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UK Tax Bulletin

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Latest Rates of Inflation and Interest

The following are the current rates at November 2014

Current Rates	November 2014
Retail Price Index: October 2014	257.7
Inflation Rate: October 2014	2.3%
Indexation factor from March 1982: to September 2014 to October 2014	 2.243 (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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Residence : New Exceptional Days

I have been looking at an unwelcome implication of the new exceptional days rule for the purposes of the Statutory Residence Test.

It is well known that an exceptional day (defined by Schedule 45(22) FA 2013) is a day when the individual would not be present in the UK at the end of that day but for exceptional circumstances beyond his control which prevent him from leaving the UK – and that he intends to leave the UK as soon as those circumstances permit.

There is considerable debate about what these words mean (an issue to which we will return in due course). But whatever they mean, you cannot have more than 60 days disregarded for exceptional reasons in any tax year.

Let us consider the position of a person who was UK resident 3 years ago. He would be a "leaver" and is therefore a person to whom the 5th UK tie (the Country Tie) is relevant. The Country Tie is satisfied if the taxpayer is present in the UK at midnight for the greatest number of days during the tax year.

In counting these days one might have thought that you would be able to exclude exceptional days. After all, that would make sense. The exceptional days are those days when you are not here out of choice but are sort of stuck here – or you are here for exceptional reasons like medical treatment for yourself or a member of your family.

Bad luck. Exceptional days are not excluded in calculating the number of days for the Country Tie – and this is made clear in the HMRC Guidance Notes. I believe the reasoning to be that the day count for the Country Tie is defined differently. One of the key concepts of the Statutory Residence Test is that "a day spent in the UK" means a day that you are "present in the UK at the end of the day". For the Country Tie, the test is that you satisfy the "midnight test" which is that you are "present in the UK at the end of the day". Sounds the same, looks the same, walks like a duck … but no.

The "days spent in the UK" test is what is affected by exceptional days. The Country Tie has a different test : Were you in the UK at midnight. The exceptional day rules do not apply to that test – only to the definition of "days spent in the UK", which is an expression not found in the Country Tie.

As the existence of exceptional days is likely to cause somebody to be in the UK for longer than normal, the inadvertent application on the Country Tie may be a much bigger risk than anybody thought.

Residence : Full Time Working Abroad

Discussions about the meaning of IR20 may be regarded of only historic interest now. However, there are still lots of cases under consideration relating to the pre statutory residence test regime. Occasionally they contain something of significance.

One such case is *Darrell Healey v HMRC TC 4004*. Mr Healey left the UK on 2 April 2006 to work full time abroad. HMRC accepted that for this reason he was not resident for 2006/07.

Mr Healey subsequently argued that he should therefore be regarded as non resident for the following year. The Tribunal was being asked for a preliminary hearing to determine whether a distinct break had occurred, but they declined to do so.

Whether Mr Healey should be regarded as continuing to be non resident is an interesting question - but I am not concerned with that point here. What caught my eye in this case were the arguments of HMRC on the relationship in IR20 between a distinct break and full time working abroad.

HMRC said that they had not made up their mind whether Mr Healey had made a distinct break on 2 April 2006. They wanted to look into the position to determine whether a distinct break had taken place on 2 April 2006 and to undertake the now famous multi-factorial enquiry.

This struck me as a bit odd because it had been the clear view of HMRC that if you go to work full time abroad, that represented a distinct break and no further enquiries into accommodation, ties etc (nor a multi-factorial enquiry) are relevant.

In the case of *Davies and James v HMRC,* it was said by HMRC in the Court of Appeal that leaving the UK for full time work abroad was sufficient severing of ties for the purposes of IR20. Furthermore, HMRC confirmed that other links were irrelevant for this purpose - so in these circumstances there is no need to enquire further. Genuine full time employment abroad restricted the enquiry to that point. This was the view of HMRC when IR20 was in force, but it would seem that they now have a different view.

I am getting a serious feeling of déjà vu here.

ATED Figures

HMRC have published some provisional figures for 2013/14 on the Annual Tax on Enveloped Dwellings.

Apparently 3,880 properties were subject to the ATED during that year - 2,400 in the £2 million - £5 million band and only 220 in the over £20 million band. Total receipts amounted to £100 million, 80% of which came from properties in Westminster and Kensington and Chelsea.

Lots of conclusions can be drawn from these figures - but whatever view one takes of all this, I am sure it is not going away.

Capital Gains Tax : Non Residents

The suggestion that next year capital gains tax will be charged on UK residential property held by non residents has caused a great deal of anxiety – not least because of the uncertainty surrounding the subject. However, almost on the eve of the Autumn Statement (next Wednesday) and the draft Finance Bill clauses which are expected to be published on 10 December, HMRC have published some further details which indicate much more clearly where they are going on this subject.

The charge will apply to non resident individuals, companies, partnerships (in the sense that they will be transparent and the gains will be traced through to the partners) and trusts. It will not apply to gains relating to periods before April 2015 – they will be excluded either by rebasing or by a time apportionment calculation.

It is clear that this tax will apply only to interests in residential property and there is no (present) intention to broaden the scope to anything else. There are various reliefs (but not it seems any for commercial lettings or property development which apply for ATED and SDLT purposes). HMRC are keen not to discourage large scale institutional investment through foreign companies and therefore the new charge will extend only to closely held companies which they describe as companies which are the private investment vehicles of individuals, families or small groups.

The rate of tax for companies will be the normal corporation tax rate of 20% (with an indexation relief) and not the 28% which applies to individuals and companies subject to the ATED related capital gains tax charge. Where the ATED related charge would also apply, that takes priority (at the higher rate).

It will be possible for individuals (and trusts) to claim exemption from the charge in respect of a property which is the individual's only or main residence. However, the exemption is being modified and will not be available unless the individual has resided in the property for at least 90 nights during the tax year.

We still do not know how they intend to collect this tax. They have abandoned the idea of a withholding tax. They suggest that the non resident will be required to deliver a tax return in respect of the disposal and make the payment within 30 days. I am not sure what they will do to somebody in Shanghai who displays a bit of reluctance, or to the company resident in (say) Egypt which is liquidated shortly after the sale. There obviously needs to be some machinery for payment of this tax – but it is difficult to understand what it will be at the moment.

There is clearly some way to go on all this, but at least we now have a clearer picture of most of the key elements – and you never know, it might get even clearer in 10 days time.

Debts and Collateral : Discovery

The announcement of HMRC on 4 August regarding their change of practice on the remittance basis in respect of loans secured on foreign income or gains continues to create waves – and goodness knows where this will end up. There is a widely held view that HMRC are simply wrong and rather than a lot of pointless litigation I would think it may be better for them to change the law to ensure that it coincides with their view.

There was a meeting in September between HMRC and the relevant professional bodies on this subject at which an enormous number of implications (and no doubt unintended consequences) were discussed. A couple of points emerge from the published notes of that meeting which are interesting.

The first is the helpful acknowledgement by HMRC that there is no remittance where the loan is unsecured but is given only because the lender is aware of the borrower's assets. Without any contractual matrix, the lender has no right of recovery against the foreign income or gains and they cannot therefore be said to be "used" in connection with the debt.

The second relates to discovery – that is to say the ability for HMRC to reopen closed years and apply their new practice. Section 29(2) TMA 1970 provides that they cannot do so if the matter has been dealt with in accordance with the practice generally prevailing at the time. One might have thought that preparing a tax return on the basis of a long standing HMRC practice confirmed by their Manuals would be the very epitome of generally prevailing practice – but apparently not. HMRC do not accept that this is the case but are considering the point further.

As if that is not bad enough, HMRC were asked to confirm that a taxpayer would not be regarded as careless (which would cause him to be subject to penalties and other disadvantages) if they followed published HMRC guidelines. HMRC would not confirm that either – merely saying that it is unlikely they would argue the point. I could hardly believe my eyes. It is difficult to imagine how that could possibly be a tenable view.

However, maybe these responses were merely somebody being cautious at a meeting and that confirmation on these points will be forthcoming before too long.

Non Resident Companies : Section 13 TCGA 1992

Section 13 Taxation of Chargeable Gains Act 1992 is an anti avoidance provision, whereby capital gains made by non resident companies can be taxed on their UK shareholders. The general idea is that a capital gain made by the offshore company is apportioned to the UK resident shareholders (but only to those with more than 25% since April 2012) and charged to capital gains tax in their hands. Like all anti avoidance provisions it is long and complicated, but you get the idea.

The European Court of Justice in their recent judgment *C-112/14* held that the provisions of Section 13 were discriminatory because this tax treatment was less favourable than that which applies to shareholders in UK resident companies. There is no procedure for attributing gains made by a UK resident company to its shareholders; this applies only to non resident companies. The Court said that the Section 13 rules went beyond what was necessary to combat tax evasion and avoidance and that this discrimination was unlawful.

This may sound academic because in 2012 (as a result of pressure from the EU) HMRC changed the rules to the effect that Section 13 no longer applies to gains on assets used for economically significant activities carried on outside the UK and not as part of a scheme or arrangement for avoiding tax. However, the UK did not make these changes in time to satisfy the EU – and that is why these proceedings continued and this rather unflattering judgment was made by the ECJ.

Opinions differ whether the changes made in the Finance Act 2013 which applied from 6 April 2012 go far enough to satisfy the requirements set out by the ECJ. Who knows – but I am sure we will find out in due course.

In any event, there is no doubt that the terms of Section 13 were unlawful before 6 April 2012 so that anybody who was charged to capital gains tax as a result of the application of Section 13 for 2011/12 or earlier years should have a really good case for claiming a repayment.

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Stop Press

It is announced by the UK Treasury and by the European Commission that companies in Europe have been obeying the law. Shock horror.

Commission President Jean-Claude Juncker is under criticism because when he was Finance Minister of Luxembourg, companies in Luxembourg complied with the law. Accordingly there have been calls for his resignation. Um. Maybe he should be burnt at the stake – that would perhaps be a more appropriately medieval response.

I thought the idea was that the government made the laws and the citizens complied with them. That is generally a Good Thing and how it was supposed to work. Maybe I am a bit behind in my EU law studies.

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