



Tax Updates – October 2023

Highlights

- HMRC has published a draft Finance Bill provision which confirms VAT and excise legislation will continue to be interpreted purposively, including by reference to EU law.
- HMRC has started sending nudge letters to large businesses that have failed to publish their tax strategies, to non-UK resident taxpayers, and to taxpayers identified as having complex tax affairs.
- The Supreme Court has published two tax decisions: *HMRC v Vermillion Holdings Ltd*, which clarifies the meaning of a deeming provision in relation to employment-related securities, and *Target Group Ltd v HMRC*, which confirms a narrow interpretation of the VAT exemption for payments.

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1. Upcoming hearings

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.

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

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).

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

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.

UT: *Gary Lineker Media v. HMRC* (Case ID: [2023] UKFTT 340 (TC)) – Hearing date: 19-20 February 2024 – IR35, partnership and direct contracts dispute.

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

2. Legislation and consultations

VAT law interpretation: HMRC has published a [draft Finance Bill provision](#) and [policy paper](#) clarifying that, despite the changes in the Retained EU Law (Revocation and Reform) Act 2023 abolishing the supremacy of EU law, VAT and excise legislation will continue to be interpreted drawing on rights and principles that currently apply in interpreting UK law. This includes a continued purposive approach having regard to principles derived from EU law, including case law.

Pillar Two: [Draft legislation](#) setting out the UK's implementation of the OECD Pillar Two rules has been updated to introduce an undertaxed profits rule in the multinational top-up tax and domestic top-up tax provisions. The measure ensures that top-up taxes that are not paid under another jurisdiction's inclusion rule are brought into charge in the UK. The updates include safe harbours and other features of the OECD's latest administrative guidance, such as a new chapter providing for a transitional safe harbour election.

Gambling Levy: Following the publication of the [Gambling Reform white paper](#) in April 2023, the government has published a [consultation](#) on proposals to introduce a statutory levy on gambling operators. The government is consulting on aspects of the levy's design, including its structure, distribution and governance. The consultation is open until 14 December 2023.

Autumn Statement: CIOT has submitted a number of representations to the Treasury ahead of the Autumn Statement, including in relation to the [tax treatment of cryptoassets](#), proposing that these should be recognised and dealt with expressly in legislation across the main taxes.

DAC8: The EU Council has [adopted](#) a directive (DAC8) amending existing rules on administrative cooperation in the field of taxation. The new directive mainly concerns reporting and automatic exchange of information in relation to cryptoassets and advance cross-border tax rulings for high-net-worth individuals.

3. HMRC guidance, campaigns and other news

Remittance of loan monies: HMRC has [agreed](#) to review its position on remittances secured against collateral representing foreign income or gains, according to CIOT. Currently, if 100% of the loan proceeds are brought into the UK, the full amount of the collateral is deemed to have been remitted irrespective of the loan amount, whereas if only part of the loan was brought into the UK, the remittance is limited to the amount actually brought in. CIOT considers that the taxable amount should be limited to the amount actually remitted.

Promoters factsheet: HMRC has [issued](#) a new factsheet regarding compliance checks for promoters of tax avoidance schemes, outlining when taxpayers may receive a third-party information notice from HMRC. Penalties for failure to provide information in accordance with the factsheet vary from a minimum of £300 up to a maximum of £5,000 in the event of careless or deliberate provision of inaccurate information, as well as related criminal offences.

Differences in company accounts: HMRC has for the first time published a [Data Usage Agreement](#) that has been in place with Companies House since 2018. HMRC already has access to statutory account and disqualified director data, but this agreement allows Companies House to access HMRC's comparison of differing accounts held by the two authorities in order to identify fraud and error in company accounts.

Tax strategy nudge letters: HMRC is writing to large businesses with a global turnover of over £200m that have failed to disclose their [tax strategies](#), according to [City AM](#). Such failure may result in a £7,500 fine after six months and £7,500 per month after that, up to a potential £50,000 per year.

Nudge letters to non-UK residents: HMRC has started [writing](#) to taxpayers who declared themselves as non-UK residents in their 2021/22 tax returns. The nudge letters provide a summary of the residency rules and call taxpayers to use the interactive residence tool available on gov.uk to assess their residency status before submitting their

2022/23 returns. The letters also advise taxpayers to rectify any errors in their 2021/22 tax returns.

Pre-filing nudge letters: HMRC is [writing](#) to just under 1,000 taxpayers identified as having complex tax affairs, inviting them to a voluntary call with a CCM before filing their returns. The aim of this exercise is to address any issues before they arise and avoid the need for later compliance checks.

ISA fractional shares: HMRC has issued [guidance](#) confirming that fractional shares cannot be held in ISAs as only whole shares are considered to be eligible. However, the restriction does not apply to fractional shares held as part of a collective investment scheme or fund, such as an exchange traded fund. HMRC has asked ISA managers who allow fractional shares as a qualifying investment to get in touch. This announcement followed a meeting with industry and Treasury officials where HMRC first expressed this view, as reported by [the FT](#).

Landlord avoidance scheme: Following the identification of a tax avoidance scheme marketed as tax planning for individual landlords and HMRC's publication of [Spotlight 63](#), Tax Policy Associates have [identified](#) a further promoter of a similar scheme. Stewarts are currently looking into such schemes and have published an [article](#) on how HMRC investigates mass-marketed tax products and what taxpayers can do in response.

List of avoidance schemes: HMRC has [removed](#) one scheme entry from the list and added 1st Choice Umbrella Ltd, the promoter of an umbrella company scheme. [Stop notice 6](#) relating to Focus Contractor Limited has also been amended following its initial publication in April 2023.

AI impact on digital justice system: Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice in England and Wales, has given a [speech](#) on the 150th Anniversary of the Technology and Construction Court in relation to the use of AI in the digital justice system and its potential impact on dispute resolution. He highlighted that large language models like ChatGPT can provide quick answers to legal questions (even though human supervision would still be necessary). He suggested that AI can streamline litigation activities by processing and summarising complex data, as well as automating disclosure in commercial litigation providing predictions on case outcomes.

4. Recent decisions – Direct tax

Employment-related securities: [HMRC v Vermilion Holdings Ltd](#) [2023] UKSC 37 (For the taxpayer: Julian Ghosh KC, Roddy MacLeod, and Laura Ruxandu. For HMRC: Philip Simpson KC and David Pett.) – The SC examined the scope of the definition of employment-related securities and, in particular, s. 471(3) of ITEPA 2003 which deems “a right or opportunity to acquire a securities option made available by a person’s employer” to be regarded as available by reason of employment. Contrary to the taxpayer’s arguments, the SC unanimously agreed that the sole question was whether securities options had been provided to a recipient by their employer during the existence of the employment relationship. If this was so and none of the narrow statutory exceptions were met, the securities options were employment-related.

The SC has confirmed the interpretation of what appeared to be a straightforward statutory deeming provision. Given the subjective nature of deciding whether an employment nexus existed in other contexts, s. 471(3) existed to create a simple test in such cases. The result of the deeming provision was not unjust or anomalous.

Tiered partnerships: [BCM Cayman LP v HMRC](#) [2023] EWCA Civ 1179 (For the taxpayers: Jonathan Peacock KC, John Brinsmead-Stockham KC, Edward Hellier. For HMRC: Rupert Baldry KC, Thomas Chacko, James Kirby.) – The CA upheld earlier decisions by the FTT and UT in an appeal arising from a “tiered partnership” scheme established to facilitate a buy-out of equity in a UK trading partnership through a complex arrangement which involved financing provided through a separate Cayman Islands partnership.

The case addresses some important issues of partnership law and taxation. Contrary to the taxpayer’s contention, a single “omnibus partnership” incorporating all members is not automatically created when one partnership acquires an interest in another partnership. The CA did hold, contrary to the UT’s earlier decision, that a partner is not taxable on allocated profits received as a “fiduciary”, although this was not applicable to the taxpayer’s own position which was subject to a *Ramsay* reading. The taxpayer’s claim to interest deductions relating to a

trading loan relationship was also rejected. It was necessary to distinguish different trading purposes: a purpose of investment in a partnership was not the same as a purpose of investment in the furtherance of that partnership’s trade.

DPT and transfer pricing: [R \(oao Refinitiv Ltd & others\) v HMRC](#) [2023] UKUT 257 (TCC) (For the taxpayers: Julian Ghosh KC, Sam Grodzinski KC and Laura Ruxandu. For HMRC: Jonathan Bremner KC.) – The taxpayers brought a judicial review claim against HMRC’s decision to issue DPT notices in relation to services they had provided to a Swiss-resident entity in 2018. The taxpayers argued that it was unlawful for HMRC to use a different arm’s length pricing method to that agreed in an APA covering the period 2008-2014. The UT rejected the claim and held that the TP methodology agreed in the APA could only apply to the period covered by the APA.

UK court cases on DPT and transfer pricing are few and far between, and judicial reviews in this area are almost unheard of. In this case, it is clear the taxpayers could not reach agreement with HMRC, and litigation was the last resort in a high-value case on an important point of principle. The decision sets out an interesting analysis of which periods an APA relates to, under s. 220 of TIOPA 2010.

Deliberate inaccuracy: [Suttle & Jaekel v HMRC](#) [2023] UKFTT 873 (TC) (For the taxpayers: Michael Ripley and Michael Firth. For HMRC: Jenny Goldring, Joshua Carey, and Natalya Segrove.) – The taxpayers were directors of a company which operated an umbrella scheme. HMRC argued that the company had not accounted for payroll taxes correctly and issued PLNs to the taxpayers after the company went into liquidation alleging deliberate behaviour.

The FTT sided with the taxpayers. Although accepting that there had been inaccuracies in the company’s returns, HMRC had not established that the disputed tax resulted from these inaccuracies. It also found that the taxpayer’s conduct had not been dishonest. The FTT’s consideration of whether HMRC was allowed to raise new last-minute arguments contradicting its earlier position is of particular interest. Stewarts acted for one of the successful taxpayers.

5. Recent decisions – Indirect tax

Loan administration services: [Target Group Ltd v HMRC](#) [2023] UKSC 35 (11 Oct 2023) (For the taxpayer: Roderick Cordara KC. For HMRC: Hui Ling McCarthy KC and Michael Ripley.) – The taxpayer provided loan administration services on an outsourced basis to lenders. Amongst other functions, it sent BACS instructions that resulted in the automatic transfer of funds. It argued that its services fell under the VAT exemption for payments and transfers, but HMRC disagreed. It appealed but was unsuccessful before the FTT, UT and CA. The SC, dismissing the appeal, held that the services were just a cause of the transfer of funds and did not fall within the scope of the exemption which required such services to have the effect of transferring funds and changing the legal and financial situation between the parties. Neither providing BACS instructions nor making ledger entries fulfilled these criteria.

This decision confirms a narrow approach to the payments exemption. While the application of the exemption is highly fact-dependent, other payment service providers will wish to consider the extent to which their services meet a narrow interpretation of the test in *Sparekassernes Datacenter v Skatteministeriet* (Case C-2/95).

Agency services: [Mercy Global Consult Ltd \(in liquidation\) v Adegbuyi-Jackson](#) [2023] EWCA Civ 1073 (For the Claimant: Andrew Hitchmough KC and Clara Johnson. For the Defendants: Robert Venables KC and Juliette Levy.) – The claimant supplied the services of healthcare professionals to recruitment agencies, who in turn supplied them to NHS Trusts. Following its insolvency, the liquidators sought to recover unpaid VAT on those supplies through proceedings against various individuals and raised allegations of VAT fraud. The individuals sought to amend their defences to argue that the supplies had been exempt and no unpaid VAT was due. After being unsuccessful in the High Court, they appealed to the Court of Appeal but were again unsuccessful. Dismissing two separate attacks on *Mainpay Ltd v HMRC* [2022] EWCA Civ 1620, the CA confirmed that it was binding authority on the distinction between the supply of staff, which was standard-rated, and the supply of healthcare services performed by those staff, which was exempt. Permission to amend was rejected.

The case is interesting mainly as an unusual attempt to litigate a substantive tax issue in the context of a procedural dispute in the course of commercial litigation.

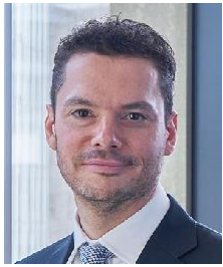
VAT grouping: [Dollar Financial UK Ltd v HMRC](#) [2023] UKUT 256 (TCC) (For the taxpayer: James Rivett KC and Calypso Blaj. For HMRC: Hui Ling McCarthy and Michael Ripley.) – The taxpayer applied to amend the date on which its US parent joined its UK VAT group, but HMRC refused the application. The FTT struck out an appeal against HMRC's refusal on the basis that it had no jurisdiction to consider the appeal because no valid application had been made in the first place. This was because an application to retrospectively change the date on which a member joined the group does not fall within the scope of s. 43B VATA 1994.

This decision confirms that the VAT grouping provisions constitute a comprehensive scheme for bringing into being, and bringing to an end, single taxable person status pursuant to the PVD, and therefore must be construed strictly. Taxpayers in this situation may have an alternative remedy: they can ask HMRC to exercise its discretionary care and management powers to grant the application and can seek a judicial review of any refusal.

Financial services: [JPMorgan Chase Bank, NA v HMRC](#) [2023] UKFTT 856 (TC) (For the taxpayer: Andrew Hitchmough KC and Laura Poots. For HMRC: Kieron Beal KC, Andrew Macnab and Ajay Ratan.) – The FTT held that intra-group supplies of financial intermediary services could not benefit from the payments and securities VAT exemptions. The FTT held that two types of services, one of trading infrastructure and another of general support services, were so closely linked that they comprised a single taxable supply.

The FTT focused heavily on the contractual framework that governed the provision of the services. Although it is well-established that the written agreements will form the basis of any VAT analysis, the FTT seemed to have little regard for the evidence it heard as to what was happening in practice, holding that the taxpayer had sufficient resources to put in place agreements that reflected the economic reality. The decision also includes a brief but intriguing analysis of the payments and securities exemptions.

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