

Tax Updates – August 2023

Highlights

- New guidance has been published on the conduct of proceedings before the Upper Tribunal and on giving evidence from abroad via video link.
- HMRC has launched several new nudge letter campaigns, including in relation to commercial property owned by non-resident landlords, VAT on fuel and power supplies, and R&D claims submitted by care homes.
- Russia has suspended a number of DTAs, including the one with the UK, but the UK is still adhering to it for now.
- The Tribunals have issued a number of decisions, including on unallowable purpose, corporate exit charges, and the VAT exemption for medical care.

Contents

Page 2 – Upcoming hearings, legislation and consultations

Page 3 – HMRC guidance, campaigns and other news

Page 4 – Recent decisions – Direct tax

Page 5 – Recent decisions – Indirect tax

1. Upcoming hearings

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

CA: *HMRC v Euromoney Institutional Investor PLC* (Case ID: CA-2022-001975) – Hearing date 18/19 October 2023 – Corporation tax and anti-abuse provisions.

UT: *Alexander Beard v HMRC* (Case ID: UT-2022-000084) – Hearing date: 31 October 2023 – Treatment of dividends.

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

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

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

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

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

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

CA: *Northumbria Healthcare NHS Foundation Trust v HMRC* (Case ID: CA-2022-002498) – Hearing date: 6/7 February 2024 – VAT exemption on car parking services provided by an NHS trust.

CA: *Blackrock Holdco 5 LLC v HMRC* (Case ID: CA-2022-001918) – Hearing date: 5 March 2024 – Intra-group loans, purpose, and transfer pricing.

2. Legislation and consultations

Trade remedies: The [Finance \(No 2\) Act 2023, Schedule 19 \(Trade Remedies\) \(Appointed Day and Savings\) Regulations 2023](#) provide that Schedule 19 to the Finance (No. 2) Act 2023 comes into force on 25 August 2023. Schedule 19 allows the Trade Remedies Authority greater flexibility in investigations and grants the Secretary of State for Business and Trade more power in taking decisions on trade remedy measures.

New alcohol duty regulations: The [Alcoholic Products \(Excise Duty\) Regulations 2023](#) came into force on 1 August 2023. These supplement the primary measures in the Finance (No. 2) Act 2023 and establish a new regime taxing alcohol on the basis of alcohol by volume (ABV) rather than classification.

Oil & gas call for evidence: Following the announcement of a review of the UK's oil and gas fiscal regime at the Autumn Statement 2022, HM Treasury has published a [call for evidence](#) on the evolving context of oil and gas production and the impact of taxation in this area. The responses will assist the government in formulating proposed reforms to reflect the changing face of the industry and to support investment as the country moves towards net zero. Stewarts have published an [article](#) reviewing this call for evidence.

E-commerce: HMRC has published an [explanatory memorandum](#) on EU proposals to amend the Principal VAT Directive and Union Customs Code to reflect developments in the movement of goods facilitated by e-commerce platforms. The UK and European Commission will discuss the effect of these changes on movement of goods to and from Northern Ireland at a later stage.

UK-Russia DTA: Russia has [suspended](#) most of the provisions in 38 of its Double Taxation Agreements, including the one entered into with the UK in 1994. The UK has asked Russia to reinstate the DTA, but Russia has refused. The UK considers the DTA remains in force for now.

3. HMRC guidance, campaigns and other news

Investment zones: The government has [announced](#) the UK's second Investment Zone located in Liverpool. This zone is focused on life sciences and will receive £320m of investment and generate an estimated 4,000 new jobs. Investments will benefit from enhanced capital allowances and other tax reliefs.

Upper Tribunal: New [guidance](#) has been issued on the conduct of proceedings in the Upper Tribunal (Tax and Chancery Chamber). This sets out detailed guidelines for the preparation of skeleton arguments, requires all bundles to be prepared in electronic form, and continues to allow flexibility around remote and hybrid hearings.

Giving evidence from abroad: The Foreign, Commonwealth & Development Office has published new [guidance](#) on giving evidence by video link from abroad. This applies to all courts and tribunals, including the tax tribunals, and sets out the rules that apply in each country. Most countries allow individuals to give evidence in the UK via video link, but there are some that do not or that require the witness to request permission.

VAT late payment interest: HMRC has updated its [guidance](#) on late payment interest where businesses do not pay VAT or penalties on time. HMRC has added a new section summarising the circumstances in which a taxpayer can object to an interest charge. Objections can be raised where the taxpayer considers that HMRC has caused a mistake or unreasonable delay, where there is a dispute as to the relevant date or effective date of payment, where mitigating circumstances apply or where the taxpayer is questioning the legislation.

VAT on insurance: HMRC has updated its [VAT Notice 701/36](#) on the VAT liability of insurance transactions to include an updated definition of insurance, as set out in *United Biscuits (Pension Trustees) Ltd & Anor v HMRC (C-235/19)*, which upheld the definition in *CPP (C-349/96)*: “the essentials of an insurance transaction are... that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of

materialisation of the risk covered, with the service agreed when the contract was concluded”.

PPT: HMRC has updated its [guidance](#) on plastic packaging tax (PPT) to clarify that recycled plastic “comes from plastic waste that has been reprocessed from pre-consumer plastic or post-consumer plastic by using a chemical or mechanical manufacturing process”.

Interest rates: Following the Bank of England decision to increase the base rate to 5.25%, HMRC's late payment interest rate for most taxes will be increased to 7.75% and the repayment interest rate to 4.25%. The increases apply from 22 August 2023 for most taxes.

Commercial property nudge letters: HMRC has started sending [nudge letters](#) to non-resident corporate landlords that own non-residential property in the UK. The recipients are asked to review their position and disclose any rental income from commercial property. This is part of HMRC's ongoing work to identify non-compliance by offshore corporates owning UK property.

Fuel and power nudge letters: HMRC has started sending educational [nudge letters](#) to energy businesses asking them to check that they are accounting for VAT in accordance with VAT Notice 701/19, which explains how VAT applies to supplies of fuel and power. In particular, the letters flag that, where there are multiple meters in a single premises, these must be aggregated for the purposes of the de minimis limit for the application of the reduced rate.

R&D nudge letters: HMRC has started sending [nudge letters](#) to nursing and care home businesses, as agents are targeting this sector and encouraging businesses to make R&D tax relief claims. HMRC has found little evidence of any qualifying R&D being undertaken by the sector and the letters ask directors to review any claims, as they are likely to be ineligible.

Tax avoidance schemes: HMRC has [published](#) details of four new tax avoidance schemes and their promoters: Pay Rec Ltd, Payworx Ltd, Prime Umbrella Services Ltd and SmartPay Ltd. These are umbrella company and disguised remuneration schemes. A new [stop notice 12](#) has also been issued in relation to a new type of avoidance scheme.

4. Recent decisions – Direct tax

Unallowable purpose: [ITL Acquisitions Company \(2011\) Ltd v HMRC](#) [2023] UKUT 194 (TCC) (For the taxpayer: John Gardiner KC and Michael Ripley. For HMRC: Elizabeth Wilson KC and Rebecca Sheldon.) – The appellant was incorporated as the acquisition vehicle for a US group. The acquisition was funded by an intra-group loan of \$550m on which the appellant applied arm's length interest. HMRC denied a deduction of that interest on the basis that the arrangement had an unallowable purpose. In dismissing the taxpayer's appeal, the UT considered whether the unallowable purpose test relates to the purpose of entering into the loan relationship, or whether the question is why a particular taxpayer was chosen as the party to the loan relationship. The UT held that a broad, fact-based approach should be taken, which includes answering both questions where relevant. In this case, the UT held that one of the main purposes of the taxpayer's involvement in the loan relationship was to secure a tax advantage.

This is the latest in a long line of cases on unallowable purpose. Unfortunately, the case law only confirms is that the test is broad and entirely fact-dependent, which makes it difficult for companies to ascertain whether tax relief is available for interest in particular circumstances.

Corporate exit charges: [Redevco Properties UK 1 Ltd v HMRC](#) [2023] UKFTT 665 (TC) (For the taxpayer: Daniel Margolin KC. For HMRC: Ben Elliott.) - The taxpayer company left the UK and became resident in the Netherlands. HMRC issued an assessment for corporation tax exit charges on a gain and profits resulting from the deemed disposal of assets and their re-acquisition. The parties agreed that the Exit Charge Provisions in UK law were incompatible with EU law as they did not allow taxpayers to defer payment of the relevant tax, but disagreed as to the remedy. The FTT dismissed most of the appeal, following a previous FTT decision which held that a conforming interpretation could be adopted in relation to the Exit Charge Provisions.

The decision confirms that the legislation can be interpreted so as to allow a taxpayer to pay any exit

charges in instalments over five years. It also includes an interesting discussion on the concept of judicial comity and reiterates the position that the FTT must follow a similar prior decision unless satisfied that it was wrong.

Avoidance scheme: [The Gala Film Partners LLP v HMRC](#) [2023] UKFTT 699 (TC) (For the taxpayers: Richard Vallat KC and Calypso Blaj. For HMRC: Jonathan Davey KC, Imran Afzal, Nicholas Macklam and Sam Chandler.) – This was an appeal against HMRC's decision to disallow an LLP's claim to loss relief in the amount of £110m for the 2003-04 tax year. The FTT held that the LLP had not incurred the claimed loss in the course of carrying on a trade of film distribution as it was not trading on a commercial basis and with a view to profit or with a reasonable expectation of profit. The LLP members could not set off their share of the loss against other income.

This is the latest decision to confirm that tax avoidance film schemes do not work. In this instance, the scheme was set up by Invicta Capital Ltd and relied on an opinion provided by Jonathan Peacock KC. In reaching its decision, the FTT considered and applied the principles set out in other cases that considered schemes such as *Ingenious*, *Acornwood* and *Icebreaker*.

CGT avoidance: [O Wilkinson & others v HMRC](#) [2023] UKFTT 695 (TC) (For the taxpayers: Alun James. For HMRC: James Henderson and Harry Winter.) – In order to qualify for entrepreneur's relief on the sale of their business, two taxpayers engaged in CGT planning which involved a gift of shares to their daughters, following by the issuing of loan notes and shares in another company after the qualifying period for entrepreneur's relief had expired. The FTT allowed the appeal and held that the planning worked; while the avoidance of liability to CGT was a purpose of the transaction, it was not a main purpose.

In this case, there was no main tax avoidance purpose because the tax saving was small compared to the size of the deal, and the sale would have gone ahead regardless of any tax advantage. The decision provides a useful summary of the case law on main purpose, including *Snell*, *Coll* and *Euromoney*, and also considers what it means for an exchange to "form part of" arrangements with a main purpose of tax avoidance.

5. Recent decisions – Indirect tax

Medical services: [Epem Limited v HMRC](#) [2023] UKFTT 627 (TC) – The FTT dismissed an appeal against HMRC’s decision to compulsorily register the taxpayer for VAT. The FTT held that services provided by a clinic that treated skin conditions using cosmetic procedures and minor surgery did not qualify as exempt supplies of medical care, as the clinic was not providing regulated services and there was insufficient documentary evidence to support the director’s contentions as to the nature of the supplies. The FTT also held that the director’s intention to improve “the quality of people’s lives, in a similar way to doctors or dermatologists working in private hospitals” was insufficient to establish that the supplies fell within the exemption.

This decision is similar to that in [Illuminate Skin Clinics Ltd v HMRC](#) [2023] UKFTT 547 (TC), in which the FTT concluded that aesthetic treatments provided by a private clinic did not constitute exempt supplies of medical care. While there was a dearth of documentary evidence in both cases, the FTT has now repeated its view that cosmetic services supplied by private clinics do not qualify for the exemption. It will be interesting to see if the FTT takes a different view in a case where more comprehensive and compelling evidence is presented.

TOMS: [Golf Holidays Worldwide Ltd v HMRC](#) [2023] UKFTT 701 (TC) (For HMRC: Isabel McArdle.) – The appellant filed an Error Correction Notice (ECN) on the basis that it had mistakenly accounted for wholesale supplies under the Tour Operators Margin Scheme (TOMS) rather than normal VAT rules. The appellant argued that UK businesses could not treat wholesale supplies as within TOMS, as allowing them to do so would mean enforcing the direct effect of EU case law. It also argued that a rejection of the ECN constituted a breach of fiscal neutrality, as it allowed identical supplies to be treated differently. The FTT dismissed the appeal against HMRC’s decision to reject the ECN and held that HMRC was neither enforcing direct effect nor breaching fiscal neutrality.

This case had the potential to be interesting, but as the FTT noted, “[n]either party’s submissions on the state of the law were particularly well developed or convincing”, either in relation to direct effect or anything else. The FTT also had the opportunity to decide whether the principle of fiscal neutrality has survived in UK law, but declined to do so as it did not consider it necessary.

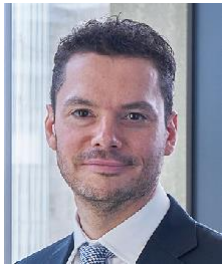
Third party costs order: [Hobbs Close Ltd v HMRC & S Dhanji](#) [2023] UKFTT 696 (TC) (For HMRC: Jenny Goldring.) – The appellant’s *Kittel* appeal had been struck out for failure to comply with an unless order following the sole director’s imprisonment for conspiracy to cheat the public revenue in relation to the appellant’s affairs. HMRC applied for a third party costs order against the director in respect of over £400k of costs incurred in defending the company’s appeal. The FTT dismissed the application. It held that, in light of the director’s limited income, it would not be a “fair and just outcome” to make the order against him.

This decision serves as a reminder of, and neatly summarises the case law on, rule 10(5)(b) of the Tribunal Procedure Rules, which requires the Tribunal to consider a person’s financial means before making a costs order against them.

Late appeal: [Little Lever Working Mens Club v HMRC](#) [2023] UKFTT 714 (TC) – The appellant appealed against a protective VAT assessment issued in 2011 in relation to the *Rank* litigation on gaming machines. The FTT struck out the appeal as the underlying decision was not appealable, and separately refused to allow a late appeal against the assessment. Although the appellant’s case had good prospects as, following *Rank*, the VAT recovered by the protective assessment was never due, the FTT found that the 11-year delay in submitting the appeal was extensive and unjustified.

Although the facts of this case were unusual given that a protective assessment was being appealed, the decision reinforces the importance of taking the necessary procedural steps in time. Failure to observe the rules can trip up even the most technically sound cases.

Profiles



David Pickstone

Partner

+44 (0)20 7936 8178

dpickstone@stewartslaw.com

David specialises in complex tax disputes with HMRC and commercial parties before the Tax Tribunals, UK and European Courts. He acts for a large number of high net worth individuals as well as various corporate clients across a range of sectors.



Matthew Greene

Partner

+44 (0)20 7903 7982

mgreene@stewartslaw.com

Matthew specialises in resolving complex tax disputes across all the main UK taxes. He has over 15 years' experience acting for corporate and individual clients in high-value disputes with HMRC, conducting litigation in the tax tribunal and higher courts and negotiating settlements with HMRC.



James Le Gallais

Partner

+44 (0)20 7822 8047

jlegallais@stewartslaw.com

James leads on complex, high-value disputes involving tax, accounting and related financial services. He has particular expertise acting for Claimants in tax mis-selling claims, group actions and cases involving commercial/corporate fraud.



Alexander Lerner

Partner

+44 (0)20 7903 7965

alerner@stewartslaw.com

Alex is listed as a key lawyer in the Legal 500 for both banking litigation and professional negligence and is sought out for high-value and strategically complex matters, often involving multi-jurisdictional elements. He specialises in mis-selling, fraud, and professional negligence and shareholder/M&A disputes.



Anastasia Nourescu

Senior Associate

+44 (0)20 7822 8045

anourescu@stewartslaw.com

Anastasia is an experienced solicitor-advocate whose practice focuses on helping clients to navigate complex tax audits, negotiating tax dispute settlements and conducting litigation against HMRC decisions and assessments.



Krishna Mahajan

Associate

+44 (0)20 7903 7952

kmahajan@stewartslaw.com

Krishna has a wealth of experience in tax and trust litigation. She has worked on cross-jurisdictional disputes in relation to high-net-worth and high profile individuals, including HMRC investigations and voluntary disclosure arrangements.