



Tax Updates – November 2022

Highlights

- The Autumn Statement was delivered on 17 November 2022. Among other measures, HMRC will receive additional funding to address serious tax fraud and non-compliance.
- HMRC's nudge letter campaign to tackle non-compliance linked to offshore corporates owning UK property, which was originally announced in September, is now underway.
- The first arrests in relation to R&D-related tax fraud have been made.
- HMRC has issued a misrepresentation claim against EY in relation to the negotiation of a tax settlement for property investor Jamie Riblat.
- Uber has paid £615m to HMRC in settlement of a long-running tax investigation.

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1. Upcoming hearings

UT: *Whyte (Heather) v HMRC* (Case ID: UT-2021-000179) – Hearing date: 15-16 December 2022 – CGT treatment of building plots in a mansion's grounds acquired as part of an estate.

UT: *Red, White and Green Ltd v HMRC* (Case ID: UT-2020-0089) – Hearing date: 16-18 January 2023 – Appeal by Eamonn Holmes on the basis that IR35 applied to contracts for services on This Morning.

UT: *Kingston Maurward College v HMRC* (Case ID: UT-2021-000171) – Hearing date: 25 January 2023 – Taxpayer had failed to establish that the claimed tax constituted residual input tax, for which it could claim credit under the PESM agreed with HMRC.

CA: *Bell v HMRC & anor* (Case ID: CA-2021-003418) – Hearing date: 25 January 2023 – Procedural appeal regarding disclosure of documents by HMRC relating to another in a related appeal.

CA: *Volkerrail Plant Ltd v HMRC* (Case ID: CA-2022-001053/54) – Hearing date: 7 February 2023 – Group relief appeal regarding whether s. 403D(1)(c) ICTA constitutes an unlawful restriction on EU freedom of establishment.

UT: *GE Financial Investments v HMRC* (Case ID: UT-2021-000165) – Hearing date: 27 or 28 February, or 1 March 2023 – Residence and US DTA relief for foreign tax.

UT: *Lancashire John v HMRC* (Case ID: UT/2021/00049) – Hearing date: 8, 9 or 10 March 2023 – Transfer of Assets Abroad appeal relating to a failed tax scheme.

CA: *London Luton Hotel BPRA Property Fund LLP v HMRC* (Case ID: CA-2021-000087 and 000738) – Hearing date: 13 March 2023 – Appeal relating to Business Premises Renovation Allowance.

CA: *British Telecommunications plc v HMRC* (Case ID: CA-2021-000700) – Hearing date: 21-23 March 2023 – Restitution claim relating to bad debt relief.

2. Legislation and consultations

Autumn Statement: On 17 November 2022, Chancellor Jeremy Hunt delivered the Autumn Statement, which sets out to plug a £55bn gap in public finances. Tax Journal has prepared a detailed [summary](#) of the announced tax measures, which include the following:

- Corporation tax will increase to 25% from April 2023, and DPT will increase to 31%.
- The bank CT surcharge will be reduced to 3% down from 8%.
- The RDEC rate for R&D relief will increase from 13% to 20%, while the SME additional deduction will decrease from April 2023.
- The windfall tax on oil and gas companies (the Energy Profits Levy) has been extended.
- The income tax additional rate threshold will be lowered from £150,000 to £125,140.
- The government has decided not to introduce an Online Sales Tax.
- HMRC will receive additional funding of £79m over five years to tackle serious tax fraud and address tax compliance risks among wealthy taxpayers.

New Bill: The [Finance Bill 2022](#) has now been published. This includes the above-mentioned changes to R&D relief. CIOT has [responded](#) to the call for evidence in relation to the R&D provisions.

New Act: The [Health and Social Care Levy \(Repeal\) Act 2022](#) has received Royal Assent. The Act abolishes the health and social care levy and removes the NICs increase.

Bill progress: The Economic Crime and Corporate Transparency Bill is progressing through Parliament. HM Treasury has published various [factsheets](#), including on the amendments to the scope of beneficial ownership made to the Register of Overseas Entities and on the counter-terrorist financing provisions in relation to cryptoassets. The Public Bill Committee has also published a [call for](#)

[evidence](#) on the Bill.

New Regulations: The Corporation Tax Act 2010 (Factors Determining Substantial Commercial Interdependence) Regulations 2022 have been [published](#). These set out whether a relationship between two companies amounts to “substantial economic interdependence”.

Share exchange: HMRC has published a [measure](#) that deems shares in a non-UK company, received in exchange for shares in a UK company, to be located in the UK for CGT purposes.

Interest rates: HMRC has [increased](#) the late payment interest rate for most taxes to 55% and the repayment interest rate to 2%.

Audio-visual reliefs: HM Treasury has published a [consultation](#) on reforms to audio-visual tax reliefs. The purpose of these is to modernise the reliefs, boost growth and ensure they remain sustainable. The consultation closes on 9 February 2023.

Consultation responses: CIOT has responded to a few consultations, including:

- CIOT has [responded](#) to the OTS [consultation](#) on the tax implications of hybrid and distance working. CIOT has suggested that many of the issues relating to working across borders could be addressed through improved guidance or by using technology so that employers can account for the right tax from the outset.
- CIOT has also [responded](#) to the OECD [consultation](#) on the Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One. CIOT noted the further complexity created by the rules and recommended that further work on Pillar One should ensure the rules are proportionate to policy objectives.

Property income: OTS has published a [report](#) recommending that income tax rules for residential landlords be simplified. In particular, OTS has recommended a review of the short-term lets regime, which the FT has covered in an [article](#).

R&D: CIOT gave [evidence](#) to the House of Lords Economic Affairs Committee on R&D reliefs. Its proposals include using risk profiling to target claims likely to be ineligible and requiring all those advising on tax to be members of a professional body.

Digital services tax: The Public Accounts Committee will [question](#) HMRC and HM Treasury on the design, implementation and administration of the DST and their readiness to replace it with the OECD Pillars One and Two reforms.

OTS: It has been [announced](#) that OTS will cease work after publication of the “Hybrid and distance working” report later this year.

Information exchange: The UK has [signed up](#) to two new OECD multilateral agreements which will facilitate the exchange of information from [digital platforms](#) and on [Common Reporting Standard](#) avoidance arrangements.

3. HMRC guidance

Umbrella companies: HMRC has updated its [guidance](#) on working through an umbrella company to help workers understand how they will be engaged, how their pay is made up and what employment tax rights and obligations they have.

IHT DOTAS: In 2019, HMRC issued a [letter](#) that answers queries raised by STEP on the operation of IHT DOTAS. HMRC has now published a further [letter](#) clarifying some of those earlier points.

Electronic sales suppression: HMRC has published a new [factsheet](#) on HMRC's powers to investigate ESS and what penalties that may be charged to taxpayers involved in ESS. ESS involves businesses hiding or artificially reducing the value of transactions in their sales records in order to reduce their turnover.

VAT reverse charge: HMRC has updated its [guidance](#) on the VAT domestic reverse charge to add new sections on scaffolding, construction services and supplies made by and to utility companies.

Children's face masks: HMRC has [announced](#) that sales of children's face masks will be treated as items of clothing and should therefore be zero-rated. VAT Notice 714 has been [updated](#) accordingly.

Plastic packaging tax: HMRC has issued [guidance](#) on how to apply relief on exported and converted packaging for PPT. The guidance is aimed at manufacturers and importers and sets out how to make a claim. HMRC has also published [guidance](#) on when packaging is classified as a finished plastic packaging component, which can affect whether a business needs to register for PPT.

4. HMRC spotlights and nudge letters

Offshore corporates owning UK property: HMRC's [campaign](#) to tackle non-compliance linked to offshore corporates owning UK property, which was announced back in September, is now underway. CIOT has published an [update](#) on this campaign for its members and the FT has also [reported](#) on it.

Company tax returns: HMRC has [identified](#) inconsistencies in Company Tax returns which do not reconcile with the figures in the corresponding CT computations. HMRC will rely on the computations as the accurate position for the companies' losses and will write to the companies to notify them.

R&D fraud arrests: HMRC has [confirmed](#) that eight people have been arrested on suspicion of conspiring to submit over 100 fraudulent R&D relief claims, with more arrests expected in the coming weeks. HMRC anticipates that the upcoming reforms to R&D reliefs will help reduce abuse. There are, however, concerns that the reforms will prevent some genuine claims due to changes in time limits.

Art market participant fine: HMRC has issued its first [fine](#) to an art market participant who failed to register with HMRC in time. Art market businesses have been subject to the Money Laundering Regulations since January 2020 and were required to have registered with HMRC as "art market participants" by 10 June 2021. Businesses that have failed to register may be able to avoid a fine if they can show that they took all reasonable steps and exercised all due diligence to ensure compliance with their AML obligations.

5. Recent decisions – Direct tax

Enterprise zone allowance: [Cobalt Data Centre 2 LLP v HMRC](#) [2022] EWCA Civ 1422 (For the taxpayer: Adrian Williamson KC, Nicola Shaw KC and Michael Jones KC instructed by Macfarlanes. For HMRC: David Ewart KC, Stephen Kosmin, Edward Waldegrave and Laura Ruxandu.) – The CA allowed HMRC's appeal and held that two LLPs were not entitled to allowance in respect of the construction of two data centres in an enterprise zone, because the relevant expenditure was incurred pursuant to a new agreement entered into outside the statutory window.

CT deductible expenses: [HMRC v Centrica Overseas Holdings Ltd](#) [2022] EWCA Civ 1520 (For the taxpayer: James Rivett KC and Ronan Magee instructed by Pinsent Masons LLP. For HMRC: David Ewart KC, James Henderson and Barbara Belgrano.) – The CA allowed HMRC's appeal and upheld its decision to disallow management expenses on services relating to the proposed sale of a subsidiary on the basis that they were capital in nature.

Gilt avoidance scheme: [Watts v HMRC](#) [2022] UKFTT 408 (TC) (For the taxpayer: Aparna Nathan KC and Colm Kelly instructed by Anthony Collins Solicitors. For HMRC: Jonathan Davey KC and Joshua Carey.) – The FTT upheld HMRC's decision to deny the taxpayer an income tax loss which arose under a tax avoidance scheme relating to the disposal of gilt strips. The FTT applied *Ramsay* and found that there was a single transaction relating to the transfer of gilt strips, which meant that the tax loss was reduced to a negligible amount.

Venue for JR: [R \(on the application of Airedale Chemical Company Ltd\) v HMRC](#) [2022] EWHC 2937 (Admin) (For the claimant: PwC.) – The High Court had issued a minded to transfer order (MTTO) to move the case from London to Leeds. The taxpayer and HMRC jointly objected to the MTTO as both parties' solicitors and Counsel were based in London, but the High Court rejected that objection on the basis that the claim had its "closest connection" to the North-East and taking into account the capacity, resources and workload the various Admin Courts.

Late appeal: [Barrett v HMRC](#) [2022] UKFTT 423 (TC) (For the taxpayer: Hartley Foster instructed by Fieldfisher LLP. For HMRC: John Tallon KC and Sarah Black) – The FTT refused an application for permission to bring a late appeal. The taxpayer was represented by a tax expert working for a large and experienced (unnamed) law firm who failed to file the appeal on time.

Late appeal: [Samuel and Helen Moore \(t/a Moore Farms\) v HMRC](#) [2022] UKFTT 411 (TC) (For the taxpayer: Lowry Grant of FPM Accountants. For HMRC: Isabel McArdle.) – The FTT refused an application for permission to bring a late appeal in relation to the Agricultural Flat Rate Scheme, despite accepting that the appellants had a strong case. The appellants' excuse was that they thought their case would not succeed, but they decided to appeal after a subsequent authority was published. The FTT held that this was not a sufficient reason to allow a late appeal.

State aid: [Fiat Chrysler Finance Europe v EC](#) (C-885/19 P and C-989/19P) – The CJEU set aside the General Court's judgment and annulled the Commission's decision that an advance transfer pricing ruling granted by the Luxembourg tax authorities constituted state aid. The CJEU held that state aid must be judged solely by reference to the national tax system rather than to a "reference framework", and that the Commission was wrong to apply an arm's length principle different from that defined in Luxembourg law.

6. Recent decisions – Indirect tax

Economic reality: [Ashtons Legal v HMRC](#) [2022] UKFTT 422 (TC) (For the taxpayer: Zizhen Yang instructed by Ensors Accountants LLP.) – A partnership set up a shell company in order to enter into a commercial lease, because as a matter of law only four partners could enter into a lease. The FTT allowed an appeal against HMRC's decision that there were two supplies: from the landlord to the company and from the company to the partnership. The economic reality was that this was a lease between the landlord and the partnership, and input VAT was therefore recoverable.

SDLT – Substantial performance: [Candy v HMRC](#) [2022] EWCA Civ 1447 (For the taxpayers: Michael Thomas and Quinlan Windle instructed by Joelson LLP. For HMRC: Imran Afzal) – The CA upheld HMRC's decision that the 12-month window for amending an SDLT return could not be extended where a contract had not completed. Where a contract is "substantially performed", the date of the substantial performance is the date of the transaction, otherwise the system would be open to abuse.

SDLT – Multiple dwelling relief: [Ladson Preston Ltd v HMRC](#) [2022] UKUT 301 (TCC) (For the taxpayers: Patrick Cannon instructed by Goldstone Tax Limited. For HMRC: Ben Elliott.) – The UT held that multiple dwellings relief was not available to the appellants because, although planning permission had been granted, the building was not yet in the course of construction.

SDLT – Avoidance scheme: [M. Brown v HMRC](#) [2022] UKUT 298 (TCC) (For the taxpayers: Ross Birkbeck instructed by Blackfriars Tax Solutions LLP. For HMRC: Ben Elliott.) – The UT held that a marketed SDLT scheme failed. The scheme involved a distribution in specie of a house by a company and was intended to take advantage of the sub-sale relief.

Reinstatement of appeal: [NTK Leisure Ltd v HMRC](#) [2022] UKUT 289 (TCC) (For the taxpayers: Ronan Daly BL. For HMRC: Charlotte Brown) – The UT dismissed an appeal against the FTT's decision not to reinstate an appeal where the appellant had failed to comply with directions and an unless order.

Late appeal: [York Burton Lane Club v HMRC](#) [2022] UKFTT 406 (TC) (For the taxpayer: Dale Pollard of Ashcroft Pollard & Co Ltd.) – The FTT decided not to admit an appeal that was 8 years late even though the taxpayer's case was very strong.

Vouchers: [GE Aircraft Engine Services Ltd v HMRC](#) (Case C-607/20) (For the taxpayer: Les Allen and Waqar Shah of Mishcon de Reya.) – The CJEU held that the provision of retail vouchers by an employer as part of its employee recognition scheme was intended to increase the employees' performance and was not carried out for purposes other than those of the business. There was therefore no deemed supply of services.

Place of supply: [Climate Corporation Emissions Trading GmbH v Finanzamt Österreich](#) (C-641/21) – The CJEU held that the place of supply of a service cannot be altered on the ground that the supplier knew or should have known that the transaction was vitiated by VAT evasion.

Economic activity: [Gmina O](#) (Case C-612/21) and [Gmina L](#) (Case C-616/21) – AG Kokott expressed the view that certain activities carried out by two municipalities (projects to install renewable energy sources and to remove asbestos from residential properties) constitute supplies, but the supplies were not carried out in the course of an economic activity and were therefore outside the scope of VAT.

Triangulation: [Luxury Trust Automobil GmbH v Finanzamt Österreich](#) (C-247/21 AGO) – AG Kokott expressed the view that the triangulation rules could only apply where the intermediary had included a reference to "reverse charge" in their invoice. This is on the basis that triangulation is an option that can only be effectively exercised if that reference is included.

7. Media

Uber settlement: HMRC's long-running investigation into Uber's VAT affairs has come to an end and resulted in a £615m [settlement](#). Uber had previously argued that it was exempt from paying VAT because its drivers were self-employed. However, this position was no longer tenable in light of recent court rulings that its drivers are workers, as a result of which Uber started charging 20% on its fares in March 2022. The Good Law Project has queried whether the settlement reflects the full amount that HMRC was asking for.

HMRC misrepresentation claim: HMRC has issued a claim against EY on the basis that it made misrepresentations to it during the negotiation of a tax settlement with British property investor Jamie Riblat, as [reported](#) by the FT. The claim is linked to a broader dispute about whether the 2015 settlement of £400 should block further taxes on £141m of profits paid after the settlement was reached. The action is referenced in a claim brought by Mr Riblat against HMRC for breach of the settlement. The papers relating to both cases are available on the [FT website](#).

Retained EU law: The government's plan to replace or repeal all retained EU law via secondary legislation has suffered a setback, as new pieces of legislation have been discovered, according to [the FT](#). It was initially thought that there would be 2,400 laws to review or repeal, but that number has now increased to 3,800.

Making tax digital: Tax advisers have flagged that HMRC's new platform for companies to register for and pay VAT has "caused havoc", according to [the FT](#). Previously, VAT registrations would clear within a few days, whereas now there are delays of up to 12 weeks. Foreign sellers face the worst delays, and as a result some have decided against trading in the UK.

Tax debt: Tax debt owed to HMRC has increased by 10% in the last three months, from £34.3bn to £37.8bn, according to information provided by Pinsent Masons to [Tax Journal](#). The number of tax investigations opened by HMRC has also increased to 72,000 civil compliance checks opened in the second quarter of 2022, a 22% increase on the first quarter.

Pillar Two: The Autumn Statement provided more detail on the timeline for the implementation of the

OECD's Pillar Two proposal. The multinational top-up tax will apply in the UK to accounting periods beginning on or after 31 December 2023. The new rule will require large groups to pay a top-up tax where their UK operations have an effective tax rate of less than 15%. However, the FT has [reported](#) on calls from businesses to delay the new rule to avoid burdening companies with impossible reporting deadlines.

Taxpayer Protection Taskforce: [TaxWatch](#) reports that HMRC is due to wind down its Taxpayer Protection Taskforce from March 2023. The Taskforce was launched in April 2021 in order to recover billions of pounds incorrectly claimed as part of the three Coronavirus support schemes administered by HMRC. According to TaxWatch, HMRC has collected less than 25% of the funds lost to fraud and error, leaving over £3.3bn unrecovered.

Discovery assessments: BDO has published an [article](#) in Tax Journal which reviews recent case law on discovery assessments. This is a useful retrospective of decisions following the Supreme Court judgment in *HMRC v Tooth*, which clarified whether discoveries may be made more than once, if they may be invalidated by "staleness" and when a mistake is deliberate.

Statutory reviews: RPC have [considered](#) whether HMRC can cancel a statutory review decision and replace it after it has been issued. The answer is no (at least under TMA 1970): according to the legislation and as confirmed by case law, a determination by a review officer is binding on HMRC, similarly to a s. 54 agreement.

Crypto exchange collapse: Andersen published an [article](#) on AccountingWeb about what advisors can do to help their clients when a crypto exchange collapses (such as in the case of FTX). This is an interesting read as it points to some areas of potential dispute with HMRC in relation to demonstrating loss for CGT purposes.

Domicile: Charles Russell Speechlys have published an [article](#) in Tax Journal on how remittance basis users can remit "non-clean capital" without incurring a tax charge. This is a good summary of the various reliefs and exemptions available to remittance basis users.