



Tax Updates – July 2023

Highlights

- On Legislation Day, the government published draft legislation and consultations on a number of issues, including the multinational top-up tax, R&D relief, and deterrent measures for tax avoidance promoters.
- HMRC has published a new Electricity Generator Levy manual.
- The Privy Council has issued a rare tax decision in relation to supplies of hotel accommodation.
- The Upper Tribunal has issued several decisions, including on intangibles relief, petroleum revenue tax, and the statutory residence test.

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1. Upcoming hearings

UT: *HMRC v Hippodrome Casino Ltd* (Case ID: UT-2022-00081) – Hearing date: 3 October 2023 – VAT 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.

CA: *BT v HMRC* (Case ID: CA-2021-000700) – Hearing date: 1 November 2023 – Bad debt 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.

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

UT: *Higgs & Ors v HMRC* (Case ID: UT-2020-000403) – Hearing date: 29-30 November 2023 – Appeal on HMRC's discretion to disapply PAYE Regulations.

UT: *The Tower One St George Wharf Limited v HMRC* (Case ID: UT-2022-000092) – Hearing date: 11/12 December 2023 – Appeal regarding SDLT group relief.

UT: *Nottingham Forest Football Club v HMRC* (Case ID: UT-2022-000129) – Hearing date: 13 December 2023 – Appeal regarding time limits for VAT assessments.

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

UT: *Kiernander v HMRC* (Case ID: UT-2023-000027) – Hearing date: 24 January 2024 – Out of time self-assessment.

UT: *HMRC v Gould* (Case ID: UT-2023-000025) – Hearing date: 25 January 2024 – Appeal regarding taxation dates of dividends to shareholders.

2. Legislation and consultations

Finance Act: [The Finance \(No. 2\) Act 2023](#) received Royal Assent on 11 July, making it the second Finance Act passed through Parliament in 2023.

Legislation Day: On 18 July, the government published [draft legislation](#) for the Finance Bill 2023-24. This follows previous consultations and announcements as part of the Tax Administration and Maintenance Day on 27 April. Highlights include draft legislation on the undertaxed profits rule as part of the multinational top-up tax, the merger of the two R&D tax relief schemes, and further deterrent measures aimed at promoters of tax avoidance.

Consultations: As part of Legislation Day, the government has also published consultations on [employee ownership trusts \(EOTs\)](#) and [employee benefit trusts \(EBTs\)](#), [plastic packaging tax](#), [energy profits levy](#) and the [VAT Terminal Markets Order](#). Depending on the responses, these proposals may be taken forward in the Finance Bill 2024.

Transfer pricing: The [Transfer Pricing Records Regulations 2023](#) were made on 18 July. The Regulations implement the record-keeping requirements in the OECD Transfer Pricing Guidelines 2022, including the obligation to prepare and retain a standardised master file and local file.

Digital platforms: [The Platform Operators \(Due Diligence and Reporting Requirements\) Regulations 2023](#) were made on 18 July and come into force on 1 January 2024. The Regulations implement the OECD Model Reporting Rules for Digital Platforms, which require platform operators to report details of sellers to HMRC and verify the information collected. The Regulations also set out penalties for non-compliance. The [policy paper](#) on reporting rules for digital platforms has also been updated accordingly.

Money laundering: The [Money Laundering and Terrorist Financing \(High-Risk Countries\) \(Amendment\) Regulations 2023](#) update the list of high-risk third countries in Schedule 3ZA to the principal Anti-Money Laundering Regulations. Cambodia and Morocco have been removed from the list. Enhanced due diligence is required for countries that are listed in the high-risk section.

3. HMRC guidance, campaigns and other news

HMRC professional standards: HMRC has published a set of [Compliance Professional Standards](#) that set out how HMRC will behave and seek to uphold its Charter and Civil Service values in undertaking any compliance activity. There are four standards: getting things right, being aware of the customer's situation, being responsive, and treating customers fairly.

Investment zones: The government has [announced](#) the UK's first Investment Zone located in South Yorkshire. This Zone is focused on Advanced Manufacturing to build on the region's existing strengths and will benefit from £1.2bn in investment and an estimated 8,000 new jobs.

Electricity generator levy: Following the introduction of the levy in the Finance (No. 2) Act 2023, HMRC has published its [Electricity Generator Levy Manual](#). This explains how the levy applies, how liability is computed, and how it works in the context of groups, partnerships and joint ventures. There is also a detailed section on the anti-avoidance rule and how the main purpose test applies.

VAT and charities: [VAT Notice 701/1](#) has been updated to set out the two-stage test that must be applied to establish if an activity is a business activity for VAT purposes, namely (1) whether the activity results in a supply of goods or services for consideration, and (2) whether the supply is made for the purpose of obtaining income. This reflects the departure from the previous test based on six indicators.

Capital allowances: HMRC has updated its [Capital Allowances Manual](#) to clarify that, if the original capital expenditure is incurred in an earlier chargeable period to that in which the asset is appropriated, the expenditure will not qualify for the annual investment allowance (AIA) or first year allowances (FYAs).

Film production: A new section has been added to [HMRC's Film Production Company Manual](#) on the availability of film tax relief in relation to production fees and intra-group charges. The Manual confirms

the principle that charges made by one group company to another should be at arm's length.

Video games: HMRC has [updated](#) its Video Games Development Company Manual in relation to intra-group charges, to avoid potential tax relief claims for artificially inflated expenditure where charges are made between connected persons at inflated rates for supplies of workers and other production services. This mirrors the very similar guidance for film tax relief.

COMPI forms: HMRC has updated its [guidance](#) on temporary agent authorisation for the purposes of dealing with a compliance check. Form CompI can now be submitted to HMRC by email as long as the taxpayer has already consented to electronic communications.

Benefits-in-kind nudge letters: HMRC's Wealthy External Forum has started sending [nudge letters](#) to taxpayers whose 2020-21 tax returns contain discrepancies in relation to benefits-in-kind. The letters advise taxpayers to make any necessary corrections to their returns within 28 days.

Gift aid carry-back nudge letters: HMRC's Wealthy External Forum has started sending [nudge letters](#) to taxpayers who amended their 2020-21 tax returns to include or amend a gift aid carry-back figure. HMRC is reminding taxpayers that such carry-back elections are restricted to original tax returns and cannot be included in any amended returns.

Tax avoidance schemes: HMRC has [published](#) details of three new tax avoidance schemes and their promoters: Apricot Umbrella Limited, Countrywide Partners Limited and Easyway Umbrella Limited. Apricot and Easyway are umbrella company schemes, while Countrywide is a disguised remuneration scheme.

HMRC service levels survey: CIOT has published a [survey](#) with a view to gaining a better understanding of HMRC's service levels and how that impacts businesses. CIOT encourages advisers who have experienced delays or other issues with HMRC to complete it.

4. Recent decisions – Direct tax

Intangibles relief: [HMRC v Jasper Conran](#) [2023] UKUT 166 (TC) (For the taxpayer: Alun James. For HMRC: Elizabeth Wilson KC and Sadiya Choudhury.) - This was an appeal by Jasper Conran, the fashion designer, in relation to the expansion of his design range into branded eyewear. The FTT held that a payment of £8.25m for the transfer of a licence between connected entities was not a distribution, meaning that no CGT or income tax was payable. The UT reversed that decision and held that the payment did constitute a distribution, as it was a payment in respect of shares in the holding company of which Mr Conran was the ultimate shareholder. The UT therefore held that intangibles relief was not available.

The case highlights that situations where the recipient of value from a company is a shareholder are very tricky and need to be considered carefully and with advice. Stewarts have reviewed this case for [Tax Journal](#).

Petroleum revenue tax: [HMRC v Perenco UK Ltd](#) [2023] UKUT 169 (TCC) (For HMRC: Elizabeth Wilson KC. For the taxpayer: John Brinsmead-Stockham KC.) – The UT considered whether expenditure incurred by the taxpayer, an oil company, in replacing a cooling plant in order to comply with the environmental regulations and removal costs at its offshore gas facilities was allowable in the computation of profit for petroleum revenue tax. The UT found in the taxpayer's favour and held that such expenditure was allowable, despite being partly reimbursed by owners of oil fields.

The UT cited with approval the FTT's findings in *Quinn (London) Ltd v HMRC* [2021] UKFTT 437 (TC) that expenditure is only subsidised if it is met "directly or indirectly" by another person. This decision will be of interest to operators in the oil sector and more broadly to those making claims (e.g. for R&D tax relief) that may raise a subsidy issue.

Residence: [HMRC v A Taxpayer](#) [2023] UKUT 182 (TCC) (For the taxpayer: James Kessler KC and Rebecca Sheldon. For HMRC: Christopher Stone and Sam Way.) – The taxpayer was resident in Ireland in the relevant period, but spent over 45 days in the UK

in a year. The question was whether the taxpayer would have spent the extra days in the UK but for exceptional circumstances beyond her control which prevented her from leaving the UK. The UT overturned the FTT decision and found in favour of HMRC, holding that the taxpayer had not established that she had to be in the UK to care for her sister.

This case demonstrates the high threshold for establishing exceptional circumstances where the 45-day limit is breached as part of the statutory residence test. Interestingly, the UT held that "moral obligations" (e.g. caring for a family member) "are not in themselves exceptional circumstances; they are instead part of normal social and familial interaction".

Domicile: [L Strachan v HMRC](#) [2023] UKFTT 617 (TC) (For the taxpayer: Samuel Brodsky. For HMRC: Christopher Stone and Georgia Hicks.) – The FTT dismissed the taxpayer's domicile appeal on the basis that he had not established a domicile of choice in the US, where he spent a few years in his youth but had not fixed his sole and chief residence by the time he returned to London in 1987. The taxpayer returned to live in the US in 2021, and in the meantime owned a holiday home there, but that was insufficient to form a domicile of choice for earlier years. The FTT also considered whether HMRC's earlier assessments were out of time and whether the extended time limit for carelessness applied; it held that the taxpayer had been careless in submitting returns on the basis of an outdated domicile ruling, but HMRC had not established that carelessness had caused the loss of tax.

This is the latest in a long line of HMRC wins on domicile, although it is perhaps not surprising given the fact pattern and limited evidence available. There is also an interesting analysis of the interplay between the extended 6-year time limit for carelessness and the Requirement to Correct legislation.

EBT: [M R Currell Ltd v HMRC](#) [2023] UKFTT 613 (TC) (For the taxpayer: Ben Elliot. For HMRC: Edwards Waldegrave.) – The FTT upheld PAYE and NICs assessments in relation to an EBT scheme, on the basis that the arrangements did not work and the loan to a director was a reward for services.

The decision is notable for its reasoning: while the loan to the director was found to have been genuine and made on commercial terms, that did not prevent it from being a reward for services.

5. Recent decisions – Indirect tax

Serviced accommodation: [Blue Lagoon Beach Hotel & Co Ltd v Assessment Review Committee & Mauritius Revenue Authority](#) [2023] UKPC 24 (For the taxpayer: Maxime Sauzier SC and Shrivani Dabee. For the Mauritius Revenue Authority: Philip Baker KC and Imran Afzal.) – Blue Lagoon entered into contracts with tour operators to buy a number of nights of accommodation, which the operators then tried to sell on to clients. If they failed to sell the rooms, Blue Lagoon did not reimburse the VAT but considered it was not consideration for any supply of services and was therefore “special income”. The Privy Council held that Blue Lagoon was required to account for VAT on the supply of hotel rooms in exchange for a fee, which constituted consideration even if the rooms were unoccupied.

Although the case deals with Mauritian law, UK VAT legislation is similar. The decision will therefore be of interest to companies in the hospitality sector, as well as more widely to taxpayers who take non-refundable fees in exchange for supplies of services.

Direct and immediate link: [HMRC v Hotel La Tour Ltd](#) [2023] UKUT 00178 (TCC) (For HMRC: Isabel McArdle. For the taxpayer: Michael Firth.) – The taxpayer decided to sell a subsidiary to finance the building of a new hotel and sought to claim input tax on professional services incurred in connection with the sale of shares, which HMRC refused on the basis that the sale of shares is an exempt activity. The UT upheld the FTT decision allowing the taxpayer’s appeal on the basis that the professional services had a direct and immediate link to the construction of the new hotel, which was funded by the share sale.

This is a surprising decision, as sales of shares are exempt, but the case ultimately turned on the fact that the purpose of the share sale was to fund a new venture rather than to turn a profit. It also appears to broaden the test for what constitutes a “direct and immediate link”.

Landfill tax: [Singleton Birch Ltd & FCC Recycling \(UK\) Ltd v HMRC](#) [2023] UKFTT 619 (TC) (For the taxpayer: Akash Nawbatt KC and Colm Kelly. For HMRC: James Puzey and Joseph Millington.) – This was a landfill tax appeal in relation to whether a type of waste produced by a titanium dioxide manufacturer, treated and deposited at a landfill site, could be lower rated. The FTT held that it could not, as the waste was not strictly a “calcium based reaction waste from titanium dioxide production”.

The judgment may impact those involved in the waste management industry. In particular, the literal interpretation and/or the “essence” or “purpose” test applied by the FTT may be relevant to other types of lower rated material. Stewarts acted for the taxpayers.

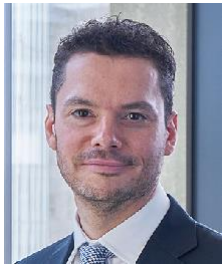
HMRC barred from proceedings: [Ebuyer \(UK\) Ltd v HMRC](#) [2023] UKFTT 611 (TC) (For the taxpayer: John Wardell KC, David Scorey KC and Akash Sonecha. For HMRC: Howard Watkinson and James Puzey.) – This is the most recent instalment in a long-running *Kittel* case, in which the taxpayer’s appeal had already been struck out for non-compliance and subsequently reinstated. The FTT has now barred HMRC from taking part in the appeal as it had failed to comply with an unless order requiring it to disclose documents.

This is a noteworthy decision as it is rare for HMRC to be barred from taking part in proceedings. Advisers and solicitors frustrated with HMRC’s handling of cases will be pleased to note that the FTT is taking non-compliance seriously. The flipside is that the FTT is likely to impose equally exacting standards on taxpayers.

TOMS: [Sonder Europe Ltd v HMRC](#) [2023] UKFTT 610 (TC) (For the taxpayer: Jonathan Bremner KC. For HMRC: Andrew Macnab.) – This was a VAT appeal relating to supplies in the “Rent to Rent” sector, i.e. supplies of flats leased from landlords and used to provide short term accommodation. The FTT held that the supplies fell within the Tour Operators Margin Scheme (TOMS), as Sonder was a tour operator and the accommodation was supplied without material alteration or further processing.

This decision suggests that TOMS applies more broadly than previously understood. It may therefore be of interest to both operators in the Rent to Rent sector and more widely to those wishing to benefit from TOMS.

Profiles



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