



## Tax Updates – September 2023

### Highlights

- The Treasury has announced that the Autumn Statement 2023 will take place on 22 November.
- The government has announced plans to legislate to retain the 0% Stamp Duty and Stamp Duty Reserve Tax charge.
- HMRC has published a revised Code of Governance for Resolving Tax Disputes.
- The Upper Tribunal has made e-filing mandatory for represented taxpayers.
- HMRC is extending its temporary CCM model for mid-sized businesses.
- The Upper Tribunal has issued its decision in the first case on the salaried members rules.

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## 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:** *Exchequer Solutions Limited v HMRC* (Case ID: UT-2022-000106) – Hearing date: 13-16 November 2023 – Umbrella companies and travel expense deductions.

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

**UT:** *Shivani Mathur v HMRC* (Case ID: UT-2022-000060) – Hearing date: 11 December 2023 – Taxation of employment termination payments.

**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

**Autumn Statement:** The Treasury has [announced](#) that the Autumn Statement 2023 will take place on 22 November.

**Stamp duty:** The government has [announced](#) plans to legislate to ensure the existing 0% Stamp Duty and Stamp Duty Reserve Tax charge on the issue of UK shares onto foreign markets and on related transfers of shares will remain in place. This legislation is necessary to maintain the current position, as the Retained EU Law (Revocation and Reform) Act 2023 would otherwise have the effect of reimposing the previous 1.5% charge that was previously disapplied as it was incompatible with EU law. The new [draft legislation](#) has also been published and HMRC is consulting on it until 12 October.

**VAT on medicines:** The [Value Added Tax \(Drugs and Medicines\) Order 2023](#) has been made, introducing a new zero rate that will apply from 9 October to medicines supplied under patient group directions, i.e. under instructions allowing healthcare professionals to supply certain medicines to a pre-defined group of patients without a prescription. This will bring the VAT treatment of medicines supplied under patient group directions in line with that applicable to medicines dispensed under a prescription.

**EU proposals:** The European Commission has [published](#) a package of initiative that include two draft directives and a proposal: the Business in Europe: Framework for Income Taxation Directive (BEFIT), the Transfer Pricing Directive (TPD), and a proposal establishing a Head Office Tax System for SMEs (HOT). BEFIT in particular has received a lot of attention, as it aims to introduce a single set of rules to determine the tax base of groups of companies. This builds on the OECD's initiative on the global minimum tax and the previous Pillar Two Directive. It also aims to reduce compliance costs for businesses that operate in several Member States and allow tax authorities to more easily determine the tax due.

### 3. HMRC guidance, campaigns and other news

**Resolving tax disputes:** HMRC has [published](#) a revised Code of Governance for Resolving Tax Disputes. While the updates do not reveal a substantial change in HMRC's approach, they do introduce four key principles of dispute resolution: separation between officers negotiating settlements and those who sign them off, even-handedness, clarity and transparency, and appropriate levels of tax expertise and scrutiny in tax disputes. Some of the content has also changed slightly, including the addition of sections on the GAAR advisory panel and statutory review and appeals, and the removal of sections on transfer pricing DPT and the High Risk Corporates Programme.

**E-filing in the UT:** The UT has issued a new [practice direction](#) on electronic filing, which requires all documents provided by represented parties in proceedings started in the UT on or after 2 November 2023 to be filed using the online portal CE-File.

**Temporary CCM:** Following a recent trial of a temporary Customer Compliance Manager (CCM) model for mid-sized businesses, HMRC has [confirmed](#) that it will continue with this model. The temporary CCM provides support to mid-sized businesses with greater complexity, multiple interactions with HMRC and/or going through key life events. It is aimed at businesses with a turnover of over £10m and/or more than 20 employees.

**R&D:** HMRC has started issuing [nudge letters](#) to taxpayers who have submitted R&D claims since 8 August 2023 without completing an additional information form (AIF). Despite the introduction of a mandatory requirements to complete an AIF, half of all R&D claims received by HMRC between 8 August and 3 September have not included the form. CIOT also [notes](#) that HMRC is trialling the use of para 16 of Sch 18 to FA 1998 to correct CT returns by removing R&D relief claims. In its [response](#) to CIOT's letter flagging issues with HMRC's handling of R&D relief claims, HMRC has acknowledged that it should explain in more detail why the claim is incorrect and has been removed. However, HMRC has noted that

half of all claims are non-compliant, a problem which requires collective action across the tax profession.

**VAT fixed establishment:** HMRC has started [writing](#) to VAT registered businesses to ask for evidence that they are established in the UK. This is due to an increase in the use of high-volume addresses by overseas established businesses that may be seeking to avoid marketplace liability rules. Failure to respond will result in HMRC recording the business as non-established in the UK.

**VAT on medicines:** HMRC has updated its [VAT Notice 701/57](#) on health professionals and pharmaceutical products to add pharmacy technicians to the meaning of health professionals and to remove services directly supervised by a pharmacist from the list of services not exempt from VAT.

**Landlord avoidance scheme:** HMRC has published [Spotlight 63](#) on a tax avoidance scheme marketed as tax planning for individual landlords to structure their property business. HMRC has confirmed that the arrangement, which claims to bypass mortgage interest relief restrictions, reduce the tax payable on profits, and reduce CGT and inheritance tax liability, does not work. This follows the identification of such a scheme promoted by Property I 18 by [Tax Policy Associates](#).

**School fee tax avoidance:** Following an earlier [report](#) on tax avoidance schemes purporting to assist with the cost of school fees and an HMRC [spotlight](#) warning that such schemes do not work, Tax Policy Associates have [identified](#) that Apollo Private Wealth has been promoting similar schemes. Apollo is the largest private wealth firm in the UK and a "senior partner practice" of St James's Place.

**Fintech avoidance scheme:** Following Tax Policy Associates' [report](#) on a tax avoidance scheme disguised as a loyalty card product promoted by B2BTradeCard, the fintech company now seems to have shut down.

**List of avoidance schemes:** HMRC has [published](#) details of several new tax avoidance schemes and their promoters, including Dalespay Ltd, ABC Umbrella Ltd, Apricot Umbrella Ltd, Edge Umbrella Ltd, Hamilton Bradbury Ltd and Olympus Contracting Ltd. All of these are umbrella company schemes. The first three companies unsuccessfully [applied](#) to the High Court to have their names removed from HMRC's list.



## 4. Recent decisions – Direct tax

**Salaried members rule:** [HMRC v BlueCrest Capital Management \(UK\) LLP](#) [2023] UKUT 232 (TCC) (For the taxpayer: Amanda Hardy KC and Oliver Marre. For HMRC: Richard Vallat KC, Laura Poots and Calypso Blaj.) – The UT has upheld the FTT’s decision in the first appeal on the salaried members rules, which had allowed the taxpayer’s appeal in part and found that the remuneration paid to some LLP members should not be taxed as employment income.

The UT has refused to read overly restrictive tests into the legislation, which means a relatively broad range of LLP members with different levels of involvement will fall outside the scope of the rules. This is potentially helpful to LLPs and especially to hedge funds, which may have a similar set up to BlueCrest. The case also reinforces the fact that each case will turn on its facts, which may prompt HMRC to take a more restrictive approach to a different fact pattern. Stewarts have prepared an [article](#) on this case.

**Deductibility of penalty payments:** [Scottish Power \(SCPL\) Ltd v HMRC](#) [2023] UKUT 218 (TCC) (For the taxpayer, David Goldberg KC and Laura Inglis. For HMRC: David Ewart KC and Thomas Chacko.) – The UT upheld an FTT decision that payments made to customers by energy providers in settlement of regulatory investigations were not deductible for corporation tax purposes. The UT held that the payments were in the nature of or in lieu of penalties and were therefore non-deductible.

The UT’s analysis is based on a wider policy that the punitive effect of such payments would be diluted if the appellant were allowed to deduct them and thereby share the burden of their non-compliance with the wider taxpayer community. The UT emphasised that the punitive character of such payments must be determined on a “global assessment of the evidence” in the context of the wider settlement.

**SSE:** [M Group Holdings Ltd v HMRC](#) [2023] UKUT 213 (TCC) (For the taxpayer: Richard Vallat KC and Laura Ruxandu. For HMRC: John Brinsmead-Stockham KC.) – The UT held that the substantial shareholding exemption (SSE) from the charge to corporation tax on gains was not available on the taxpayer’s disposal of a shareholding in a subsidiary. This was because the taxpayer disposed of the shareholding only 11 months after its acquisition. That period could not be treated as extended because the extension only applied where the assets were held and used by a company that was “a member of the group”.

An important part of the UT’s decision is its clarification of what a “group” is, as the term is not defined in the SSE legislation. The UT held that the word should be given its ordinary meaning and that it implies the existence of two or more companies, such that a single company cannot constitute a group. This is in accordance with most practitioners’ understanding, but the UT’s confirmation is helpful.

**Judicial review claim service:** [R \(oao London Fluid System Technologies Ltd and others\) v HMRC](#) [2023] EWHC 2206 (For the taxpayer: Giles Goodfellow KC and Ben Elliott. For HMRC: Christopher Stone and Ishaani Shrivastava.) – The High Court granted the taxpayer permission to bring a judicial review claim against HMRC’s refusal to return a payment made by the taxpayer under the Disguised Remuneration Repayment Scheme 2020. The Court retrospectively allowed service of the claim on HMRC, despite the taxpayer’s solicitor having sent the claim by email directly to the HMRC solicitor dealing with the case, rather than to HMRC’s specific email address for service of new proceedings.

The decision confirms HMRC’s position that new claims must be served by sending them to [newproceedings@hmrc.gov.uk](mailto:newproceedings@hmrc.gov.uk) (even if the HMRC solicitor in the case is known). The Court may take a different view on a specific fact pattern (e.g. where, as here, HMRC was aware of the claim and did not raise the issue of defective service before the time limit expired), but ensuring proper service is effected will save time and costs incurred on a preliminary dispute and guard against the risk of the claim failing due to a procedural point.

## 5. Recent decisions – Indirect tax

**Insurance exemption:** [Intelligent Money Ltd v HMRC](#) [2023] UKUT 236 (TCC) (For the taxpayer: David Bedenham. For HMRC: Andrew Macnab.) – The UT upheld an FTT decision that the VAT exemption for insurance transactions did not apply to services provided by the taxpayer in connection with the provision, operation and administration of self-invested personal pension schemes (SIPPs). Even though the SIPPs constituted a contract of insurance, the fees paid by participants in the SIPPs were paid as consideration for services and did not include any premium for risk.

This case confirms that for an insurance contract to be exempt from VAT, the service provider must charge a benefit in exchange for an indemnity from risk, whether in the form of a payment or provision of services in the event that the risk materialises. This proposition was established by a long line of CJEU case law and the UT has now closed the door to any argument that a wider definition of insurance can be applied. This decision will be of interest to other SIPPs and pension funds more generally.

**NHS VAT concession:** [R \(oao Royal Surrey NHS Foundation Trust\) v HMRC](#) [2023] EWHC 2354 (Admin) (For the taxpayer: David Scorey KC and Stephen Donnelly. For HMRC: Eric Metcalfe.) – The taxpayer brought a successful judicial review against HMRC's decision to deny it the benefit of a concession in respect of the onward supply of specialist radiation therapy devices. In ordering the repayment of sums equivalent to input tax on the purchase of those devices, the High Court held that the taxpayer benefitted from a concession available on the acquisition of goods for the purposes of an NHS Trust's business activities.

Successful tax judicial reviews are few and far between, but this is one of them. The decision will be of interest to other NHS Trusts, and practitioners may wish to review the Court's analysis as an example of a fact pattern that may give rise to a finding that there has been a public law error.

**VAT deregistration:** [Impact Contracting Solutions Limited v HMRC](#) [2023] UKUT 215 (TCC) (For the taxpayer: Daniel Margolin KC, Iain MacWhannell and David Bedenham. For HMRC: Howard Watkinson and Joshua Carey.) – The UT upheld an FTT decision dismissing the taxpayer's appeal against HMRC's decision to deregister it for VAT on the basis that it was registered principally or solely to facilitate VAT fraud. The UT relied on the *Ablessio* principle and the abuse principle in *Halifax*, which continued to apply in the UK after 1 January 2021 under s. 42 of the Taxation (Cross-border Trade) Act 2018.

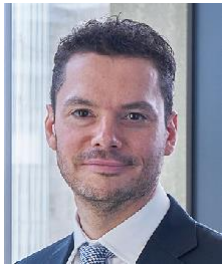
The taxpayer sought to argue that the *Ablessio* principle did not extend to taxable persons who did not themselves fraudulently evade VAT; that was a very ambitious argument and, unsurprisingly, it failed. The UT did not consider the impact of the Retained EU Law (Revocation and Reform) Act 2023 on principles of EU law after the end of 2023, but a case on that point will no doubt come along soon.

**Essay writing services:** [All Answers Ltd v HMRC](#) [2023] UKFTT 737 (TC) (For the taxpayer: Tim Brown. For HMRC: Joanna Vicary.) – The FTT dismissed the taxpayer's appeal against VAT assessments issued on the basis that it was operating as principal in providing essay writing services and had to account for VAT on the full payment received from its customers. The taxpayer's contractual terms did not support its argument that it was acting as agent for third party writers.

This is the second time this taxpayer has taken its case to the FTT, after changing its terms following an unsuccessful case before the FTT and UT. The UT held that, regardless of these changes, the core obligations to deliver a product within a certain timescale and to the requisite standard remained the same. This is a reminder that any amendments to the contractual terms must match the economic and commercial reality of the taxpayer's operation, otherwise they will not be effective for the purpose of changing the taxpayer's VAT treatment.

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