UK Tax Bulletin

April 2013

Introduction

Latest Rates of Inflation and Interest

The following are the current rates at April 2013

Current Rates	March 2013
Retail Price Index: March 2013	248.7
Inflation Rate: March 2013	3.3%
Indexation factor from March 1982:	
to April 1998	1.047
to February 2013	2.117
to March 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%

SQUIRE SANDERS

GAAR

The General Anti Abuse Rule is coming into force this year, effective from Royal Assent. This may sound barely relevant to the ordinary taxpayer but I fear it will end up affecting nearly everybody.

The basic idea behind the GAAR is that taxpayers are not free to reduce their tax bills by any lawful means, but only in a manner which is not regarded as abusive. An abusive arrangement is one which cannot reasonably be regarded as a reasonable course of action.

Anything falling within this description will be subject to counteraction to remove the intended tax advantages. This has no effect on the existing legislation which may continue to be used to challenge a particular transaction. The GAAR only applies to arrangements which are entirely lawful and would otherwise have been effective.

I started to imagine myself playing cricket. The opposition captain tells me that a batsman in my team will be out if he is caught. However, if he hits the ball where there is no fielder, the batsman will still be out because had they put a fielder in the right place, he would have caught it. But this rule does not apply to his batsmen. Um.

Anyway, to help our understanding of how it will operate, HMRC have issued some lengthy guidance. It is beautifully written with many examples but you do need to stand back and think what some of these words really mean. One example should suffice. HMRC explain that there would be no challenge or allegation of abuse in situations where the law deliberately sets precise rules or boundaries. They say that:

> "*If the statute specifies a particular period or set of conditions quite precisely, then taxpayers are entitled to assume that they are on the right side of the line if they have satisfied the statutory condition and there is no contrivance about what they have done.*"

On first reading that looks entirely reasonable but actually what it means is that you are only protected if you satisfy the statutory conditions by accident. If you deliberately arrange things so that you satisfy the statutory conditions then you must have contrived to do so - and that is objectionable as an abuse.

Despite the above reservations, the Guidance Note is full of examples involving a wide range of the planning arrangements which HMRC confirm would not be regarded as objectionable. That is extremely welcome. However, the difficulty (as always) is where to draw the line. We all know an elephant when we see one, but what if it is not an elephant, but something else - for example a big thing with four legs, a head and a tail, like a wooden horse.

In fact, I think a Trojan horse is probably about right.

SQUIRE SANDERS

Repairs and Renewals

HMRC have also published detailed guidance note on the vexed question of repairs, renewals and improvements and their treatment for tax purposes: HMRC Brief 5/2013. It covers a wide variety of circumstances explaining what is meant by a repair and where elements of improvement will cause expenditure not to be categorised as a repair but as a new asset, possibly (but not always) qualifying for capital allowances.

The old arguments about what is a repair and what is a replacement of the entirety are all discussed, including the use of different materials and the effect of changing technology. Of course there will always be areas of controversy and uncertainty, but this is a very useful document.

Transfer of a Going Concern

The recent case of *Royal College of Pediatricians v HMRC TC 2617* is interesting as it provides some welcome judicial guidance regarding the meaning of a transfer of a going concern for VAT purposes.

This is important because during the course of the hearing, HMRC confirmed that they do not give clearances about whether a transaction constitutes at TOGC nor do they give post transaction rulings. The Tribunal noted that there is no possibility of the parties being able to ascertain HMRC's views on whether the sale of a particular property would qualify as a TOGC. So we are on our own - and every bit of guidance helps.

The Royal College of Pediatricians is a charity which occupied premises in London. They entered into an agreement for a lease with another charity and then sold the property as a TOGC for £17.5 million. No VAT was charged on the transaction in accordance with this treatment. However, in due course, HMRC took the view that this was not a TOGC and sought VAT on the transfer.

The argument for HMRC was that there was only an agreement for a lease; the lease had not actually been entered into when they transferred the property to the third party. So they said there was no transfer as a going concern.

It is interesting to see the VAT Notice on the subject which gives the following example of when a business can be transferred as a going concern:

> "*If you own a property and have found a tenant but not actually entered into a lease agreement when you transfer the property to a third party (with the benefit of the prospective tenancy but before a lease has been signed) there is sufficient evidence of intended economic activity for there to be a property rental business capable of being transferred.*"

Just because HMRC says something in the Manuals or VAT Notices does not make it right - although they are asking to be Judicially Reviewed if they act contrary to their published guidance. Fortunately, the Tribunal found that the sale was a TOGC and no VAT was payable.

Presumption of Continuity

I have made detailed reference to this concept before - see September 2011 and December 2011 Bulletins. It is really important because HMRC like to raise assessments for earlier years on the grounds that if a taxpayer has made an error in one year, then it may be presumed that he made similar errors in other years.

HMRC are naturally very keen on this idea but they have been pushing it too far and have been rebuffed time and time again. The authority they rely on for this presumption is *Jonas v Bamford (1973)* but this case does not give them this authority and the Courts keep telling them so - for example in *Syed v HMRC TC 1776* and *Chapman v HMRC TC 1593*, and now in *Aeroassistance Logistics*.

However, they are not discouraged. In *Aeroassistance Logistics Limited v HMRC TC2628* they again argued the same point and again the Court told them that the argument is wrong.

There is something rather unsatisfactory for HMRC to keep advancing an argument which the Courts keep telling them is wrong. I suppose that they hope one day a Tribunal will find in their favour. But what good will that do? One decision in their favour and a whole load against them. If they feel so strongly about this point, they should organise a change in the law rather than keep arguing that black is white.

Concession A19 : Equitable Liability

HMRC have been reviewing this concession and put forward a number of suggested amendments which have given rise to a good deal of public comment. This concession allows (or requires) HMRC to waive tax where they have failed to make proper and timely use of information provided to them and where the taxpayer could reasonably have believed that their affairs were in order.

To their credit, HMRC have taken on board all the criticisms made about these proposals and have decided to leave the concession in place. This is obviously to be welcomed. The ability (or requirement) for HMRC to act fairly in these circumstances is not something which needs to be changed - indeed one might say that it is something to be supported. After all, there can be no abuse here - this is just a concession enabling HMRC to use their discretion to act fairly.

This must surely be a Good Thing. I seem to remember somebody Important saying: *The quality of mercy is not strain'd ….it blesseth him that gives and him that takes…*etc.

Islands Disclosure Facilities

We have now become familiar with the Liechtenstein Disclosure Facility and, in traditional fashion, 3 more have come along at once - Jersey, Guernsey and the Isle of Man. They are all very similar (and the disclosure pack whereby the disclosures are made seems identical to the LDF) but none of them have the automatic exemption from criminal prosecution that is a feature of the LDF. However, HMRC do confirm in their FAQs that they will not start a criminal investigation for a tax related offence if a full and accurate disclosure has been made.

All the recognisable features are there in these new disclosure facilities - a 10% penalty (but only up to 2007/8) and higher penalties for subsequent years - and complete closure in respect of years prior to 1999.

These facilities are seriously advantageous and although they require full disclosure of all income and gains (and a full statement of worldwide assets), that can hardly be objectionable for anybody who has misbehaved and now wants to put their affairs in order.

Having regard to the amount of information which we are told is flowing around, and therefore available to HMRC, it must be highly likely that anybody seeking to conceal income in the Islands will get a tap on the shoulder before too long. That would disqualify them from the benefits of the disclosure facilities the consequences of which could prove fearfully expensive.

Dividends : NIC

It has been announced that *PA Holdings Limited* has withdrawn its appeal to the Supreme Court. Accordingly, the Court of Appeal judgment in *HMRC v PA Holdings Limited [2011] ECWA CIV 1414* is final.

This is a disappointment because the Court of Appeal judgment raised some really important questions which will not now be answered without further litigation.

In very broad terms, what happened in this case is that some employees acquired shares in a company connected with their employer. The issue was the tax treatment of dividends subsequently paid by the company on those shares. HMRC argued that the dividends could reasonably be said to have derived from the employment and should therefore be taxed as earnings.

The First Tier Tribunal found that the dividends were correctly categorised as dividends. However, they also found that they could be treated as earnings - but that did not stop them being dividends. There was therefore an uncertainty about whether they should be charged to tax as dividends under Schedule F or as earnings under Schedule E (as we understood them at the time). It is because of the possibility of income being chargeable under two separate heads that Section 20 Taxes Act 1988 was enacted - and it dealt specifically with the point to confirm that dividend treatment took priority. Section 20(2) says:

> "*No distribution which is chargeable under Schedule F shall be chargeable under any provision of the Income Tax Acts.*"

However, the Court of Appeal said that once the Tribunal had concluded that the payments were emoluments, that was the end of the matter. There was no room for further consideration of anything else. Schedule F was irrelevant - the income never came within Section 20 at all. The dividends were earnings and that was the end of it.

The difficulty with this conclusion is that the Tribunal found as a fact that the payments were dividends. There was no challenge to this finding of fact. The Court of Appeal could have said with equal force that the Tribunal found the payments were dividends and therefore there was no scope for the application of any other Schedule. They were dividends and that was the end of it.

Where does this leave the taxpayer? It leaves him in an impossible position. If HMRC had chosen to argue that the payments were dividends, they must have succeeded. They were dividends in form, they were found to be dividends as a fact by the Tribunal and Section 20 says precisely that dividend treatment must prevail. HMRC could not possibly have lost that argument. However, HMRC argued exactly the opposite and the Court of Appeal agreed with them. There is something profoundly wrong for the State to be able to advance completely opposite arguments and succeed on both.

If this sounds familiar - it is. This is exactly what happened in the case of *Aspect Capital Ltd (2012)* and *MJP Media (2010)*.

It may be that this decision will not be of lasting significance because section 20 has been rewritten in rather different terms In section 366 ITTOIA 2005, However the implications are really important and many will regret that we will not have the benefit of the views of the Supreme Court on the matter.

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