SQUIRE PATTON BOGGS

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Latest Rates of Inflation and Interest

The following are the current rates at August 2014

Current Rates	August 2014
Retail Price Index: July 2014	256.0
Inflation Rate: July 2014	2.5%
Indexation factor from March 1982: to June 2014 to July 2014	 2.226 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

To 6 April 2014: 4%

From 6 April 2014: 3.25%

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CGT : Non Residents

An announcement was made by HMRC in March that from April 2015, non residents will no longer be outside the scope of capital gains tax on the disposal of UK residential property. Individuals, trusts, companies - all would be exposed to the charge.

One idea was that the tax would be withheld by the solicitors acting on the sale but this was soon abandoned (possibly on the entirely predictable basis that the relevant non resident would simply instruct a foreign firm to deal with the transaction).

It is now suggested that the charge will not apply to institutional investors or collective investment schemes. Quite who will be caught by this charge remains unclear - and whether there will be a value threshold or any exemptions for commercial property which presently apply to the ATED related capital gains tax charge. Indeed the relationship of this proposal with the ATED related capital gains tax charge is both difficult and uncertain.

There remains a cloud over the election for the CGT main residence exemption because various dark and ambiguous statements have been made about it - and one way of treating residents and non residents in the same way would be to abolish the right of election for everybody.

Clarification on all these matters is probably still a couple of months away.

Undeclared Offshore Income

HMRC are getting seriously heavy with anybody who does not declare their foreign income and capital gains. A consultation document was published on 19 August taking forward a guidance note in April entitled “No Safe Havens” which I mentioned in the April Tax Bulletin. This note was an impressive summary of how HMRC obtain information, making it pretty clear that if you deliberately conceal money in an offshore account, they will find it – and when they do, there will be some serious penalties.

Quite right too. Of course there should be criminal penalties for people who evade taxes; that is a crime and should be appropriately punished. So what is the big deal?

The big deal is that HMRC propose to introduce a new strict liability criminal offence of failing to declare an offshore account containing taxable income and gains. “Strict liability” means that you are guilty of the offence even if there was no intention to commit a crime. Strict liability criminal offences for which you can be sent to jail are rare – and generally offensive to anybody with a pulse. You cannot be convicted of murder, arson, burglary, or much else without the prosecution being able to prove your guilt – and to prove it beyond a reasonable doubt. However, strict liability means that you are guilty and can be fined or sent to prison, merely for having money in an overseas account and not telling HMRC. There is no defence and no excuse. Go directly to jail; do not pass GO; do not collect £200. Do we not feel that something is getting a bit out of hand here?

The underlying reasoning can be found from the introduction to the consultation document where HMRC say it is right to re-examine whether it should be necessary for them to prove that a person has acted fraudulently in order for the Court to convict them of fraud. I am not sure why they assume it is right for this idea to be “re- examined”. Actually, I am quite sure that it is not right. To give HMRC power to have people sent to prison for a crime, without having the tedious inconvenience of having to prove that a crime has been committed, cannot surely be regarded as right by anybody.

However, with a little linguistic ambiguity, HMRC suggest that there may be defences to this new offence – for example if the offshore account did not contain anything taxable. The funds might have arisen during a period of non residence or may have been a gift from a third party, or maybe the taxpayer is a non dom and claiming the remittance basis. It is a funny sort of strict liability if there is a defence, but never mind. Unfortunately a genuine error or innocent mistake (even one based on expert professional advice) – and specifically a complete absence of any dishonesty – will not help you at all. Clang.

It will be interesting to see what sort of responses they receive. However, the consultation document indicates clearly that the decision to introduce this offence has already been made and it is merely how the offence will be constructed and used by HMRC which is up for discussion.

Accelerated Payment Notices

HMRC have published a Fact Sheet explaining to people who have participated in tax schemes that they might get a demand for an accelerated payment - that is, be asked to pay the tax in dispute even though the merits of the scheme have not yet been adjudicated.

However one views this idea in principle, it is now the law and accelerated payment notices are being sent out. I say it is the law, but there are many conditions to be satisfied for an accelerated payment notice and it is obviously worth making sure that the notice fulfils all the legal requirements. Many people will not want to challenge an accelerated payment notice even if it is defective as they may feel that they have enough aggravation already - or more importantly perhaps, because failing to comply with such a notice can give rise to serious penalties.

Unfortunately there is no right to appeal against an accelerated payment notice so any challenge would need to be made by way of Judicial Review. Not a prospect anybody is going to welcome - but the taxpayer does have the right to make representations if he feels the conditions for the notice have not been satisfied (or the amount of the tax demanded is wrong) and HMRC have an obligation to consider those representations.

Although there is no right of appeal against the actual notice, it is possible to appeal against any penalty if the taxpayer can show that it was reasonable for him not to have complied with the accelerated payment notice.

To describe this as a minefield would seem to be entirely appropriate.

Remittance Basis : Loans

HMRC have recently announced a change in practice regarding the application of the remittance basis to loans secured on foreign income or gains.

This was never an easy matter. Simply stated, where foreign income and gains are used as collateral for a loan which is brought to the UK, does this represent a remittance under Section 809L FA 2008 – or is it only a remittance if the foreign income or gains are used to repay or service the debt. Or maybe HMRC thinks it is both.

There is no doubt that servicing or repaying the loan out of foreign income or gains is a remittance. However, that is unlikely to occur when the foreign income is merely used as security, or perhaps additional security if the loan is used to buy a UK property which will be the primary security for the loan.

Until this month, HMRC took the view that in a commercial situation where neither party expects that the collateral will be taken by the lender, the only taxable remittance would occur when the foreign income or gains are used to service or repay the loan.

However, HMRC also say that where the foreign income and gains are offered as collateral to minimise interest charges or repayments then they will regard a remittance as taking place at the time the security is taken.

So it is both. They say that the loan itself was remittance and so is the servicing or repayment of the loan so there is a double charge. But they will not charge one by concession. Perhaps HMRC expect us to be grateful for not charging tax twice on the same transaction. I do not think that gratitude will be the immediate response of any taxpayer. (And what about the principle that one should be taxed by the law – not untaxed by concession. Oh, that is so last century!)

Maybe I should not be too precious about this and accept that concessions are helpful and this one prevents an injustice. Well maybe. However, it does not matter any more because HMRC have withdrawn this concession from 4 August and they will now treat as a taxable remittance the giving of a collateral against foreign income and will also charge tax when the loan is repaid or serviced out of the foreign income.

This is an interesting point of view. There must be serious doubt whether a concession ever existed – it can hardly be argued with any force that the legislation was intended to impose a tax charge twice on the same bona fide commercial transaction.

Anyway this is their stance and I foresee a good deal of argument arising in due course.

Transfer of Assets Abroad

By a strange coincidence two entirely different cases before the First Tier Tribunal were published on consecutive days this month on the application of Section 739 TA 1988 to various arrangements. Seeing as how Section 739 was rewritten some years ago and now is found at Section 714 et seq Income Tax Act 2007 this just adds to the interest of these cases. The new provisions have been completely rewritten and rearranged but the general idea is that there has been little change to the underlying law.

The case of *Fisher v HMRC TC 3921* takes you through all the legislation and most of the relevant cases with a very detailed analysis. For those interested in the subject it is a valuable read – even if it does go on for 172 pages.

Fisher v HMRC concerned the transfer of the well known bookmaking business of Stan James to Gibraltar in 1998 following changes to UK betting duty.

HMRC claimed that the subsequent profits of the Gibraltar company should be taxed on the UK shareholders by reason of Section 739.

Section 739 applies where there has been a transfer of assets by virtue or in consequence of which income becomes payable to a non resident person and the transferor has power to enjoy such income. For anybody thinking of transferring their business abroad this case is a very valuable summary of the position. Practically every word of Section 739 has been subject to judicial examination at some time or another since it was first introduced in 1936, so this is a very interesting summary.

The arrangements were held to fall within the terms of the section (and the judgment goes through all the various elements – including the European aspects). However, the key element was whether the transfer was effected for commercial purposes and not for the purpose of avoiding tax (which includes betting duty). The Tribunal held that this defence was not available on the facts.

Although this case was a very interesting examination of the issues relating to transferring assets abroad and the application of the anti avoidance provisions, another relevant element of this case related to the ability of HMRC to raise a discovery assessment.

This issue hinged on whether an officer of HMRC should have been aware of an insufficiency of tax bearing in mind the disclosures and information provided by the taxpayer. The taxpayer was largely successful in his arguments that all relevant disclosures were made so that discovery assessments were not possible. It is always useful to have examples where the information provided by the taxpayer is sufficient to thwart a discovery assessment and although the facts in this case were both complicated and lengthy, they too are worth a good read on this point alone.

The other case, *Seesurrun v HMRC TC 3900* was not so comprehensive, dealing only with the question of whether the taxpayer had power to enjoy income of a company owned by an offshore trust. Not particularly earth shattering, but I guess after all this time we should expect a third case on Section 739 to come along any minute.

Liechtenstein Disclosure Facility

HMRC have announced some new rules this month to restrict the operation of the Liechtenstein Disclosure Facility. The general idea is to ensure that people do not benefit from the LDF who HMRC do not feel are not deserving candidates.

A taxpayer will not be entitled to benefit from the LDF if it relates to disclosures already known to HMRC – there needs to be a disclosure of something HMRC does not already know.

Another requirement of the LDF is the provision of a Confirmation of Relevance – that is to say confirmation that a substantial part of the assets affected by the disclosure are invested or managed in Liechtenstein. Where less than 20% of the liabilities being disclosed relate to Liechtenstein assets, the favourable treatment under the LDF will only apply to those assets.

These changes only relate to the availability of the reduced penalties by reason of the disclosure. The assurance regarding criminal penalties is not affected.

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