Tax Updates – December 2022

Highlights

- The new VAT penalty and interest regime came into force on 1 January 2023.
- The new Electricity Generator Levy also applies with effect from 1 January 2023 on exceptional receipts generated from the production of wholesale electricity.
- The European Commission has released the VAT in the Digital Age proposed legislation package.
- The OTS has published its final report on the tax implications of hybrid and remote working and will now close down.
- The Digital Services Tax is in the spotlight, with the publication of CIOT's response to the Public Accounts Committee's inquiry into its design, implementation and administration, as well as the NAO's report on HMRC's administration of the tax.

Contents

1. Upcoming hearings

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.

UT: *United Grand Lodge of England v HMRC* (Case ID: UT-2022-00009) – Hearing date: 24-25 April 2023 – VAT exempt supplies relating to membership fees charged to Freemasons.

2. Legislation and consultations

Legislation – VAT penalties: The Finance Act 2021 (Value Added Tax) (Penalties) (Appointed Day) Regulations 2022 have been made, bringing the new VAT penalties for late filing and late payment set out in Schedules 24 and 26 to the Finance Act 2021 into force from 1 January 2023. HMRC has also published new guidance in its Compliance Handbook at 192000 and 193000.

Legislation – VAT interest: The Finance Act 2009, Finance (No. 3) Act 2010 and Finance Act 2021 (Value Added Tax) (Interest) (Appointed Days) Regulations 2022 have been made, applying the late payment interest and repayment interest in ss. 101 and 102 of the Finance Act 2009 to VAT from 1 January 2023. HMRC has also updated its Compliance Handbook to reflect these changes.

Draft legislation – Electricity Generator Levy: HMRC has published a policy paper, supplementary technical note and draft legislation on the Electricity Generator Levy, which will apply at a 45% rate on the exceptional receipts generated from the production of wholesale electricity. The levy will be in place from 1 January 2023 to 31 March 2028.

Announcement – REITs: The Chancellor has announced proposed changes to the tax rules for real estate investment trusts (REITs). The reforms will remove the requirement for a REIT to own at least three properties, as long as they hold a single commercial property worth at least £20m. There will also be an amendment to the rules applying to properties disposed of within three years of significant development activity.

Consultation – TP: HMRC is consulting on the draft Transfer Pricing Records Regulations 2023, which will require MNEs with a turnover of €750m or more, operating in the UK, to keep a master file and local file in accordance with the OECD Transfer Pricing Guidelines.

Consultation – Fund management: HMRC has published a consultation on a proposed reform of the VAT rules on fund management. The consultation is proposing to put on a statutory footing the principles resulting from case law and guidance with a view to simplifying and clarifying this area.

Consultation – DASVOIT: HMRC is consulting on the Draft Indirect Taxes (Notifiable Arrangements) (Amendment) Regulations 2023, which will amend the descriptions of various tax avoidance arrangements in the Indirect Taxes (Notifiable Arrangements) Regulations 2017. The purpose of the amendments is to ensure that the relevant disclosure requirements also apply in relation to supplies between VAT group members.

Consultation – R&D guidance: HMRC has published draft guidance on the proposed changes to R&D tax relief which are due to be included in the Finance Bill 2023 and take effect from April 2023. HMRC has invited comments by 28 February 2023.

Consultation outcome – Funds: HMRC has published the summary of responses to its consultation "Expanding the Investment Transactions List for the Investment Management Exemption (IME) and other fund tax regimes", which covered a proposed expansion of the IME to include cryptoassets. HMRC has also made the relevant regulations. Macfarlanes have queried the timing of this development in light of recent events in the crypto markets.

OTS report – Hybrid working: The OTS has published its report on the tax implications of hybrid and remote working. Due to the short time available to OTS before its closure, the report mainly summarises the evidence received and does not make any recommendations. The key findings are organised around domestic issues (in relation to deductible expenses for hybrid working) and international issues (PE, income tax, social security, short-term visitors and the need to improve and simplify the guidance).

Consultation response – DST: CIOT has responded to the Public Accounts Committee inquiry into the design, implementation and administration of the DST. CIOT welcomes the government's plans to remove the DST once BEPS Pillars One and Two have been implemented, and has criticised the DST as "a blunt instrument that cannot accurately represent the tax on the profits related to user based value on all businesses on which it is imposed".

DTA: The UK-Brazil Double Tax Agreement has now been signed and published.

EU – Pillar Two: The EU Council has reached agreement to implement the OECD BEPS Pillar Two at EU level. EU member states have advised the Council to adopt the Pillar Two Directive, which will provides for a minimum tax rate of 15% on the profits of MNEs with a turnover of at least €750m. Member states will have until the end of 2023 to transpose the directive into national law.

EU – VAT in the Digital Age: The European Commission has released proposed legislation for VAT in the Digital Age. The measures cover three areas: e-invoicing and digital reporting, moving to a single VAT registration when trading across the EU, and the taxation of the platform economy. The legislation will be debated and will need unanimous support from the EU Council in order to pass.

EU – Cryptoassets: The European Commission has released proposals for new transparency rules requiring all service providers to report transactions in cryptoassets for EU customers. These will be implemented through an amendment to DAC 8 and aim to improve Member States' ability to detect and counter tax fraud, evasion and avoidance.

EU – ATAD 3: The European Parliament has put forward amendments to the proposed ATAD 3 directive, which is designed to prevent the misuse of shell entities for tax purposes. These amendments are significant because they show that there is greater awareness of the roles that some holding vehicles play in fund structure. Macfarlanes have prepared a useful summary of the directive and the further amendments we may see before it is approved by the Council.

OECD – Pillar One: OECD is consulting on the main design elements of Amount B under Pillar One relating to the simplification of transfer pricing rules. Interested parties can send their comments by 25 January 2023.

OECD – Pillars One and Two: OECD has also published a package of BEPS policy papers. These include guidance on the Pillar Two safe harbours and a consultation on Pillar One rules that would require countries to abolish DSTs, the proposed GloBE information returns for groups in scope of Pillar Two, and tax certainty and dispute resolution under Pillar Two.

3. HMRC guidance

Labour fraud: HMRC has published guidance on checking for signs of labour fraud in the construction industry. The guidance explains what labour fraud is, how to recognise it and how employers and workers can report it to HMRC.

Loan charge: HMRC has updated its "Disguised remuneration settlement terms 2020 for tax agents or advisers" guidance. The guidance has been amended to confirm that a charge under s. 222 of ITEPA 2003 can arise on the loan charge when an individual has used an employment-based scheme, their employer was required to account for tax under PAYE on the loan charge income, and the individual, as an employee, did not make good the tax within the time allowed. The guidance also provides that HMRC will not collect any s. 222 charge on loan charge income if the conditions set out therein apply.

Interest rates: In light of the Bank of England's increase of the base rate, HMRC has increased its late payment interest rate for most taxes to 6% and its repayment interest rate to 25%, effective from 6 January 2023.

Register of Overseas Entities: HMRC has published a policy paper on the tax implications of the Register of Overseas Entities, in particular, for managers or administrators of overseas entities, trustees of non-UK trusts and UK resident beneficial owners.

GAAR: The GAAR Advisory Panel has published an opinion on arrangements involving a loan by a pension scheme to a member of the scheme. The arrangement involved the purchase by the pension scheme of an investment product that was transferred to a member and then cancelled, resulting in the member receiving a payment for the value of the investment. The Panel found that the payment was a loan and therefore taxable as an unauthorised payment.

Modes of address: The Lord Chief Justice and Senior President of Tribunals have announced a change in the practice of how certain judges are address in court. In particular, Tribunal judges should be addressed as "Judge", rather than "Sir" or "Madam".

4. HMRC spotlights and nudge letters

Mixed membership partnerships: HMRC has started issuing One to Many letters to nominated partners in mixed membership partnerships (i.e. partnerships that have both individual and non-individual partners), asking them to check that they are applying the rules correctly.

Disguised remuneration: HMRC has published a spotlight on tax avoidance schemes that use remuneration trusts to reduce profits and disguise income in light of three recent Tribunal decisions.

5. Recent decisions – Direct tax

Capital allowances: Urenco Chemplants Ltd v HMRC [2022] EWCA Civ 1587 (For the taxpayer: Jonathan Peacock KC and Michael Ripley instructed by Enyo Law LLP. For HMRC: Jonathan Bremner KC and Edward Waldegrave.) – The Court of Appeal held that expenditure on the construction of a nuclear deconversion facility did not qualify for capital allowances as it was incurred in relation to premises, not plant or machinery.

Unallowable purpose: Kwik-Fit Group Ltd v HMRC [2022] UKUT 314 (TCC) (For the taxpayer: Julian Ghosh KC and Laura Ruxandu instructed by Baker McKenzie. For HMRC: Elizabeth Wilson KC and Ronan Magee.) – The UT upheld the FTT decision that intra-group loan relationships had an unallowable purpose as the interest claimed by the taxpayers was a "tax advantage" under s. 441 of CTA 2009.

Avoidance scheme: Clipperton v HMRC [2022] UKUT 00351 (TCC) (For the taxpayer: Michael Jones KC instructed by RPC. For HMRC: Aparna Nathan KC and Laura Poots.) – The UT held that, taking a *Ramsay* purpose approach, sums received by the taxpayers from arrangements involving a company of which they were sole shareholders and directors were liable to income tax as distributions and also under the settlements legislation.

DOTAS: HMRC v Root2 Tax Ltd [2022] UKUT 00353 (TCC) (For HMRC: Aparna Nathan KC and Georgia Hicks.) – The UT dismissed HMRC's application to determine a penalty for non-compliance by a tax avoidance scheme promoter with the DOTAS information requirements. The UT held that a promoter is only required to notify HMRC the first time it becomes aware of a transaction forming part of a particular scheme.

NICs: Wagstaff v HMRC [2022] UKUT 00327 (TCC) (For the taxpayer: Sam Brodsky. For HMRC: Giselle McGowan.) – The UT dismissed an appeal against an FTT decision dismissing the taxpayer's appeal against a Personal Liability Notice (PLN) issued to the director of a company in liquidation in respect of the company's NICs liability. The UT held that the PLN had been issued in time.

Dividends: Gould v HMRC [2022] UKFTT 431 (TC) (For the taxpayer: David Yates KC. For HMRC: Charles Bradley.) – Two equal shareholders had dividends authorised on the same day, but paid on different dates in different tax years for tax planning purposes. The FTT held that the planning was effective, as each taxpayer only had a right to the dividend when it was paid, not when it was declared.

Preliminary issue: Embiricos v HMRC [2022] UKFTT 464 (TC) (For the taxpayer: Kevin Prosser KC and Barbara Belgrano instructed by Moore Family Office Ltd. For HMRC: Sebastian Purnell.) – The FTT refused the taxpayer's application to have the issue of domicile dealt with as a preliminary issue, as a lengthy hearing would have been required to determine the issue and there was potential for significant delay to any subsequent hearing on quantum.

Late appeal: MPTL Limited v HMRC [2022] UKFTT 00472 (TC) (For the taxpayer: Liesl Fichardt and Emily Au of Quinn Emanuel. For HMRC: Georgina Hirsch.) – The FTT refused the taxpayer's application for permission to bring a late appeal. The appeal was 59 days late due to failure by the taxpayer's previous advisors to file it on time. The FTT held that the taxpayer could not distance itself from that failure.

Costs: Opus Labour Services (in liquidation) v HMRC [2022] UKFTT 00470 (TC) (For the taxpayer: Mr Mayes of Simmons Gainsford LLP. For HMRC: Joanna Vicary.) – The FTT refused the taxpayer's late application to opt out of the costs regime for complex cases. The FTT held that the adviser's forgetfulness was not a good reason for the failure to comply with the time limit to opt out.

FOI request: Keith Gordon v The Information Commissioner & HMRC [2022] UKFTT 437 – The FTT held that HMRC was entitled to refuse a request under the Freedom of Information Act 2000, even though the information sought was in the public domain and no longer confidential.

Beneficial ownership registers: Joined cases Luxembourg Business Registers (C-37/20) and Sovim (C-601/20) – The CJEU held the European Anti-Money Laundering Directive, which allows public access to details of company beneficial ownership, was invalid, as it constituted a "serious interference" with the rights to respect for private life and the protection of personal data (Articles 7 and 8 of the Charter of Fundamental Rights).

6. Recent decisions – Indirect tax

Medical exemption: *Mainpay Limited v HMRC* [2022] EWCA Civ 1620 (For the taxpayer: Michael Firth instructed by direct access. For HMRC: Sarabjit Singh KC and Jennifer Newstead Taylor.) – The CoA found in favour of HMRC and held that a supply of hospital consultants to an agency which in turn supplied those consultants to NHS hospitals was a taxable payroll service, not an exempt supply of medical care.

VAT registration: *GB Fleet Hire Ltd v HMRC* [2022] UKUT 307 (TCC) (For the taxpayer: Kieron Beal KC instructed by VC Law Ltd. For HMRC: Howard Watkinson.) – The taxpayer appealed against HMRC's decision to refuse its application for VAT registration, after it had previously been compulsorily deregistered on the basis that its registration was being used abusively. The FTT struck out the appeal on the basis that it had no chance of success. The UT overturned the strike out as HMRC had not provided sufficient evidence that the 2020 registration was abusive.

Car parking: *Borough Council of King's Lynn and West Norfolk v HMRC* [2022] UKUT 00326 (TCC) (For the taxpayer: Natasha Barnes instructed by PSTAX Ltd. For HMRC: Brendan McGurk.) – This case concerned the VAT treatment of overpayments made for off-street parking to the local council, where the charges are collected by a machine which does not offer change. The UT upheld the FTT's decision that the overpayments are part of the consideration for the provision of parking services by the council.

Evidence of company activity: *Apollinaire Ltd v HMRC* [2022] UKFTT 432 (TC) (For the taxpayer: Rebecca Sheldon instructed by Croner Taxwise Ltd.) – The FTT dismissed appeals against VAT assessments in relation to TOGC. The decision was based on evidence submitted by HMRC consisting of date stamped Google images which contradicted the taxpayer's story regarding the operation of his company.

VAT overpayment: *Pye Motors Ltd v HMRC* [2022] UKFTT 471 (TC) (For the taxpayer: Adam Rycroft, solicitor of KPMG LLP. For HMRC: James Puzey.) – The taxpayer overpaid output tax to HMRC and claimed interest on that amount. The FTT held that neither the overpayment nor any delay in the repayment of the overpaid tax were the result of HMRC error.

SDLT – Grazing and rewilding land: *Withers v HMRC* [2022] UKFTT 433 (TC) – The taxpayer appealed against a closure notice in relation to SDLT on a land transaction. The FTT allowed the appeal and held that the land in question was not residential, as it was used for grazing and rewilding under agreements with a local farmer and the Woodland Trust, and therefore had a self-standing function.

Customs duty: *Thyssenkrupp Materials (UK) Ltd v HMRC* [2022] UKFTT 443 (TC) (For the taxpayer: Jeremy White instructed by KPMG. For HMRC: Edward Waldegrave.) – The FTT dismissed the appeal and held that an error in the bill of discharge provided to HMRC in relation to goods on which inward processing relief had been claimed invalidated the whole claim.

7. Media

Covid fraud: HMRC has halved its target for recovering losses from fraudulent and erroneous claims made through the Covid-19 support schemes, from £2bn down to £1.1bn, according to the FT. Jim Harra gave evidence to the House of Commons Treasury select committee that the figure had been revised as there had been a larger number of smaller cases than originally predicted.

Tax investigations: The FT has reported on figures published by the National Audit Office that a fall in investigations over the pandemic has cost HMRC around £9bn. This is due to a fall in investigations by 30% in 2020-21 and a fall in criminal prosecutions from 700 to 163 compared to the previous year.

Tribunal backlog: The Tax Tribunal backlog has increased following an HMRC crackdown on fraudulent "umbrella companies", according to City AM. The First-tier Tribunal backlog has increased by 84%, with 46,000 cases waiting to be heard. The number of new appeals has also increased by 738%, rising from 1,200 in 2021 to 10,000 in 2022. This is said to be at least partly due to HMRC's targeting of umbrella companies that are said to avoid tax by disguising payments to workers as non-taxable loans, grants and annuities.

Windfall tax: The FT has reported that Community Windpower, a UK developer of onshore wind farms, has written to the Treasury threatening to take legal action against the government unless it scraps or amends the new windfall tax on low-carbon electricity generators. Mishcon de Reya will be representing Community Windpower.

Carbon border tax: The EU has signed off on the introduction of the Carbon Border Adjustment Mechanism, which will introduce the world's first major carbon border tax, as reported by the FT. The deal is expected to be formally agreed by the European Council and will come into force in 2026.

Making Tax Digital: HMRC has announced a further delay of the requirement to use Making Tax Digital software for self-assessment income tax returns, according to the FT. The scheme has been pushed back to April 2026, after having been initially announced in 2015.

UTT: HMRC has published an uncertain tax treatment (UTT) policy evaluation plan. HMRC will evaluate UTT to assess whether it is achieving its stated aim to help close the legal interpretation portion of the tax gap. HMRC will review three areas: administrative burdens, customer service and the effectiveness of the measure in reducing the tax gap.

Human rights: Stewarts have published an article in Tax Journal reviewing the main protections offered by the ECHR in the context of tax penalties. This is a useful reminder of how human rights arguments can be deployed to challenge penalties.

DST: The NAO has published a report of their investigation into HMRC's implementation of the DST since its introduction in April 2020. The NAO has found that HMRC collected £358m in DST receipts in 2020-21, which was 30% more than initially forecast. 90% of this was paid by five business groups. HMRC has not yet identified any non-compliance, although it is considering whether it has captured all groups that should be in scope of DST.

MAP: OECD has published new mutual agreement procedure (MAP) statistics for 2021. The main findings are that 13% more cases were closed in 2021 than in 2020, slightly fewer new MAP cases were opened, and around 75% of MAPs fully resolved the issues in dispute. However, MAP cases still take a long time (32 months for transfer pricing cases and 21 months for other cases).

Certificates of Tax Deposit: RSM have reported on an HMRC announcement that the Certificate of Tax Deposit (CTD) scheme will be closed for new certificate purchases from 23 November 2017. Taxpayers who hold CTDs must contact HMRC before 23 November 2023; after that date HMRC will make "reasonable efforts" to contact remaining certificate holders, failing which any money deposited but not allocated to a tax debt will be forfeited. HMRC currently holds £391m of unallocated deposits.

Cryptoassets: PwC have published their Annual Global Crypto Tax Report 2022, which sets out the direct and indirect tax treatment of digital assets in several jurisdictions.