



## Tax Updates – October 2022

### Highlights

- October has been a turbulent month, culminating in the new Chancellor's announcement that there will be an Autumn Statement on 17 November which will scrap almost all of the tax measures announced in the "mini" Budget.
- One U-turn we have not seen so far relates to the abolition of the Office of Tax Simplification.
- There have been a few interesting Tribunal decisions on procedure, including around disclosure, third party access to bundles and the relevance of a criminal plea in civil tax proceedings.
- There has been increasing focus on tax avoidance and evasion and whether the distinction is useful.
- Six months after its introduction, PPT is getting a lot of attention, mainly as it has not had as wide an impact as expected.

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## 1. Upcoming hearings

**UKSC:** *News Corp UK & Ireland v HMRC* (Case ID 2021/0047) – Hearing date: November 2022 – VAT zero rating of digital editions of The Times, The Sunday Times and The Sun.

**UT:** *M Group Holdings Ltd v HMRC* (Case ID UT-2021-000106) – Hearing date: 7-9 November 2022 – Availability of Substantial Shareholdings Exemption (SSE) where the relevant shares owned for less than 12 months.

**UT:** *Prudential Assurance Company Limited v HMRC* (Case ID UT-2021-000175) – Hearing date: 14-17 November 2022 – VAT on supply of investment management services between companies that are part of the same VAT group.

**UT:** *Scanwell Logistics (UK) Limited v HMRC* (Case ID UT-2021-000195) – Hearing date: 25 November 2022 – Onward Supply Relief (“OSR”) on goods imported to the UK from China for onward transport to EU countries.

**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 were acquired as part of an estate, as a capital asset.

**UT:** *Red, White and Green Ltd v HMRC* (Case ID UT-2020-0089) – Hearing date: 16-18 January 2023 – IR35 appeal by Eamonn Holmes on the basis that IR35 applied to his four contracts for provision of services on This Morning between 2011 and 2015.

**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 partial exemption special method it had agreed with HMRC.

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

## 2. Legislation and consultations

**Growth Plan:** Chancellor Jeremy Hunt’s Autumn Statement is expected to be delivered on 17 November.

**U-turn:** The Chancellor has [announced](#) that “almost all” of the tax measures set out in the “mini” Budget would be scrapped. In particular, plans to scrap the 45% additional income tax rate will be reversed, the basic rate will remain at 20% and the IR35 and dividend rate reforms will no longer go ahead.

**Digital platforms:** HMRC has published a [consultation](#) on draft regulations to implement the OECD’s Model Reporting Rules for Digital Platforms. The rules will require UK platform operators to collect, verify and report details of sellers to HMRC. HMRC will share the information with other tax authorities and use it to tackle non-compliance.

**HMRC statistics:** HMRC has published a [consultation](#) on proposed changes to its statistical publications. In particular, HMRC plans to reduce statistical publication to streamline production.

**Remote participation in hearings:** A new [report](#) on the status of the Coronavirus Act 2020 confirms that temporary powers to allow remote participation in court and tribunal hearings have now been made permanent under s. 85A of the Courts Act 2003.

**Consultation responses:** CIOT has responded to two live HMRC consultations:

- The consultation on improving data HMRC collects from its customers. The [response](#) flags that gathering additional data will place an additional burden on HMRC and will increase complexity around tax compliance.
- The consultation on the draft Finance Bill. The [response](#) focuses on CGT, transfer pricing documentation and pension schemes.

**EU blacklist:** The EU has added Anguilla, the Bahamas and the Turks and Caicos Islands to its [list of non-cooperative jurisdictions](#) over concerns that these jurisdictions are attracting profits without real economic activity.

## 3. HMRC guidance

**R&D relief:** HMRC has updated its [Internal Manual](#) on R&D tax relief and the conditions to be satisfied to be eligible for the relief.

**SMEs:** Guidance on changes to SME limits has been [published](#). The definition of small business will be extended to businesses with fewer than 500 employees (previously 50). This applies from 3 October 2022, and the government will consult on extending the threshold to businesses with 1,000 employees in the future.

**Information notices:** HMRC has published a new [factsheet](#) CC/FS71 Compliance checks: information notices on penalties for facilitating avoidance schemes involving non-resident promoters. The notice explains the situations where HMRC may issue a penalty for facilitating an avoidance scheme involving a non-resident promoter.

**Overseas Entities Register:** [Guidance](#) has been published on the Register of Overseas Entities, which will require overseas entities who want to buy, sell or transfer property or land in the UK to inform Companies House who their registrable beneficial owners or managing officers are.

**New Compliance Guidelines:** On 6 October 2022, HMRC published [How Guidelines for Compliance \(GfC\) help you with tax](#) and [GFCI \(2022\): Guidelines for Compliance: help with PAYE Settlement Agreement calculations](#). GfCs are an additional tool for taxpayers in areas with a high risk of non-compliance and indicate that businesses following them will operate in a more “low tax-risk environment”. The latter is the first set of HMRC GfCs, offering its view on best practice for PAYE settlement agreement calculations and HMRC’s “known position” for the purpose of the Uncertain Tax Treatment rules.

**Statutory clearance:** HMRC has shared with CIOT a [checklist](#) for use when making statutory clearance applications. This will shortly be published on gov.uk.

**Civil tax disputes:** HMRC has published [guidance](#) on how it resolves civil tax disputes. This sets out HMRC’s internal governance arrangements for resolving tax disputes.

**GAAR - SDLT:** A new GAAR Advisory Panel [opinion](#) on SDLT arrangements has been published.

The Panel has notified promoters and conveyancing lawyers involved in defeated SDLT avoidance that arrangements designed to avoid SDLT using alternative finance arrangements were not a reasonable course of action. Penalties will now be assessed for those involved.

**VAT - Museums:** Guidance on applying for the VAT Refund Scheme for museums and galleries has been [published](#) (see previous issue for announcement).

**VAT – Flat Rate Scheme:** A new [VAT Notice 733](#) on the Flat Rate Scheme for small businesses has been published. This explains the operation of the Scheme, who can use it and how to apply to join.

**VAT – Cash Accounting Scheme:** [VAT Notice 731](#) has been updated to confirm that businesses cannot use the Cash Accounting Scheme for supplies that are subject to one of the domestic reverse charges.

**Plastic Packaging Tax:** HMRC [guidance](#) has been updated to provide more information and examples on what packaging is exempt from PPT. HMRC has also published new [guidance](#) on secondary and joint and several liability for PPT.

**Bilateral Advance Pricing Arrangements:** The OECD has published a [manual](#) on the operation of BAPAs and best practices. BAPAs provide advance certainty to taxpayers and tax administrations in relation to international transactions.

## 4. HMRC spotlights and nudge letters

**Foreign Tax Credit Relief:** HMRC will start sending One to Many [reminder letters](#) to taxpayers who claimed Foreign Tax Credit Relief against tax deducted from foreign employment income in their 2020/21 returns. The letters set out points that taxpayers should take into account before making similar claims for 2021-22.

**ATED:** HMRC will start sending One to Many [reminder letters](#) to taxpayers making ATED returns for 2022/23. HMRC are reminding taxpayers who own a relevant property worth over £500,000 to submit their returns by 30 April 2023.



## 5. Recent decisions – Direct tax

**Withholding tax relief:** [\*HMRC v Aozora GMAC Investment Ltd\*](#) [2022] UKUT 258 (TCC) (For the taxpayer: David Ewart KC instructed by Eversheds. For HMRC: James Rivett KC and Barbara Belgrano.) – The Upper Tribunal upheld the FTT decision allowing the taxpayer's appeal on the basis that domestic legislation (currently s. 11(3) TIOPA 2010) did not prevent the taxpayer from being entitled to unilateral relief in the UK for US withholding tax on interest, even though the taxpayer was not entitled to relief under the US-UK DTA as a result of the limitation on benefits provision.

**Residence:** [\*McCabe v HMRC\*](#) [2022] UKFTT 356 (TC) (For the taxpayer: Nicola Shaw KC and Samuel Brodsky instructed by Mazars. For HMRC: Christopher Stone and Charlie Hill.) – The FTT held that the taxpayer remained resident in the UK despite trying to establish a clean break. This was because his “centre of vital interests” under the Belgium-UK DTA was the UK.

**Disclosure:** [\*Ellis and another v HMRC\*](#) [2022] UKUT 254 (TCC) (For the taxpayer: Michael Firth instructed by RPC. For HMRC: Howard Watkinson and Marika Lemos.) – The UT dismissed the taxpayers' appeal against an FTT order for disclosure of documents to HMRC. The decision sets out the scope of the disclosure requirements and explains the processes which must be followed before an order can be approved.

**EBT scheme/insolvency:** [\*Asertis Ltd v Heathcote & another\*](#) (For the Claimant: Douglas Cochran instructed by Primas Solicitors. For the Defendant: Chelsea Carter instructed by BBS Solicitors) – The High Court held that EBT scheme transactions entered into by a company with the intention to provide tax-efficient remuneration were not later recoverable by the liquidator, despite HMRC's decision that the transactions were taxable as employment income.

**Judicial review of regulations:** [\*R \(Tax Returned Ltd\) v HMRC\*](#) [2022] EWHC 2515 (Admin) (For the taxpayers: Joanne Clement KC and Zac Sammour instructed by Hill Dickinson. For HMRC: Adam Tolley KC and Marika Lemos.) – This was a challenge by a number of high-volume tax refund companies to regulations which specify the form which must be used to make repayment claims. The reason for the challenge was that such companies often use bespoke forms which do not require the same level of detail as the HMRC form. This was only a procedural hearing at which the Court held that the application was brought in time, but it will be interesting to keep an eye on the substantive proceedings.

**Information notices:** [\*B Davies and others v HMRC\*](#) [2022] UKFTT 369 (TC) (For the taxpayers: Michael Clarke.) – The FTT held that the information requested by HMRC was not reasonably required to check the taxpayers' position and directed HMRC to issue closure notices. This was because the information would have taken a long time to compile, and even if provided it would not give HMRC the information it actually required.

## 6. Recent decisions – Indirect tax

**Marshmallows:** [Innovative Bites Ltd v HMRC](#) [2022] UKFTT 352 (TC) (For the Appellant: Tim Brown instructed by The VAT Consultancy.) – The FTT considered the VAT treatment of “Mega Marshmallows”. The FTT allowed the appeal on the basis that they are sold and purchased as products for roasting over a fire and are ingredients for “s’mores”, as made clear by the packaging. They are not items of confectionery and are exempt.

**Civil vs criminal:** [R Binfield v HMRC](#) [2022] UKFTT 364 (TC) (For the taxpayer: Andrew Young. For HMRC: Joseph Millington.) – The taxpayer was convicted of tax evasion as he failed to pay VAT on a property transaction. In the civil hearing, he argued that no VAT was due because the transaction was a TOGC; he said he had only accepted it was taxable in the criminal trial to avoid a custodial sentence. The FTT held that it would be an abuse of process to allow the taxpayer to pursue the TOGC argument.

**Time limits:** [DCM \(Optical Holdings\) Ltd v HMRC](#) [2022] UKSC 26 (For the taxpayer: Julian Ghosh KC and David Welsh instructed by Harper Macleod LLP. For HMRC: David Thomson KC and Ross Anderson.) – The Supreme Court held that an assessment of under-declared VAT was not time barred, because the time ran from when HMRC had actual (not just constructive) knowledge of facts sufficient to justify the raising of the assessment. The Supreme Court mentioned that the principle of fiscal neutrality applied domestically, despite the UK’s departure from the EU.

**Third party access to documents:** [Bounqylagoon Ltd v HMRC](#) [2022] UKFTT 361 (TC) – The FTT held that a BBC journalist should not be permitted access to the hearing bundle as that would not further the principle of open justice in any material way.

**Evidence to support a claim:** [HMRC v NHS Lothian Health Board](#) [2022] UKSC 28 (For the taxpayer: David Southern KC and Denis Edwards instructed by Clyde & Co. For HMRC: David Thomson KC and Ross Anderson.) – The Supreme Court allowed HMRC’s appeal on the basis that NHS Lothian had not provided sufficient evidence to support the amount of VAT claimed. It is not enough for the taxpayer to show that it engaged in business activity

and paid VAT on supplies it bought, but it also had to provide evidence to show (or allow HMRC to quantify) the input tax incurred.

**Local authorities:** [Northumbria NHS Trust v HMRC](#) [2022] UKUT 267 (For the taxpayer: Michael Firth instructed by VATangles VAT Consultancy. For HMRC: Howard Watkinson.) – This appeal concerned the VAT status of car parking charges levied by an NHS trust. The UT found against the trust and held that the supplies were not exempt because the trust was a taxable person.

**Alcohol diversion fraud:** [Sintra Global Inc v HMRC](#) [2022] UKFTT 365 (TC) (For the taxpayer: Alistair Webster KC and Simon Gurney instructed by Freeths LLP. For HMRC: John McGuinness KC, Ben Hayhurst and Gerwyn Wise.) – The FTT held that HMRC had failed to make out its case to support its VAT and excise assessments and penalties. It held that HMRC had reason to be suspicious of the arrangements, but suspicion is not proof.

**Finance agreements:** [Raiffeisen Leasing v Republic of Slovenia](#) (C-235/21) – The CJEU considered the imposition of VAT in relation to sale-and-lease back agreements on land. It held that in the absence of a VAT invoice, a contractual agreement may be regarded as an invoice if it contains all the information necessary for the tax authorities to establish whether the substantive conditions for the right to deduct VAT are satisfied.

**Sub-participation arrangement:** [O. Fundusz Inwestycyjny Zamknięty reprezentowany przez O.S.A.](#) – The CJEU held that a sub-participation arrangement was a VAT exempt credit transaction. This was because the taxpayer was making capital available in return for remuneration (i.e. a loan) and the sub-participation (i.e. sub-contracting the risk to another financial institution) did not change this.

**Reemtsma claim:** [Humda](#) (C-397/21): The CJEU held that, in light of the principles of effectiveness and neutrality, a taxable person must be able to claim from the tax authorities a refund of VAT unduly invoiced but paid (with interest) where it is impossible or excessively difficult to recover the VAT from a supplier which has gone into liquidation.

## 7. Media

**Whistleblowers:** The FT has published an [article](#) on HMRC whistleblower reports, which have increased by 70% over the past two years. Pinsent Masons have commented that this is likely to be due to a high number of reports of furlough fraud.

**Bank tax:** UK banks have [warned](#) that taxes on the sector (including the increase in corporation tax to 25% from next April and the proposed 8% bank surcharge) are putting pressure on midsized lenders. Not everyone is impressed with their plight, though, especially given rising interest rates. The FT has published an [opinion](#) on the pros and cons of taxing the sector.

**Tax avoidance/evasion:** The All-Party Parliamentary Group for Anti-Corruption and Responsible Tax and TaxWatch have published a joint [report](#) proposing that arrangements currently treated as tax avoidance could be prosecuted as tax fraud. The report calls on the government to close loopholes which allow tax fraud to go unpunished. TaxWatch have summarised the main points on their [website](#).

**Tax simplification:** A lot has changed since the “mini” Budget, but so far there has been no U-turn on the abolition of the OTS. PwC considered the future of tax simplification in an [article](#) for Tax Journal. CIOT has also [written](#) to the Chancellor asking him to retain the OTS.

**Retained EU law:** Tanja Velling of Slaughter and May has published an [article](#) on what the sunset clauses in the Retained EU Law (Revocation and Reform) Bill will mean for tax. In a nutshell, the plan is for all changes relating to tax law to be made via the Finance Bill or subordinate legislation, and for bespoke legislation to be introduced for retained EU law concerning VAT, excise and customs duty.

**VAT on TOGC:** BDO have written a useful [summary](#) of the VAT provisions that apply to TOGCs. The TOGC conditions should be borne in mind because, if they are met, the sale of assets will not be treated as a supply for VAT purposes.

**Plastic Packaging Tax:** Pinsent Masons have published an [article](#) reviewing the PPT six months after its introduction. Although registrations have been lower than expected, the new tax has achieved its goal of changing behaviour, as there have been visible efforts by large manufacturers to adopt either non-plastic packaging or switch to recycled plastic packaging.

**Recession and tax:** There is a new [PLC note](#) called “Recession and economic instability toolkit”. While not tax-specific, the note does highlight some tax issues that come up in a recession (e.g. dealing with loan finance and restructurings).

**Crypto-asset reporting:** The OECD has published a [report](#) setting out a new global tax transparency framework for the reporting and exchange of information in relation to crypto-assets. This framework aims to standardise the exchange of information in a similar manner to the CRS. The CRS is also being amended to cover digital financial products.

**Litigation funding:** Last month, the EU Parliament voted to bring in greater regulation of the EU’s litigation funding sector. Pinsent Masons have [mixed feelings](#) on this.

**OECD warning:** Finally, a [warning](#) from Pascal Saint-Amans, the outgoing tax director of the OECD, that the US and Europe risk reviving trade wars and face significant lost revenue if they fail to implement the agreed two-pillar solution to address the tax challenges arising from the digitalisation of the economy.