Tax Updates – June 2023

Highlights

- The Retained EU Law (Revocation and Reform) Act 2023 has received Royal Assent, while the Finance (No. 2) Bill is expected to receive Royal Assent shortly.
- HMRC has issued an updated Code of Practice 9, clarifying how it conducts civil investigations where it suspects fraud.
- Three nudge letter campaigns have been launched in relation to the Pandora Papers, Persons of Significant Control and the OECD Pillar 2 rules.
- Following the report by Tax Policy Associates on school fee avoidance schemes, HMRC has issued a spotlight warning that such schemes do not work.
- A UK Labour Party donor is planning to challenge HMRC's approach to taxing private equity profits.

Contents

1. Upcoming hearings

SC: *Target Group Limited v HMRC* (Case ID: 2021/0189) – Hearing date: 12-13 July 2023 – VAT appeal in relation to loan administration services.

SC: *HMRC v Fisher* (Case ID: 2021/0213) – Hearing date: 19-20 July 2023 –Transfer of Assets Abroad appeal.

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) – 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.

UT: *Strategic Branding Limited v HMRC* (Case ID: UT-2022-000019) – Hearing date: 15-17 January 2024 – Disguised remuneration appeal.

2. Legislation and consultations

Retained EU law: The Retained EU Law (Revocation and Reform) Act 2023 has received Royal Assent. From the end of 2023, EU law will no longer have priority over domestic legislation.

Finance Bill: The Finance (No. 2) Bill has completed its third reading in the House of Lords and is now due to receive Royal Assent.

Failure to prevent fraud: The Economic Crime and Corporate Transparency Bill is making its way through the House of Lords. The Lords have voted to widen the scope of the failure to prevent fraud offence by including failure to prevent money laundering within its scope and removing the SME exemption.

Register of Overseas Entities: The Register of Overseas Entities (Penalties and Northern Ireland Dispositions) Regulations 2023 have come into force, giving the Registrar of Companies the power to impose a financial penalty where the Registrar reasonably believes a person has engaged in conduct that constitutes an offence in relation to the registration of overseas entities.

PPT: The Plastic Packaging Tax (General) (Amendment) Regulations 2023 have come into force, providing that a claim for a tax credit arising in the same accounting period must be accounted for in a separate return to claims for tax credits in relation to previous periods.

Energy Profits Levy: The Treasury has announced that the Energy Profits Levy will remain in place until March 2028, but will fall to 40% (rather than the current 75%) when oil and gas prices consistently return to normal levels for a sustained period. The BBC has reported on this, and according to the FT the projected tax raised has dropped almost 40% due to a sharp fall in the price of oil and gas.

DAC8: Back in December 2022, the EU Commission published a proposal for a directive amending Council Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8). The EU Council has now agreed the proposed amendments, which will bring transactions in cryptoassets within the scope of the EU reporting and automatic exchange of information requirements.

Consultation – International tax: HMRC is consulting on potential reforms to transfer pricing, permanent establishment and DPT legislation. The proposals include updating the definition of a PE to refer to relevant double tax treaty definitions and bringing DPT within corporation tax rather than having it as a separate tax. HMRC has also published draft guidance. Stewarts have published an article reviewing the proposals.

Consultation – Umbrella companies: The government has published a summary of responses to the 2022 consultation on the umbrella company market, and has also published a new consultation seeking views on proposals to regulate and tackle non-compliance by umbrella companies. The new consultation focuses on safeguarding employment rights for individuals engaged through umbrella companies and tackling tax non-compliance through the use of such companies. The FT has reported on the proposals, and the Low Incomes Tax Reform Group (LITRG) has welcomed them.

Consultation – Non-Discretionary Tax-Advantaged Share Schemes: The government is consulting on the Save As You Earn (SAYE) and Share Incentive Plan (SIP) employee share schemes to improve and simplify the schemes.

Consultation – Customs declarations: HMRC is consulting on proposed simplifications to customs declarations and how businesses use technology to complete these.

Consultation – Bringing goods into the UK temporarily: HMRC is consulting on improving the Temporary Admission procedure in order to simplify procedures for importing goods into the UK temporarily without payment of import duties.

Consultation responses:

- CIOT has responded to HMRC's consultation on the VAT energy savings materials relief. CIOT warns that the benefits of expanding the relief may not be fully realised given the increased complexity where energy saving materials are installed as part of a wider contract for building works.

- CIOT has responded to HMRC's consultation on the modernisation of stamp taxes on shares. CIOT supports HMRC's proposals for a new single tax on shares, but highlights that there are some aspects where there are significant differences between transactions undertaken through CREST and those that are not, which must be recognised in the new rules. CIOT also disagrees with the proposed removal of the de minimis threshold below which transactions are treated as exempt.

- CIOT has responded to HMRC's consultation on expanding the income tax cash basis. CIOT welcomes the review, which comes 10 years after its introduction, and has called for a simplification of the rules and improved guidance.

- CIOT and ATT have responded to HMRC's consultation on the taxation of decentralised finance involving the lending and staking of cryptoassets. CIOT and ATT welcome the proposals, which reflect the reality of DeFi transactions, but call for a wider, bespoke set of rules for cryptoassets.

- CIOT has responded to HMRC's consultation on introducing tougher penalties for promoters of tax avoidance schemes. CIOT supports a more robust approach by the government against scheme promoters, but has serious concerns about the proposed introduction of a criminal offence for promoters who continue to promote such schemes after being issued with a stop notice.

- CIOT has responded to HMRC's consultation "Simplifying and modernising HMRC's Income Tax services through the tax administration framework". CIOT supports HMRC's move to digital services, but highlights that the public would need greater trust in HMRC's IT infrastructure for this to work.

- CIOT has responded to HMRC's consultation on the draft regulations in relation to VAT on drink deposit return schemes. CIOT welcomes the regulations and the simplification of the VAT accounting position for persons in the supply chain other than the producer.

3. HMRC guidance

COP9: HMRC has rewritten its Code of Practice 9 used where FIS carries out civil investigations where it suspects fraud. COP9 allows taxpayers to disclose tax fraud and pay any tax and penalties under a civil procedure rather than face a criminal prosecution. The main updates include clarification on when HMRC will escalate a case to a criminal investigation and steps HMRC will take should a taxpayer reverse their admission.

Economic Crime Levy: HMRC has published new guidance on the Economic Crime Levy, which applies to businesses regulated for anti-money laundering purposes. The first guidance page published explains who needs to register for the levy, and the second page sets out when and how to register.

Enquiries: HMRC has updated its Enquiry Manual to clarify that when considering if behaviour has been "careless" or "deliberate", there must be a causal link between the behaviour and loss of tax. Deliberate behaviour must involve a "deliberate intention to mislead". Other updates include clarification of HMRC's powers under section 30 of TMA 1970 in relation to the recovery of excessive repayments that have occurred as a result of an HMRC error, and a new chapter which states that, when HMRC is unsure which tax to charge, it can pursue both taxes and make alternative assessments.

Reliance on HMRC guidance: HMRC has updated its guidance on "How HMRC advice and information can help you" to clarify that a taxpayer may be able to rely on incorrect advice and information from HMRC if it is reasonable for the taxpayer to expect this and very unfair for HMRC to act in a different way from the advice and information given.

VAT on digital publications: HMRC has published Revenue and Customs Brief 6/2023 providing an update on the VAT liability of digital publications in light of the Supreme Court decision in *News Corp*. HMRC has confirmed that supplies of digital publications before 1 May 2020 are standard-rated.

Errors in VAT returns: HMRC has published guidance on reporting errors in previous VAT returns.

Interest rates: Following the Bank of England decision to increase the base rate to 5%, HMRC's late payment interest rate for most taxes will be increased to 7.5% and the repayment interest rate to 4%. The increases apply from 11 July 2023 for most taxes.

4. HMRC spotlights and nudge letters

Pandora Papers: HMRC is sending nudge letters to UK residents named in the Pandora Papers leaked back in 2021. The letters ask recipients to report all overseas income or gains that they owe UK tax on, and warn that failure to do so may result in penalties of up to 200% of any tax due or even prosecution. The FT has reported on this development and Stewarts have also covered it.

Persons of Significant Control: HMRC is sending nudge letters to those registered as Persons of Significant Control who have either not completed a 2021/22 tax return or whose income is "lower compared to most in a similar position".

Pillar 2: HMRC has started sending educational nudge letters to large and top-end mid-sized businesses that may be within the scope of the OECD Pillar 2 model rules, as recently adopted by the UK.

School fee tax avoidance: HMRC has published a new spotlight warning that a tax avoidance scheme that purports to assist with the cost of school fees does not work. The scheme is targeted at individuals who are the main shareholders or directors of an owner managed company and the dividend income is diverted from them to their minor children. This spotlight was published after Tax Policy Associates flagged the widespread use of this scheme, and Stewarts have also published an article on it.

Tax avoidance schemes: HMRC has published details of four new tax avoidance schemes and their promoters: Peak PAYE Ltd, Saxonside Ltd, Veqta Ltd and Vision HR Solutions Ltd. All four are disguised remuneration schemes.

5. Recent decisions – Direct tax

Income from immoveable property: *Royal Bank of Canada v HMRC* [2023] EWCA Civ 695 (For the taxpayer: Jonathan Peacock KC and Sarah Black instructed by Norton Rose. For HMRC: Jonathan Bremner KC and Michael Ripley.) – The CA allowed the taxpayer's appeal and held that its receipts of payments relating to oil extraction did not constitute income from immoveable property under the UK-Canada double tax treaty and were not chargeable to UK corporation tax. Stewarts have reviewed this case.

Carry-back loss: *Civic Environmental Systems Ltd v HMRC* [2023] EWCA Civ 722 (For the taxpayer: Michael Firth. For HMRC: Charles Bradley.) – The CA dismissed the taxpayer's appeal and held that HMRC had been correct to disregard the effect of the taxpayer's carry-back loss claim.

Late payment penalties: *Archer v HMRC* [2023] EWCA Civ 626 (For the taxpayer: Amanda Brown KC and Conrad McDonnell instructed by KPMG. For HMRC: Julian Ghosh KC and Michael Ripley.) – The taxpayer had judicially reviewed HMRC's closure notices and pursued his appeal to the Supreme Court, which refused permission to appeal. HMRC then issued late payment penalties. The CA held that, while the taxpayer had a reasonable excuse for non-payment between the issuing of the closure notices and dismissal of his judicial review, there ceased to be a reasonable excuse beyond that stage.

Company residence and PE: *GE Financial Investments v HMRC* [2023] UKUT 146 (TCC) (For the taxpayer: Philip Baker KC and John Brinsmead-Stockham KC instructed by Slaughter & May. For HMRC: Hui Ling McCarthy KC and Barbara Belgrano.) – The UT held that the taxpayer was entitled to relief under the UK-USA double tax treaty, as it was tax resident in the USA. The UT also considered an alternative argument as to whether the taxpayer was carrying on a business in the USA through a permanent establishment and upheld the FTT's decision that it was.

Loan relationships: *Swiss Centre Ltd v HMRC* [2023] UKFTT 449 (TC) (For the taxpayer: Rory Mullan KC instructed by ASM Ltd. For HMRC: Edward Waldegrave and Calypso Blaj.) – The FTT dismissed the taxpayer's appeal and held that a payment by a Northern Ireland-based property developer to an Irish government agency was not deductible under the loan relationship rules in calculating profits for CT purposes.

Domicile: *Shah v HMRC* [2023] UKFTT 539 (TC) (For the taxpayer: Nikhil Mehta instructed by Sopher & Co. For HMRC: Christopher Stone.) – The FTT held that the taxpayer had acquired a domicile of choice in England and Wales as there was not enough evidence that he intended to return to India.

Information notice: *Foreign National v HMRC* [2023] UKFTT 475 (TC) (For the taxpayer: Robert Maas instructed by Walji & Associates.) – The taxpayer, a non-UK resident and non-UK domiciled person, applied to HMRC to receive UK rental income without deduction of UK tax in relation to a UK property rental business. HMRC opened enquiries and issued an information notice to allow it to establish whether the profits in question were trading profits. The taxpayer appealed against the information notice and the FTT dismissed the appeal, as the information requested by HMRC was reasonably required and did not amount to a "fishing expedition".

ATED penalties: *Hughes Property Partners Ltd v HMRC* [2023] UKFTT 453 (TC) – The taxpayer appealed against penalties for failure to file an ATED return on time on the basis that it had a reasonable excuse, as its agents were busy due to increased work volume arising from the Covid-19 pandemic. The FTT dismissed the appeal as there was an insufficient nexus between the pandemic and the failure to file the return in this case.

CJRS: *Raystra Healthcare Ltd v HMRC* [2023] UKFTT 496 (TC) – The FTT dismissed an appeal against an assessment to recover payments made to the taxpayer under the Coronavirus Job Retention Scheme (CJRS) on the basis that the relevant employees had not been included in the real-time information return before the deadline.

6. Recent decisions – Indirect tax

Legitimate expectation: R (oao Glint Pay Services Ltd) v HMRC [2023] EWHC 1621 (Admin) (For the taxpayer: David Bedenham and Christopher Leigh instructed by KPMG. For HMRC: Andrew Macnab.) – This was a judicial review claim in relation to HMRC's decision that the taxpayer's supplies of gold bullion were exempt from VAT rather than zero-rated. The High Court dismissed the claim on the basis that a memorandum of understanding with HMRC did not give rise to a legitimate expectation.

Legitimate expectation: Realreed Ltd v HMRC [2023] EWHC 1572 (Admin) (For the taxpayer: Kieron Beal KC and Daniel Cashman instructed by Levy & Levy. For HMRC: Isabel McArdle.) – This was a judicial review claim in relation to serviced accommodation that the taxpayer had treated as VAT exempt and that HMRC later assessed as standard-rated. The High Court dismissed the claim on the basis that the taxpayer had no legitimate expectation that the supplies were exempt despite numerous HMRC VAT inspections where this point was not raised. Even if a legitimate expectation had arisen, there was no detrimental reliance.

Medical care: Illuminate Skin Clinics Ltd v HMRC [2023] UKFTT 547 (TC) (For the taxpayer: Melanie Hall KC and Ciar McAndrew instructed by Campbell Dallas.) – The FTT held that supplies of aesthetic, skincare and wellness treatments were made for non-medical purposes, as they did not constitute medical care, and were therefore not exempt.

PPE: 3D Crowd CIC v HMRC [2023] UKFTT 495 (TC) – This was an appeal relating to the recoverability of input tax on free PPE given away by a community interest company during the Covid-19 pandemic. The FTT held that the input tax incurred in obtaining the company's accreditation as a supplier was recoverable, but VAT on general overheads and manufacturing costs had to be apportioned based on whether it had a business or non-business purpose.

Input tax claim and PLN: Coonley Trading Ltd v HMRC [2023] UKFTT 452 (TC) – The FTT dismissed appeals against HMRC's refusal of input tax claimed by the taxpayer and related personal liability notices. The FTT held that the taxpayer had not provided sufficient evidence to show it was entitled to the input tax claimed, and the inaccuracies in the taxpayer's return were due to its deliberate behaviour.

Wasted costs: Hare Wines Ltd v HMRC [2023] UKFTT 536 (TC) – The FTT granted a wasted costs order to HMRC in respect of a failed appeal against an excise assessment where the taxpayer had relied on an invoice that was not genuine. However, the FTT did not grant such an order in respect of the related penalties appeal, as it could not be said that the reasonable person in the taxpayer's position should have known the penalties appeal could not succeed.

VAT penalties: Maxxim Residential Design Ltd v HMRC [2023] UKFTT 474 (TC) – The FTT held that VAT assessments were out of time as HMRC had raised them outside the one-year time limit. However, the FTT upheld the related penalties as Schedule 24 of FA 2007 provides that potential lost revenue must be calculated by reference to the amounts due or payable. The FTT held that, even though the assessments were out of time, the tax was due (even if not payable) and penalties could be issued.

Fixed establishment: Cabot Plastics Belgium SA v État belge (Case C-232/22) – The CJEU held that a service agreement between a Swiss company and a Belgian company in the same group did not create a fixed establishment in Belgium, as the Belgian company was responsible for its own services and provided them at its own risk, without having the resources of the Belgian company at its disposal.

SDLT: Suterwalla and anor v HMRC [2023] UKFTT 450 (TC) (For the taxpayer: Patrick Cannon.) – The FTT allowed the appeal on the basis that the property in question was mixed use rather than residential. The FTT held that the presence of a power network on the land meant that at least some of the land was non-residential.

7. Media

Carried interest: The FT reports that Dale Vince, a UK entrepreneur and Labour party donor, is planning to seek a judicial review of HMRC's taxation of private equity profits. Vince's lawyers have sent a pre-action letter to HMRC arguing that its approach to taxing carried interest is "potentially unlawful".

Tax gap: HMRC has published figures showing a steady tax gap in the year 2021-22, according to CIOT. The tax gap is up by £5bn, but that is to be expected in light of the increase in theoretical tax liability, and HMRC is still collecting around 95% of tax due. However, the tax loss due to errors and carelessness is rising, which may be due to the complexity of the tax system and a shift in HMRC's approach to penalties.

Tax avoidance schemes: Tax Policy Associates have reported on two tax avoidance schemes. The first is a £46m scheme through what looks like a loyalty card product run by B2BTradeCard, a fintech company. The second is a £50m tax avoidance scheme backed by Giles Goodfellow KC that involved splitting a business between 10,000 companies and hiring 10,000 Filipino individuals as shareholders and directors.

Delayed investigation: HMRC has been criticised over an investigation into a potential breach of managed service company (MSC) law that has taken HMRC more than a year to pursue, according to the FT. HMRC sent letters to 1,000 contractors in March 2022 and has so far failed to respond to their case.

Making Tax Digital: The National Audit Office (NAO) has published a report on Making Tax Digital which states that HMRC omitted costs to taxpayers from its business case on how much the programme would cost the public, as reported by the FT. The programme is also expected to cost the government £1.3bn, up from the expected £226m. The Public Accounts Committee (PAC) has announced an inquiry based on the report.

IR35: The FT reports on a survey by the Association of Independent Professionals and the Self-Employed, which shows that 53% of freelancers have turned down contracts to avoid being caught by the new IR35 rules, up 31% from the previous survey. 22% also said they intended to seek work abroad, as overseas businesses are exempt from the new rules.

Closure of Self-Assessment helpline: HMRC is trialling the closure of its Self-Assessment Helpline for three months from 12 June, directing queries to its digital services. HMRC has said this would free up 350 advisers to take other urgent calls. CIOT has described this as a "cry for help" and an indication that HMRC does not have the resources to provide necessary services to taxpayers. The Treasury Committee has also criticised HMRC's decision and the fact that it did not consult stakeholders before the announcement.

Inheritance tax: The FT reports on figures published by HMRC showing it has raised £1.2bn in inheritance tax in April and May, which is a new record and a 9.1% year-on-year increase. The increase is due to frozen thresholds and rising asset values.

Tax fraud: 27 people have been sentenced in what is believed to be Northern Ireland's biggest tax fraud case. The conviction follows a decade-long HMRC investigation into a complex £5m fraud that allowed clients to operate in the construction industry without paying any tax.

Tax havens: City A.M. reports on data obtained by Pinsent Masons via a FOI request showing that HMRC is tracking 512 UK firms suspected of using tax havens. This is an 84% increase on the number of firms that HMRC was monitoring this time last year and is due to increased scrutiny as part of the OECD's "No or Only Nominal Tax Jurisdiction" project.

R&D: CIOT has warned that HMRC's recent focus and increased number of enquiries into R&D tax relief claims is deterring genuine claims. CIOT has expressed concern regarding HMRC's approach to R&D enquiries into claims by SMEs, which has led to "a breakdown of goodwill and trust between HMRC and taxpayers and their agents".

EU tax disputes: International Tax Review (ITR) has published an interesting article reviewing recent EU action in relation to corporate tax avoidance and state aid. ITR comments that recent CJEU decisions signal a shift in favour of taxpayers and national governments in relation to state aid.