price Index: January 2013	245.8
Inflation Rate: January 2013	3.3%
Indexation factor from March 1982:	
to April 1998	1.047
to December 2012	2.107
to January 2013	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%

Foreign Entertainers

With tax hitting the popular headlines every day it is difficult to know what to make of the recent announcement by the Treasury that Usain Bolt (and other competitors attending the London Grand Prix in July) are going to have a special exemption from UK tax.

Of course everybody understands this. Usain Bolt announced long ago that he would not attend any UK events if he was going to be hit by punitive taxes and so did others such as Rafael Nadal and Sergio Garcia. It obviously makes sense not to penalise people who want to come here, carry on business here and generally add to the country's prosperity. However, it is not only Usain Bolt who is deterred from coming to the UK. There are thousands of people who are deterred from bringing their wealth to the UK and creating employment here. So why don't we give the same relaxation to other people for the benefit of the country. I yield to nobody in my admiration of Usain Bolt but there is something not quite right about an exemption for Usain Bolt and not for anybody else.

But the rules are not really being relaxed for him. They are being relaxed because the Treasury recognises that the country will benefit from him bringing his particular activity here - or to put it another way, it is bad for the country to discourage such people from coming here. How can they not see that if Usain Bolt is discouraged from coming here so is everybody else who is subject to these punitive tax rules? If the rules which cause these major players to stay away from the UK (and which cost us important sporting events such as the Champions League final in 2010) are causing us damage, they should be repealed rather than simply giving special exemptions to selected celebrities.

The debate about taxes is spectacularly ill informed and the discussion is not improved by giving special tax exemptions for a handful of celebrities. I wonder who will be next - Steven Spielberg or Lionel Messi perhaps. The decision to give these exemptions (and the need for them) are a clear acknowledgement that our existing rules are damaging the UK economy and it would be interesting for somebody to explain why they remain in force.

IHT : Business Property

The Upper Tribunal have found in favour of HMRC in the case of *Mrs N Pawson Deceased v HMRC FTC/36/2012* in which a claim for business property relief was made on assets used for a holiday letting business. The First Tier Tribunal had regarded the activity as a business qualifying for business property relief but the Upper Tribunal have concluded that the property was an investment and not eligible for business property relief.

The issue is of course very fact specific; a property was operated as a holiday letting business and various services were provided. The essence of the decision was that the services were consistent with the holding of an investment and were not enough to prevent the business being mainly one of property investment. As the First Tier Tribunal had determined all the relevant facts, it was quite something for the Upper Tribunal to overturn their decision. However, Mr Justice Henderson decided that the First Tier Tribunal judges were completely wrong. The true and only reasonable conclusion from the facts contradicted their

determination. It will be interesting to see whether this goes further. I hear it may well do. It is always possible that the Court of Appeal would decide that the First Tier Tribunal came to a reasonable view on the facts (albeit not the only view) and that its decision should stand.

An interesting element which emerged from this case was the introduction of the "intelligent businessman test". We are familiar with the celebrated man on the Clapham omnibus and also Lord Justice Parker's refinement (the moron in a hurry) but it seems for inheritance tax purposes it is now necessary to consider the views of a hypothetical intelligent businessman in determining the nature of a business.

It would be helpful to be provided with some characteristics of such a person and how he would address his task. When considering the valuation of unquoted shares for fiscal purposes we know that we have two hypothetical parties, a willing seller and a willing buyer, the purchaser is a prudent man of business and we have many other assumptions upon which the valuation can be made. I am not so sure about the intelligent businessman. Why should it not be the man on the Clapham omnibus who is able to decide whether this activity is an investment or is a business going further than an investment? The introduction of an intelligent businessman would seem to be merely a substitute for the Judge's own view - but I do not see what is wrong with that anyway.

The Upper Tribunal did not seem to think much of this test and it maybe we will hear no more of it.

Benefits in Kind : Making Good

The general principle is well known that if an employer provides a benefit to an employee, the cash equivalent of that benefit is chargeable to tax as earnings, less so much of the benefit as is made good by the employee.

Of course there are lots of rules surrounding all these words but one crucial question is when must the benefit be made good? Does it have to be made good during the same tax year as the benefit is provided or can it be made good in a later year. You can guess what HMRC say.

This matter was examined in the case of *Marshall v HMRC TC 2466*. The case involved the provision of a motor car and Section 144(1) ITEPA 2003 provides for a deduction from the taxable benefit if as a condition of the car being made available for the employee's private use, the employee:

> *"(a) is required in the tax year in question to pay (whether by way of deduction from earnings or otherwise) an amount of money for that use; and*
>
> *(b) makes such payment"*

HMRC argued that the amount required to be paid by the employee had to be paid in the year in question. The Tribunal did not agree. The qualifying words "*in the tax year in question*" only appear in sub-section (a) and do not appear in sub-section (b) and it was therefore perfectly permissible for the taxpayer to obtain a reduction in his current benefit in respect of a payment made after the year end.

SQUIRE SANDERS

Penalties : Postal Delays

I make no apologies for returning to this subject as HMRC continue to charge penalties (and support those penalties before the Tribunal) where there has been a delay in receipt of a tax return or other documents by post.

The cases of *Browns CTP Limited v HMRC* and *Panther Parcels and Courier Limited v HMRC* (see the January and September Tax Bulletins) set out the position in some detail and the recent case of *The Trustee of the de Britton Settlement v HMRC TC 2524* continues the same theme.

The Trustee submitted a tax return by post. HMRC said that it was received late and imposed a penalty.

That sounds simple enough and you would have thought that if HMRC were charging a penalty for the late submission of a tax return they might feel the need to provide the Tribunal with evidence of the date of delivery. For some reason they did not do so. It was therefore hardly surprising that they lost. The surprise is that it ever got to the Tribunal in the first place.

The Tribunal went on to explain that Section 7 Interpretation Act 1978 applied to the effect that a properly addressed letter is treated as being received at the time it would have been delivered in the ordinary course of post. We know that this will be the following day - and we also know from these earlier cases that this conclusion is accepted by HMRC.

The taxpayer gave unchallenged evidence which was accepted by the Tribunal that the return was posted on 26 October and it would have been received long before the 31 October deadline. HMRC merely asserted that it was not received until 2 November but with no evidence in support. Even if they had adduced some evidence, they would still have failed because they could not challenge the conclusion that it would have been treated as being received before the deadline.

I cannot imagine that HMRC are going to stop making these arguments so anybody posting anything to HMRC would be wise to ensure that there is good evidence (or at least the existence of a system) to show when the letter was posted. It is unlikely in another case that HMRC will fail to provide any evidence of the actual date of receipt so it will fall to the taxpayer to show on the balance of probabilities that he did post the letter in good time.

SQUIRE SANDERS

Isle of Man Disclosure Facility

On 6 April 2013 a new disclosure facility is coming into operation in connection with the Isle of Man whereby liabilities arising from April 1999 can be disclosed with a guaranteed penalty rate of 10% up to 2009 and 20% thereafter. This seems to be modelled on the Liechtenstein Disclosure Facility - with one exception, there seems to be no immunity from criminal penalties under the Isle of Man Disclosure Facility.

There is some suggestion that the agreement with the Isle of Man was designed to discourage people transferring funds to Liechtenstein and claiming under the LDF but that would still be preferable for those engaged in serious fraud. However, I doubt whether those who are likely to be the subject of criminal prosecution would take much notice anyway.

The taxpayer will be required to make a full disclosure of all relevant information (not only in respect of Isle of Man assets). It is not clear exactly what information HMRC will require but I would expect it to be identical to that required for the LDF.

Although the IoM Disclosure Facility continues until September 2016, we are going to have an automatic tax information exchange agreement with the Isle of Man starting next January - and of course you cannot claim under the Disclosure Facility if you are already under enquiry.

Accordingly anybody who has funds in the Isle of Man which have not been fully disclosed to HMRC would be very well advised to take advantage of this facility and get their affairs regularised by the end of this year.

I am sure there will be more of these facilities. They are a really good deal for HMRC because the taxpayer has to do all the work - HMRC merely has to receive the details (and the money) from the repenting sinners. A 10% penalty is generous - but still pretty good for HMRC. Just as important of course is that people (or sources of income) which were not otherwise known to HMRC will be clearly locked on their radar for the future.

ARPT : Expensive Properties

Time is running out for those people who are holding UK residential properties through a UK or offshore company. In April they will be subject to the annual residential property tax which starts at £15,000 for properties worth more than £2 million rising to £140,000 a year for those properties worth more than £20 million. The associated capital gains tax charge on the company has been substantially ameliorated by the decision for it to be rebased at April 2013 so that the main issue would seem to be whether the annual charge is worth the inheritance tax risk which will arise when the property is no longer protected by the existence of the company. The property will be situated in the UK and cannot be regarded as excluded property and even if it is held by trustees, it may even swim straight back into the settlor's estate because of the existence of a reservation of a benefit.

These are important issues which are engaging everybody's attention but there is another implication which may be much more important. If the company shares are held by an offshore trust, then the transfer of the property to be held directly by the trustees before 5 April 2013 would crystalise the accrued gain which would be regarded as a trust gain by the trustees - capable of being attributed to and taxed on any UK resident beneficiary who receives benefits from the trust. If there is a UK beneficiary who has been occupying the property - which is quite possible because otherwise the property is likely to have been let and would be protected by the lettings exemption - this would be a benefit enjoyed in the UK. Even if there are no UK resident beneficiaries at the moment, there may be some later and this trust gain will be lurking, waiting to attach itself to such a beneficiary in due course.

If on the other hand, the shares are held directly by individuals, and any of those individuals are UK resident, the winding up of the company is likely to cause the accrued gain to be taxed immediately on them under Section 13 TCGA 1992.

These are not easy issues to deal with but I doubt whether we can expect much by way of change in the Budget in three weeks time.

One of the crucial elements to consider is the value of the property - whether it is above the £2 million threshold or whether it crosses any of the other bands. HMRC have helpfully introduced the opportunity for a "pre return banding check" where you can seek the agreement of HMRC about which band applies to the property - or indeed whether it falls outside the tax as being under the £2 million threshold.

If you believe that the value of the property is within 10% of a banding threshold you can apply to HMRC for this pre return banding check and they will either confirm or otherwise the band into which you fall - although they might want to ask lots of questions first.

One advantage of such confirmation is that HMRC will not impose a penalty if you were waiting for a decision when you submit you're ARPT return. (That presupposes a penalty would apply in the first place - which it would not if you had taken all reasonable care in determining the valuation for the return).

It is important to emphasise that this is not a specific valuation of the property. It is merely confirmation of which band you fall into and they say it cannot be used for any other taxation purpose. They can say what they like, but if they confirm that, for example, your property is not worth more than £2 million and therefore not within the first ARPT band, it is likely to be extraordinarily difficult for them later to suggest that it was worth some higher figure.

Travel to Work

The recent Tribunal case of *Samadian v HMRC TC 2523* revisits the old question of allowability of the expense of travelling from home to work or between places where a person has a business base, in circumstances where he has a business base at his home.

There are numerous authorities on this matter but the case of Mr Samadian brings a new twist.

Mr Samadian was a self employed consultant geriatrician. He worked from home but also worked at various NHS and private hospitals. His work at the NHS hospitals was pursuant to his employment with the NHS but his work at home and at the private hospitals was pursuant to his self employed activity.

It may reasonably be expected from a consideration of the earlier cases that travelling from home to an NHS hospital would not be allowable. On the other hand, despite *Sargent v Barnes*, there would be a reasonable case for a deduction to be allowed for travelling between his home base and the private hospitals or indeed between the private hospitals. However, it was the cost of travel between home and the private hospitals which was the problem.

The Tribunal accepted that Mr Samadian had a place of business at home. He also had places of business at the private hospitals. One might therefore have thought that the cost of travelling between two places of business ought to be allowable. However the Tribunal said that was not enough. They said that the test for deductibility established by *Mallalieu v Drummond* in 1983 applied because although Miss Mallalieu did not have any conscious non business motive for incurring the expenditure, she must necessarily have had a non business motive in her mind as well. One has to look behind the conscious motive of the taxpayer to see whether an unconscious object should also be inferred.

In this case, the Tribunal decided that Mr Samadian had a mixed object in his general pattern of travelling between his home and his places of business at the private hospitals:

> "*Part of his object in making those journeys must inescapably in our view, be in order to maintain a private place of residence which is geographically separate from the two hospitals. It follows that even though we find he has a place of business also at his home, his travel between his home and these two locations cannot be deductible on the basis of the reasoning in Mallalieu*".

It seems really harsh to have a tax deduction denied by the thought police. The reason Mr Samadian Incurred expenditure from travelling from one base to another was exclusively for the purposes of his profession. The fact that he had his home at one of his business bases was simply the starting point for his journey. It is equally possible to say that travelling from one of the private hospitals to another was equally disallowable because there is an element of personal choice whether he made that journey at all. He was self employed and the master of his own destiny - he could have gone fishing. Again, the argument is the same whether he purchased a Dell computer or an Apple computer. This would be a matter of personal choice and therefore the difference in cost would be disallowable.

As the Tribunal was relying so firmly on *Mallalieu v Drummond* to deny this expenditure, they might have had regard to the following passage in the House of Lords judgment in *Mallalieu v Drummond*:

> "*Expenditure may be made exclusively to serve the purposes of the business but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example, a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home of his friend and attending professionally upon him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay In the South of France was a reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of his expenditure on the journey and the expenditure lies outside the prohibition [for deduction].*"

P S Vaines
Squire Sanders (UK) LLP
28 February 2013

Contact

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