



## Tax Updates – February 2023

### Highlights

- The UK and EU have agreed the Windsor Framework, which will have implications for VAT, customs and excise duties.
- HMRC has published new guidance on ADR and its Litigation and Settlement Strategy.
- HMRC has started issuing letters to taxpayers in relation to R&D, short-term property letting and BADR.
- Two people have been arrested on suspicion of tax evasion in connection with the Euro Pacific Bank investigation.
- HMRC delays persist, leading the ICAEW to call for an emergency taskforce to address severe understaffing which is affecting the UK's economic growth.

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## 1. Upcoming hearings

**UT:** *Hargreaves Property Holdings Ltd v HMRC* (Case ID: UT-2022-000010) – Hearing date: 6 March 2023. Withholding tax on interest payments.

**CA:** *London Luton Hotel BPPA Property Fund LLP v HMRC* (Case ID: CA-2021-000087 and 000738) – Hearing date: 13 March 2023 – 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:** *Laing O'Rourke Services Ltd v HMRC; HMRC v Willmott Dixon Holding Ltd* (Case IDs: UT-2021-000196 and UT-2022-00035) – Hearing date: 20-22 March 2023 – Payments made to employees under a car allowance were earnings for NICs but not 'relevant motoring expenditure'.

**UT:** *George Mantides Limited v HMRC* (Case ID: UT-2020-0122) – Hearing date: 4, 5 or 6 April 2022 – IR35 hypothetical contract interpretation.

**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.

**UT:** *Lancashire John v HMRC* (Case ID: UT/2021/00049) – Hearing date: 8, 9 or 10 May 2023 – Transfer of Assets Abroad.

**CA:** *Royal Bank of Canada v HMRC* (Case ID: CA-2022-000812) – Hearing date: 17 May 2023 – Taxation of oil royalties received by overseas bank and applied to outstanding debt of insolvent borrower.

**UT:** *Scottish Power (SCPL) Ltd v HMRC* (Case IDs: UT-2022-000045 and UT-2022-000051) – Hearing date: 15, 16 or 17 May 2023 - Deductibility of payments in settlement of regulatory breaches appeal.

**UT:** *Gunfleet Sands Ltd and others v HMRC* (Case ID: UT-2022-000053) – Hearing date: 5-8 June 2023 – Capital allowances on plant and machinery.

**UT:** *Hotel La Tour v HMRC* (Case ID: UT-2022-000031) – Hearing date: 12-14 June 2023 – VAT on professional fees connected to the sale of shares in subsidiary company.

## 2. Legislation and consultations

**Windsor Framework:** On 27 February 2023, the UK and EU reached agreement in principle regarding the [Windsor Framework](#), which aims to address issues with the application of the Northern Ireland Protocol. Tax Journal has summarised the main [tax implications](#).

**New Act – SDLT:** The [Stamp Duty Land Tax \(Temporary Relief\) Act 2023](#) received Royal Assent on 8 February 2023 and enacts the temporary reduction in SDLT on the acquisition of residential property.

**Draft Bill – Economic Crime and Corporate Transparency:** The government has [confirmed](#) that it intends to amend the Economic Crime and Corporate Transparency Bill to include proposed offences for failure to prevent fraud, false accounting and money laundering.

**Draft Bill – VAT on children's clothing:** The [Children's Clothing \(Value Added Tax\) Bill](#) has had its second reading in the House of Commons scheduled for 14 July 2023. The Bill proposes to extend the definition of children's clothing for the purposes of zero-rating, particularly in relation to school uniforms.

**Consultation – Alcohol duty regulations:** HMRC is consulting on the draft [Alcoholic Products \(Excise Duty\) Regulations](#), which aim to simplify the current alcohol duty system. The regulations follow the draft primary legislation and consultation published last year, which aim to replace the current product-specific alcohol duty regulations with a system of common bands based on strength.

**Inquiry submissions – Crypto:** The House of Commons Treasury Committee's inquiry into the crypto-asset industry, launched in the summer of 2022, continues. Tax has so far not been raised, but CLOT and other industry bodies have made [written submissions](#) calling for reform on how the sector should be taxed.

### Consultation responses:

- Ahead of the Spring 2023 Budget, CIOT has made [representations](#) on the tax treatment of expenses incurred by employees and pensions. CIOT has also [called](#) for a consultation on a fair approach to repayment interest.
- CIOT has [responded](#) to the [consultation](#) on the VAT treatment of fund management services. While CIOT welcomes the proposal to translate policy into statute, it has asked that any terms used be clearly defined. For example, the proposals do not seem to maintain the scope of the existing exemption, as they do not set out the UK VAT treatment of the management of non-UK funds.
- ForresterBrown have made a number of [proposals](#) in response to the [consultation](#) on R&D relief. These include the introduction of a de minimis threshold so that companies carrying out a minority of their R&D overseas are not denied relief, and a compulsory professional body membership for R&D advisors to tackle abuse.
- CIOT has [responded](#) to the OECD's "Pillar Two - Tax Certainty for the GloBE Rules" [consultation](#). CIOT has welcomed the focus on tax certainty and recommended that dispute prevention and resolution mechanism should be binding on tax authorities.
- CIOT has [responded](#) to the OECD's "Pillar Two – GloBE Information Return" [consultation](#). CIOT welcomes the adoption of a standard return, but recommends that the GIR be streamlined in order to avoid creating an additional compliance burden on taxpayers and tax authorities.

**EU – Non-cooperative jurisdictions:** The EU Council has added the British Virgin Islands, Costa Rica, Marshall Islands and Russia to its [list of non-cooperative jurisdictions](#) for tax purposes.

**OECD – Tax certainty:** The OECD has published a [manual](#) on the handling of multilateral Mutual Agreement Procedures (MAPs) and Advance Pricing Arrangements (APAs). This allows tax authorities to decide whether to incorporate the guidance into domestic MAP and APA processes and outlines the cooperation expected from taxpayers.

**OECD – Pillar Two GloBE:** The OECD has published technical [guidance](#) on the Pillar Two GloBE rules. The guidance aims to assist members in implementing the rules in their domestic legislation in a co-ordinated manner, and addresses a few technical issues raised by stakeholders.

### 3. HMRC guidance

**ADR:** HMRC has [published](#) new guidance on Alternative Dispute Resolution as part of its internal manual. The guidance includes a new approach by HMRC to confidentiality and without prejudice communications. Stewarts have set out their thoughts on the guidance for [Tax Journal](#).

**Litigation and Settlement Strategy:** HMRC has [published](#) new guidance on its Litigation and Settlement Strategy as part of its internal manual. This sets out factors HMRC should consider when deciding to engage in a dispute or use its collection and management powers to settle a dispute.

**Mandatory Disclosure Rules:** HMRC has [published](#) new guidance in advance of the introduction of the requirement for taxpayers, promoters and advisers to disclose details of cross-border avoidance arrangements under the Mandatory Disclosure Rules.

**Economic Crime Levy:** HMRC has published a [policy paper](#) explaining how the Economic Crime Levy will affect organisations supervised under the Money Laundering Regulations.

**Trust penalties:** HMRC has published [guidance](#) on penalties where trustees fail to register or maintain the details of a trust with HMRC. RSM [query](#) whether this means HMRC will follow through with its threat to issue fines to offending trustees.

**Insurance PESM:** HMRC has published detailed [guidance](#) on the VAT partial exemption special method (PESM) for insurers.

**Import VAT:** HMRC has [published](#) updated guidance explaining how taxpayers who use postponed VAT accounting should account for import VAT on their VAT returns. Further [guidance](#) explains taxpayers must access the Customs Declaration Service to obtain a postponed import VAT statement.

**Re-importing goods:** HMRC has published [guidance](#) which explains how taxpayers can claim relief to pay less customs duty and VAT if they re-import goods to the UK.

**VAT penalties and interest payments:** HMRC has [published](#) a press release reminding VAT registered businesses to file their returns and pay VAT on time in light of the new VAT penalty regime.

### 4. HMRC spotlights and nudge letters

**Interest rates:** Following the Bank of England decision to increase base rate to 4%, HMRC's late payment interest rate for most taxes will be [increased](#) to 6.5% and the repayment interest rate to 3%. The increases apply from 21 February 2023.

**R&D:** HMRC has launched a [One to Many](#) letter campaign asking company directors to review previous R&D claims to ensure their accuracy. The letters are part of HMRC's increased efforts to clamp down on fraudulent R&D tax relief claims, including where companies have been targeted by third parties and encouraged to make claims.

**TP and DPT:** HMRC has published [statistics](#) showing that it settled a record 175 transfer pricing and Diverted Profits Tax cases in 2021/22 and collected £1.5bn as a result.

**Short-term property letting:** HMRC has launched a [One to Many](#) letter campaign to individuals who have potentially earned but not declared income from short-term property lettings (e.g. through Airbnb).

**BADR:** HMRC's Wealthy External Forum is issuing [nudge letters](#) to individuals who have claimed Business Assets Disposal relief (BADR) in their 2021/22 returns and who may have exceeded their £1m lifetime allowance.

**Euro Pacific Bank:** The Euro Pacific Bank investigation is gathering pace, as two men from Liverpool have been [arrested](#) on suspicion of tax evasion and money laundering.

**Winding-up petitions:** According to [Tax Journal](#), HMRC issued winding-up petitions to 440 companies in the final quarter of 2022, a 46% increase on the previous quarter. This reflects a change of approach following the end of the pandemic-related moratorium on winding-up petitions and increased pressure to collect more tax.

**Tax avoidance:** HMRC has [updated](#) the current list of named tax avoidance schemes, promoters, enablers and suppliers with the addition of Canopaye Limited and Integra Resourcing Limited (Malta).

## 5. Recent decisions – Direct tax

**Film income:** [Thomas Good v HMRC](#) [2023] EWCA Civ 114 (For the taxpayer: Rupert Baldry KC instructed by Greenwoods Legal LLP. For HMRC: Aparna Nathan KC.) – The taxpayer had participated in a tax avoidance scheme whereby he invested in film distribution rights and assigned them in return for a profit share and minimum annual payments. The Court of Appeal held that the payments were subject to tax as the taxpayer was “entitled to” them. The scheme did not work.

**Discovery assessments:** [Paul Harrison v HMRC](#) [2023] UKUT 38 (TC) (For the taxpayer: Harriet Brown and Ross Birkbeck. For HMRC: Sadiya Choudhury.) – The UT upheld a discovery assessment in relation to a “finder’s fee” received by the taxpayer on the sale of property. The UT rejected an argument that the Supreme Court’s decision in *Tooth v HMRC* [2021] UKSC 17 on staleness did not apply as it did not form part of the Court’s reasoning.

**Domicile:** [Coller v HMRC](#) [2023] UKFTT 212 (TC) (For the taxpayer: Christopher Stone instructed by Macfarlanes. For HMRC: Akash Nawbatt KC and Georgia Hicks.) – The FTT dismissed an appeal against closure notices issued on the basis that the taxpayer was domiciled in the UK. The FTT considered the acquisition of a domicile of choice over two generations.

**Employee shares:** [Gain Capital Ltd v HMRC](#) [2023] UKFTT 61 (TC) (For the taxpayer: Christopher Stone instructed by RSM. For HMRC: Georgina Hirsch.) – The FTT held that amounts gifted to two former employees to repay loans in relation to a deferred share plan constituted employment income and were subject to PAYE.

**EIS:** [Rizvi v HMRC](#) [2023] UKFTT 124 (TC) – The FTT held that the taxpayer’s Enterprise Investment Scheme (EIS) relief claims, submitted through his adviser, were careless as the investments had not been granted EIS3 compliance certificates. The FTT upheld HMRC’s discovery assessments.

**Third party notices:** [HMRC v Third party and taxpayer](#) [2023] UKFTT 71 (TC) – The FTT granted HMRC’s application for approval to issue a third party notice

to a law firm in Northern Ireland. The FTT held that many of the documents requested related to conveyancing transactions and were therefore not protected by legal professional privilege.

**SDLT avoidance scheme:** [Olufote v HMRC](#) [2023] UKFTT 130 (TC) (For HMRC: Elizabeth Wilson KC and Admas Habteslasie.) – The FTT held that and SDLT sub-sale avoidance scheme failed and upheld closure notices charging SDLT on the purchase of a house.

**Publication of interlocutory decision:** [Lillicrap v HMRC and J Messore](#) (third party) [2023] UKFTT 72 (TC) – The FTT granted a third party’s application to publish the FTT’s decision to lift the stay in the main appeal, despite HMRC’s objection. The FTT held that the interlocutory decision was already in the public domain and, in light of the third party’s application, it was now in the public interest to publish it.

**Status of FTT decisions:** [Executors of the Estate of Peter Linington v HMRC](#) [2023] UKFTT 89 (TC) (For HMRC: James Henderson and Thomas James.) – The FTT held that it was not bound by an earlier FTT decision on the same inheritance tax scheme and, contrary to the FTT’s earlier determination, dismissed the appeal, holding that the scheme did not work.

**Negligent advice:** [Etroy v Speechly Bircham LLP](#) [2023] EWHC 386 (Ch) (For the claimant: Richard Wilson KC and Jamie Randall instructed by Withers. For the defendant: Michael Pooles KC instructed by RPC.) – This was a professional negligence claim in relation to the transfer of assets from a trust into a new discretionary settlement. The High Court held that the claim was not time barred, as the six-year time limit only started running when the taxpayer’s new advisers gave a firm indication that tax charges had been incurred.

**Transfer pricing:** [Gallaher Ltd v HMRC](#) (Case C-707/20) (For the taxpayer: Philip Baker KC and Imran Afzal instructed by Freshfields. For HMRC: Rupert Baldry KC and Ben Elliott.) – This was a challenge to the UK’s group transfer pricing rules (in force until October 2018) in relation to two cross-border transactions. The CJEU held that the rules constituted a restriction on freedom of establishment, but that it was justified by the need to maintain a balanced allocation of powers between Member States and was therefore compatible with EU law.

## 6. Recent decisions – Indirect tax

**Digital newspapers:** [News Corp UK & Ireland Ltd v HMRC](#) [2023] UKSC 7 (For the taxpayer: Jonathan Peacock KC, Edward Brown KC and Edward Hellier instructed by Deloitte LLP. For HMRC: Eleni Mitrophanous KC and Stephen Donnelly) – News Corp contended that digital editions of newspapers should be zero-rated in line with print editions and sought recovery of £34m in overpaid VAT. The Supreme Court unanimously dismissed the taxpayer's appeal, holding that digital editions of newspapers were not zero-rated as they were not "newspapers" for the purposes of VATA. The judgment reiterates the canons of statutory interpretation such as the "always speaking" principle.

**Matchmaking:** [Gray & Farrar International LLP v HMRC](#) [2023] EWCA Civ 121 (For the taxpayer: David Milne KC and Barbara Belgrano instructed by Harbottle & Lewis LLP. For HMRC: Sarabjit Singh KC.) – The Court of Appeal held that a dating matchmaking service was not a supply of consultancy services for VAT purposes, such that UK VAT was due even if the services were supplied to non-UK clients. This was because there was a single supply of introductory services and not consultancy services.

**Insulation:** [Greenspace \(UK\) Ltd v HMRC](#) [2023] EWCA Civ 106 (For the taxpayer: Edward Hellier. For HMRC: Joanna Vicary.) – The Court of Appeal held that supplies of roofing panels designed to insulate conservatory roofs did not constitute supplies of insulation and the 5% reduced rate did not apply.

**Healthcare facilities:** [R oao. Gloucestershire Hospital NHS Foundation Trust v HMRC](#) [2023] UKUT 28 (TCC) (For the taxpayer: Owain Thomas KC instructed by KPMG. For HMRC: Peter Mantle) – This was a judicial review of HMRC's decision to refuse a VAT refund on the provision of consumable goods used in its operating theatre provided under a contract for the supply of healthcare services, on the basis that the goods fell outside the Contracted-Out Services Direction. The UT held that, taking the *Levor* approach, the consumable goods formed part of a single supply of healthcare facility services.

**VAT registration:** [R oao. Nourish Training Ltd v HMRC](#) [2023] EWHC 350 (Admin) (For the taxpayer:

Richard Clayton KC and Rebecca Murray instructed by Jurit LLP. For HMRC: Howard Watkinson.) – This was a judicial review claim against an HMRC decision to cancel the taxpayer's VAT registration. The High Court refused permission on the basis that the taxpayer had an alternative remedy by way of an appeal before the FTT and that the claim was just a vehicle for the injunction application. The Court also refused to grant an injunction due to the public interest in ensuring no further losses are caused to HMRC.

**Late amendment of pleadings:** [The CBD Flower Shop Ltd v HMRC](#) [2023] UKFTT 107 (TC) (For the taxpayer: Max Schofield instructed by Nicholls and Nicholls. For HMRC: Natasha Barnes) – The substantive appeal concerns supplies of CBD products and whether these should be zero-rated as food products. The FTT refused HMRC's application for permission to amend its Statement of Case at a late stage, as although a hearing date had not been set, the amendment would have affected the hearing window. Interestingly, the argument that HMRC proposed to introduce related to whether the supplies had been made illegally, which the FTT held had real prospects of success.

**Personal liability notice:** [Kuldip Bachra v HMRC](#) [2023] UKFTT 91 (TC) (For the taxpayer: David Bedenham. For HMRC: Howard Watkinson and Ishaani Shrivastava.) – The FTT allowed an appeal against a personal liability notice (PLN) in relation to a Kittel assessment issued to her company. The FTT held that the appellant should have known that her company's transactions were connected to the fraudulent evasion of VAT, but that was not sufficient as actual knowledge is necessary to establish a deliberate inaccuracy for the purposes of a PLN.

**Covid and reasonable excuse:** [Diamond Bodycraft Ltd v HMRC](#) [2023] UKFTT (TC) – The FTT upheld a VAT default surcharge issued due to late payment on the basis that technical issues faced by the business and the fact that the director suffered from long Covid did not constitute reasonable excuses, and the penalty was not disproportionate.

**Late appeal:** [Pawar v HMRC](#) [2023] UKFTT 81 (TC) (For the taxpayer: Christopher McNall instructed by SP Legal Solutions. For HMRC: Jenny Goldring.) – The FTT refused the taxpayer's application for permission to bring an appeal 38 months late on the basis that the adviser had failed to submit the appeal.

## 7. Media

**Record tax receipts:** The ONS has [reported](#) that HMRC collected a record £21.9b in self-assessment income tax in January 2023. This is a 33% increase compared to the previous year.

**HMRC delays:** The ICAEW is [calling](#) for a cross-sector emergency taskforce to address severe delays caused by understaffing at HMRC, which is affecting companies' ability to operate and impacting the UK's economic growth. This has also been picked up by [the BBC](#). Alan Pearce, partner at Blick Rothenberg, has described the HMRC service as "diabolical".

**HMRC stakeholder conference:** Tax Journal has [reviewed](#) the key points arising at HMRC's annual stakeholder conference, which bring HMRC's senior leadership team together with 200 industry representatives. The key themes explored included tax simplification, UK border issues, intermediaries, customer challenges and small business issues.

**Homeworking tax rules:** There have been increasing calls for reform and clarification of the tax rules around homeworking, according to [the FT](#). A particular concern is around the tax treatment of office equipment to be used at home, as well as the tax deductibility for homeworkers' bills.

**Influencers and online earners:** The FT has [reported](#) on HMRC nudge letter campaign targeting 2,300 online traders, gamers and social media influencers whom it believes have not paid the right amount of tax on their earnings. HMRC also plans to send a further 2,000 letters to people who sell goods through online marketplaces. There are currently around 16m content creators in the UK.

**Post Office scandal:** Tax Policy Associates have [reported](#) on the settlement offers made to victims of the Post Office scandal as compensation for the treatment they received, which included malicious prosecution, asset seizures and prison sentences. Much of the payments received by the victims will have to be paid in tax, as they include compensation for loss of earnings and interest, which are fully taxable.

**Gary Lineker appeal:** A preliminary hearing is currently taking place before the First-tier Tribunal in relation to income tax assessments issued to Gary Lineker in the amount of £4.9m under the IR35

legislation, as [reported](#) by the Guardian. James Rivett KC is acting for Mr Lineker and Akash Nawbatt KC is acting for HMRC.

**Intangibles:** An [article](#) in the International Tax Review explains that tax authorities worldwide are increasingly focused on intra-group transactions involving intangible assets and in particular, on the correct allocation of profits deriving from the use of intangible assets. Any entities in the group which have performed functions, used assets or assumed risks must be remunerated for their contribution at arm's length, which must be determined in accordance with the DEMPE analysis in Chapter 6 of the OECD Transfer Pricing Guidelines.

**VAT disputes in asset management:** Macfarlanes have published a [note](#) on the most common topics of dispute in relation to VAT between fund managers and tax authorities. These include cost recharges (e.g. borrowers paying costs incurred by the fund), PESMs which have not been updated in line with business changes, and VAT recovery on deal fees.

**OTS:** Bill Dodwell, former tax director of the Office of Tax Simplification (OTS), has written an [article](#) for Tax Journal on the work of the OTS during its 13-year existence. One of the OTS's greatest successes was the introduction of the cash basis for self-employed individuals and landlords.

**Law firm insolvency:** HMRC has issued a winding-up petition Fletcher Day, a London-based commercial and family law firm that had fallen into financial difficulty in recent months, according to [The Lawyer](#). The SRA has since [intervened](#) to close the firm and protect the interests of clients.

**Avoidance schemes:** TaxWatch have submitted a [complaint](#) to the ICAEW about Paul Ruocco, the sole director of Gateway Outsource Solutions Ltd, which has been "named and shamed" for its involvement in disguised remuneration schemes. TaxWatch has urged ICAEW to investigate Mr Ruocco in light of HMRC's decision to list the company, as any involvement in tax avoidance schemes goes counter to the ICAEW's Professional Conduct in Relation to Taxation code.