



## Tax Updates – May 2023

### Highlights

- The EU has announced “the most ambitious and comprehensive” reform of the EU Customs Union since its inception.
- HMRC has updated its guidance on the unallowable purpose rules for loan relationships.
- HMRC has launched two new nudge letters campaigns in relation to Business Asset Disposal Relief and Gift Aid repayments.
- The higher courts have been busy, with a few important decisions being issued on capital allowances, ESCs, professional negligence and legitimate expectation.
- There has been extensive press coverage of school fee avoidance schemes promoted by some firms.

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## 1. Upcoming hearings

**UT:** *Gunfleet Sands Ltd and others v HMRC* (Case IDs: UT-2022-000053, UT-2022-000054, UT-2022-000056, UT-2022-000057 and UT-2022-000055) – Hearing date: 5-8 June 2023 – Appeal in relation to capital allowances on plant and machinery.

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

**SC:** *HMRC v Professional Game Match Officials Ltd* (Case ID: UKSC-2021-0220) – Hearing date: 26 June 2023 – Part-time employee/employer relationship in relation to PAYE and NICs.

**UT:** *BlueCrest Capital Management (UK) LLP v HMRC* (Case ID: UT-2022-000110) – Hearing date: 27-29 June 2023 – Appeal on salaried members rules.

**CA:** *Archer (William) v HMRC* (Case ID: CA-2022-00890) – Hearing date: 2 October 2023 – Appeal on reasonable excuse in relation to tax surcharges for non-payment of income tax or capital gains tax.

**UT:** *HMRC v Hippodrome Casino Ltd* (Case ID: UT-2022-00081) – Hearing date: 3 October 2023 – Appeal on partial exemption and residual input tax.

**UT:** *Coconut Animated Island Ltd v HMRC* (Case ID: UT-2022-000123) – Hearing date: 16 October 2023 – SEIS relief appeal.

**UT:** *HMRC v Marlborough DP Ltd* (Case ID: UT-2022-000041) – Hearing date: 6-8 November 2023 – Disguised remuneration appeal.

**CA:** *HMRC v Pickles and another* (Case ID: CA-2022-002497) – Hearing date: 9 November 2023 – Appeal in relation to income tax on partnership distributions.

**CA:** *Northumbria Healthcare NHS Foundation Trust v HMRC* (Case ID: CA-2022-002498) – Appeal in relation to the VAT exemption on car parking services provided by an NHS trust.

**UT:** *HMRC v Innovative Bites Ltd* (Case ID: UT-2023-000007) – Hearing date: 21 November 2023 – Appeal in relation to VAT on marshmallows.

## 2. Legislation and consultations

**Finance Bill:** The [Finance \(No 2\) Bill](#) has passed the Committee and Report stages and will shortly proceed to its third reading in the House of Commons.

**Retained EU law:** The government has [confirmed](#) that the sunset clause will be removed from the Retained EU law (Revocation and Reform) Bill. Instead, 600 pieces of legislation will be revoked by the end of 2023. The FT has [reported](#) on this.

**Community Investment Tax Relief:** The [Community Investment Tax Relief \(Amendment of Investment Limits\) Regulations 2023](#) increase the limits on the amounts of capital that Community Development Finance Institutions (CDFIs) can raise from investors and on which investors can claim CITR.

**Register of Overseas Entities:** The [Register of Overseas Entities \(Definition of Foreign Limited Partner, Protection and Rectification\) Regulations 2023](#) amend the operation of the register of overseas entities which requires overseas entities that own UK property to provide beneficial ownership information to the Registrar of Companies.

**VAT notifiable arrangements:** The [Indirect Taxes \(Notifiable Arrangements\) \(Amendment\) Regulations 2023](#) include intra-group supplies within the definition of VAT avoidance arrangements in the Notifiable Arrangement Regulations 2017, which specify the type of arrangements giving rise to a duty to disclose.

**Tonnage tax:** The [Tonnage Tax \(Further Opportunity for Election\) Order 2023](#) allows shipping companies to make a tonnage tax election under Schedule 22 of the Finance Act 2000 during the period of 18 months from 1 June 2023.

**EU Customs reform:** The EU Commission has announced [proposals](#) for what it describes as “the most ambitious and comprehensive reform of the EU Customs Union”. The reform will include the establishment of a new EU Customs Authority, an EU Customs Data Hub that will allow businesses to log their information into a single online environment, and a new e-commerce regime.

### 3. HMRC guidance

**Loan relationships:** HMRC has updated its [Corporate Finance Manual](#) (at CFM38100–CFM38200) on the unallowable purpose test for loan relationships. The guidance sets out a more detailed summary of the rules, as well as HMRC's view on issues that have been subject to recent disputes. These include 17 examples of fact patterns that illustrate HMRC's views on when the unallowable purpose test applies, as well as potentially relevant tax-related factors that may assist in assessing whether a taxpayer has a main purpose of securing a tax advantage. Freshfields have [reviewed](#) the guidance for Tax Journal.

**Residence and domicile:** HMRC has updated its [RDR1 guidance](#) on residence, domicile and the remittance basis to provide that, following Brexit, where a UK-resident leaves the UK after 31 December 2020 to take up employment with an EU institution, their residence status will change.

**VAT on medical services:** HMRC has issued [Revenue and Customs Brief 5](#), which sets out details of the recent extension of the VAT exemption for healthcare to medical services carried out by staff directly supervised by registered pharmacists.

**VAT on energy-saving materials:** HMRC has published [VAT Notice 708/6](#), which explains when the zero rate or reduced rate of VAT applies on the installation of energy-saving materials and grant-funded heating equipment.

**Interest rates:** Following the Bank of England decision to increase the base rate to 4.5%, HMRC's late payment interest rate for most taxes will be [increased](#) to 7% and the repayment interest rate to 3.5%. The increases apply from 31 May 2023 for most taxes.

**Temporary CCM:** HMRC is [trials](#) a temporary Customer Compliance Manager (CCM) model, according to [CIOT](#). This aims to provide temporary CCM support to mid-sized businesses in crisis, facing uncertainty, going through key life events, experiencing significant growth or that have multiple enquiries open. HMRC will assess the findings of this model in summer 2023 and decide what approach to take in the future.

**Standard for agents:** HMRC has updated its [Standard for Agents guidance](#) to reflect the Spring Budget announcement that income tax repayments cannot be assigned by taxpayers to agents and will belong to the taxpayers. Taxpayers can still nominate an agent to receive the repayment but will remain legally entitled to it.

**Customs:** HMRC has published [guidance](#) on how taxpayers can apply for an Advance Valuation Ruling before making an import declaration to check and obtain assurance from HMRC that the proposed valuation method is correct.

### 4. HMRC spotlights and nudge letters

**BADR:** HMRC is [writing](#) to taxpayers believed to have exceeded the Business Asset Disposal Relief (BADR) £1m lifetime limit. Two types of nudge letter are being sent: one to taxpayers thought to have exceeded the lifetime limit with a claim in their 2021/22 return, and one to taxpayers believed to have exceeded the limit prior to that return.

**Gift aid:** HMRC has [launched](#) a nudge letter campaign in relation to Gift Aid repayment claims. These letters are being issued to charities that use the "aggregated donations" provisions within their Gift Aid repayment claims to help them comply with the rules.



## 5. Recent decisions – Direct tax

**Capital allowances:** [HMRC v SSE Generation Ltd](#) [2023] UKSC 17 (For the taxpayer: Jonathan Peacock KC and Michael Ripley instructed by CMS. For HMRC: Timothy Brennan KC and Aparna Nathan KC.) – This was a £260m capital allowances dispute in relation to expenditure on the construction of a hydroelectric power station at Loch Ness. The Supreme Court dismissed HMRC's appeal and held that underground conduits that conveyed water did not fall within the definition of a tunnel or an aqueduct and were therefore not excluded from the scope of capital allowances. Stewarts have [commented](#) on the decision.

**Permission to appeal:** [Altrad Services Ltd & Anor v HMRC](#) [2023] EWCA Civ 474 (For the taxpayer: Jonathan Peacock KC and Edward Hellier instructed by KPMG LLP. For HMRC: Jonathan Davey KC and Barbara Belgrano.) – This is a capital allowances appeal relating to the long-funding lease rules. The CoA granted HMRC permission to appeal on a ground that had not been raised in the lower courts, on the basis that it would not prejudice the taxpayer as it only raised issue of law.

**Extra-statutory concessions:** [Murphy v HMRC](#) [2023] EWCA Civ 497 (For the taxpayer: William Massey KC and Ben Elliot instructed by Howes Percival LLP. For HMRC: Aparna Nathan KC and Ishaani Shrivastava.) – The CoA found in favour of the taxpayers on a judicial review of HMRC's decision to reject their claim for income tax credit on trust income under ESC B18 (1999), on the basis that they had a legitimate expectation that a time limit not mentioned in the ESC would not apply.

**Professional negligence:** [McClellan v Thornhill](#) [2023] EWCA Civ 466 (For the claimants: Roger Stewart KC, Nik Yeo and Harry Winder instructed by Stewarts. For the defendant: Tom Adam KC and Max Schaefer instructed by Herbert Smith.) – The CoA upheld the High Court decision that Andrew Thornhill KC, who had advised the promoters of a film scheme, did not owe a duty of care to investors in the scheme but that, had Mr Thornhill KC owed such a duty, he would have breached it.

**Avoidance scheme:** [Bhaur v Equity First Trustees \(Nevis\) Ltd](#) [2023] EWCA Civ 534 (For the claimants: David Mitchell instructed by Kangs Solicitors. For the defendants: Michael Avient instructed by Greenwood Legal LLP.) – The CoA upheld the High Court's decision not to set aside a transfer of shares to an EBT on the grounds of mistake, thereby refusing to allow the claimants to unwind an inheritance tax avoidance scheme.

**GLOs:** [AXA Sun Life Plc and Ors v HMRC](#) [2023] EWHC 944 (Ch) (For the taxpayer: Jonathan Bremner KC instructed by Joseph Hage Aaronson. For HMRC: David Ewart KC, Barbara Belgrano, Laura Ruxandu and Frederick Wilmot-Smith.) – The claimants were non-test claimants in the CFC/Dividend Group Litigation Order which concerned CT levied on overseas dividends in breach of EU law. The High Court considered a few preliminary issues and held that the question of whether the claims were in time had to be determined in accordance with the Supreme Court's FII GLO decision.

**Loan relationships:** [Shinlock Limited v HMRC](#) [2023] UKUT 107 (TCC) (For the taxpayer: Patrick Boch. For HMRC: Michael Ripley.) – The UT dismissed the taxpayer's appeal and held it could not claim a loan relationship debit in respect of a payment to a shareholder of a gain on the disposal of property.

**Withholding tax on interest:** [Hargreaves Property Holdings Ltd v HMRC](#) [2023] UKUT 120 (TCC) (For the taxpayer: Patrick Way KC and Dilpreet Dhanoa instructed by BDO. For HMRC: Richard Vallat KC and Calypso Blaj.) – The UT dismissed an appeal against an FTT decision upholding income tax assessments on the basis that the taxpayer had a duty to deduct withholding tax on loan interest payments.

**Penalty notices:** [Marano v HMRC](#) [2023] UKUT 113 (TCC) (For the taxpayer: Keith Gordon instructed by RSM UK. For HMRC: Sadiya Choudhury.) – The UT allowed a taxpayer's appeal against a penalty for failure to file a return. The UT remitted the case to the FTT to consider whether a payment on account could constitute special circumstances to mitigate the penalty.

## 6. Recent decisions – Indirect tax

**Legitimate expectation:** [R \(oao Airline Placement Ltd\) v HMRC](#) [2023] EWHC 1191 (Admin) (For the taxpayer: Nicola Shaw KC instructed by Macfarlanes. For HMRC: Howard Watkinson and Ishaani Shrivastava.) – The High Court dismissed the taxpayer's judicial review claim on the basis that an application for non-statutory clearance in relation to the VAT treatment of a training programme for cadet pilots was materially inaccurate.

**Issue estoppel:** [British Telecommunications PLC v HMRC](#) [2023] UKUT 00122 (TCC) (For the taxpayer: Roderick Cordara KC and Lyndsey Frawley instructed by DWF Law LLP. For HMRC: Kieron Beal KC and Eleni Mitrophanous KC.) – The FTT had struck out the taxpayer's bad debt relief appeal on the basis that it had no prospects of success in light of the Court of Appeal's findings in the *GMAC* case. The UT dismissed the taxpayer's appeal and upheld the strike out as issue estoppel arose.

**Fundraising exemption:** [Yorkshire Agricultural Society v HMRC](#) [2023] UKFTT 00389 (TC) (For the taxpayer: Michael Firth instructed by VATangles Consultancy Ltd.) – The FTT held that an assessment for underpaid VAT on admission to an agricultural show was out of time, as it was made more than one year after HMRC had sufficient evidence of facts to justify the assessment. The FTT also held that the fundraising exemption in UK law should be read and modified to accord with the PVD. The FTT therefore found that the income was exempt because fundraising was a main purpose of the show and the show was promoted as being for the raising of money.

**Education:** [St Patrick's International College Ltd v HMRC](#) [2023] UKFTT 408 (TC) (For the taxpayer: Nicola Shaw KC and Ben Blades instructed by PwC. For HMRC: Raymond Hill and Laura Inglis.) – The FTT dismissed an appeal in relation to the VAT exemption for education supplies. It held that the UK legislation in relation to alternative providers of education conformed with the PVD, and taxing the supplies at the standard rate did not contravene the principle of fiscal neutrality.

**Late appeal:** [PRB Trading Ltd v HMRC](#) [2023] UKFTT 421 (TC) (For the taxpayer: Howard Watkinson.) – The FTT allowed late appeals against Kittel VAT and penalty assessments on the basis that HMRC had failed to fully particularise the alleged fraud, there was no significant prejudice to HMRC, and there had been a breakdown in communication with the HMRC officer.

**Landfill tax – late appeal:** [City Plant Ltd v HMRC](#) [2023] UKFTT 414 (TC) (For the taxpayer: Charles Bott KC instructed by Cohen Cramer Solicitors. For HMRC: James Puzey.) – The FTT refused the taxpayer's application for permission to bring a £1.5m landfill tax appeal out of time. Following the review conclusion letter, the taxpayer and HMRC continued to engage in discussions, during which time HMRC made it clear it would not enforce the liability. HMRC tried to take action 4 years later, but the taxpayer's representatives took a further 18 months to submit an appeal.

**Hardship:** [ABA Motors Ltd v HMRC](#) [2023] UKFTT 406 (TC) (For HMRC: Ini Udom.) – The FTT held a decision by HMRC to refuse hardship had been reasonable, but overturned it upon hearing oral evidence from the appellant's director.

**Appointment of lawyer:** [Niec v HMRC](#) [2023] UKFTT 415 (TC) – The FTT held it had no authority to order HMCTS to instruct a lawyer fluent in Polish to represent the taxpayer in an excise appeal. This was a matter outside the jurisdiction of the Tribunal and was properly addressed via the legal aid regime.

**Kittel:** [PPX Metal Management Ltd v HMRC](#) [2023] UKFTT 405 (TC) (For the taxpayer: Jonathan Kinnear KC instructed by Mezzle Law. For HMRC: Howard Watkinson.) – The FTT dismissed a Kittel appeal by a scrap metal merchant on the basis that the appellant knew that its transactions were connected to the fraudulent evasion of VAT.

**Kittel:** [Elbrook \(Catch & Carry\) Ltd v HMRC](#) [2023] UKFTT 403 (TC) (For the taxpayer: Tim Brown instructed by Rainer Hughes. For HMRC: Howard Watkinson.) – The FTT dismissed a Kittel appeal by a cash and carry business on the basis that the appellant knew or, alternatively, should have known that its transactions in alcohol and soft drinks were connected to the fraudulent evasion of VAT.

## 7. Media

**Judges invest in avoidance schemes:** The FT has [identified](#) five High Court judges who have invested in tax avoidance schemes that were challenged by HMRC. In particular, one of the judges ruled on tax appeals in relation to schemes that raised similar questions to the one she had invested in. This has raised questions around whether judges should publicly disclose their financial affairs prior to or during their appointment.

**School fee tax avoidance:** Tax Policy Associates have [flagged](#) that a number of firms (including Signature Tax, Fortus and Accotax) are promoting school fee tax avoidance schemes. These schemes aim to flout a rule that stops wealthy parents from gifting assets to their children and the children then paying tax at a much lower rate on the dividends.

**Carried interest:** An analysis by Macfarlanes shows that 255 of the UK's PE executives earned £2.7bn in carried interest in 2020/21, around 80% of all carried interest in that year, according to [the FT](#). This follows a previous [report](#) by Tax Policy Associates and Labour party plans to tax carried interest as income.

**Investment tax reliefs:** HMRC has published [statistics](#) on the Enterprise Investment Scheme (EIS), Seed Enterprise Investment Scheme (SEIS) and Social Investment Tax Relief (SITR). In the tax year 2021/22, £2.3bn of funds were raised by 4,480 through EIS, a record since the introduction of the scheme in 1994. The same is true of SEIS, through which £205m of funds were raised. However, BDO have [warned](#) that many EIS and SEIS advance assurance applications are being rejected, with HMRC cracking down on the use of these reliefs.

**HMRC service levels:** The Treasury has [responded](#) to an [open letter](#) from ten leading professional bodies on unacceptable HMRC service levels. The Treasury has acknowledged the issues raised and stated that HMRC's focus on building digital services should reduce the need for direct taxpayer contact and therefore address any delays.

**HMRC enforcement activity:** The PAC has published a new [report](#), "Managing tax compliance following the pandemic". According to the PAC, HMRC's enforcement activity has diminished during and following the Covid-19 pandemic, with 1,000 fewer prosecutions for tax-related offences

completed over the two pandemic years compared to pre-pandemic numbers. The PAC has recommended that HMRC put in place a plan to catch up on its compliance activity. City A.M. has also [reported](#) on this.

**Covid-19 support schemes:** The government has published a response in the May 2023 [Treasury Minutes](#) to the [PAC report](#) on the Covid-19 employment support schemes. HMRC and the Treasury have largely agreed with the PAC recommendations and undertaken to publish their assessment of the impact and value for money of the schemes by December 2023, and also set out their priorities for gathering data that will help them target such schemes in the future.

**Disguised remuneration:** In a recent [report](#), TaxWatch have reviewed the actions taken by HMRC so far to shut down disguised remuneration schemes, including the introduction of the loan charge, and how effective these have been. TaxWatch welcome the government's proposed consultation on a new criminal offence for promoters who fail to comply with a legal notice from HMRC to stop promoting a tax avoidance scheme. However, there is a concern that this will only have a marginal effect and HMRC should instead broaden its enforcement action to shut down disguised remuneration schemes.

**Electricity generator levy:** Alvarez & Marsal have written an [article](#) for Tax Journal examining how the new electricity generator levy will work and a few uncertainties arising from the current drafting of the legislation in the Finance (No. 2) Bill. Areas of future dispute may relate to the definition of "generation receipts", which has been intentionally kept broad, and the application of the levy to joint ventures, which are often used to fund solar and wind projects.

**Domicile:** Writing for FT Adviser, Moore Kingston Smith have [considered](#) the Labour party's proposal to abolish non-dom tax status and what a replacement regime might look like. One of the options might be a special tax regime for in-bound expats earning income from their work, who might benefit from a reduced top rate of income tax, for example.

**Pillar Two:** In a recent [article](#) for Tax Journal, Macfarlanes have considered a few issues arising from a staggered implementation of Pillar Two by different OECD members.