



## Tax Updates – December 2023

### Highlights

- The Chancellor has announced he will deliver the Spring Budget on 6 March 2024.
- The requirement for digital platforms to report details of sellers to HMRC came into force on 1 January 2024.
- HMRC has announced its plans to implement the UK Carbon Border Adjustment Mechanism by 2027.
- The Court of Appeal has published three important decisions on the taxation of partnership profits (*HMRC v BlueCrest Capital Management LP*), the taxation of payments facilitating pension contributions (*HMRC v E.ON UK plc*) and unjust enrichment in the context of VAT bad debt relief claims (*British Telecommunications PLC v HMRC*).

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

**SC:** *R (on the application of Cobalt Data Centre 2 LLP & another) v HMRC* (Case ID: UKSC 2022/0174) – Hearing dates: 24-25 January 2024 – Enterprise zone allowances.

**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 – 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.

**CA:** *Hargreaves Property Holdings Ltd v HMRC* (Case ID: CA-2023-001517) – Hearing date: 12/13 March 2024 – UK withholding tax on interest.

**SC:** *Centrica Overseas Holdings Ltd v HMRC* (Case ID: UKSC 2022/0183) – Hearing date: 19 March 2024 – Capital allowances.

**CA:** *HMRC v Hotel La Tour Ltd* (Case ID: CA-2023-001883) – Hearing date: 10 April 2024 – VAT recovery on professional fees incurred from subsidiary share sale.

**CA:** *Kwik-Fit Group Ltd & Ors. v HMRC* (Case ID: CA-2023-000429) – Hearing date: 16-17 April 2024 – Unallowable purpose loan relationship regime contained in the CTA 2009.

## 2. Legislation and consultations

**Spring Budget 2024:** The Treasury has [announced](#) that the Chancellor will deliver the Spring Budget on 6 March 2024.

**Digital platforms:** The [Platform Operators \(Due Diligence and Reporting Requirements\) Regulations 2023](#) came 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.

**Electricity Generator Levy:** HMRC has [published](#) draft legislation on a new exemption from the Electricity Generator Levy that applies to revenues from new electricity generating projects where the decision to proceed is made on or after 22 November 2023.

**CBAM:** HMRC has published the [outcome](#) of its consultation on the UK Carbon Border Adjustment Mechanism and announced that it will implement it by 2027. This will impose charges on imported goods based on the greenhouse gas emissions intensity of the product and the gap between the carbon price applied in the court of origin and the carbon that would have been applied to that product in the UK.

**VAT on fund management:** The Treasury has published a [summary of responses](#) to its [consultation](#) on the VAT treatment of fund management services. The proposal to implement a principle-based approach to the definition of a SIF has been abandoned in favour of retaining the current list of fund types that are entitled to the SIF exemption.

**VAT on energy-saving materials:** HMRC has published a [summary of responses](#) to its [call for evidence](#) on the expansion of VAT relief on energy-saving materials. Following the consultation, the government will bring some new technologies and a list of groundworks within the scope of the relief and extend it to the installation of qualifying energy-saving materials in buildings used solely for a charitable purpose.

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

**Foreign entities:** HMRC has [amended](#) its International Manual and updated its guidance on foreign entity classification in the context of double taxation relief. The guidance has been redrafted and expanded to note the fact that “transparent” and “opaque” are labels, rather than statutory terms, and to clarify the meaning of “entity shielding”. The updated Manual explains that HMRC considers that US LLCs are opaque (as set out in Revenue and Customs Brief 15 (2015)).

**Multinational Top-up Tax:** HMRC is [consulting](#) on draft guidance on the Multinational Top-up Tax and Domestic Top-up Tax, as set out in Parts 3 and 4 of the Finance (No. 2) Act 2023 and implemented to reflect the OECD’s Pillar Two rules. The guidance sets out an overview of the taxes and when they are charged, the scope of the taxes, how the effective tax rate should be calculated, and administration. The guidance is fairly hefty, running to over 200 pages. The consultation closes on 7 February 2024.

**IR35:** HMRC has published [new guidance](#) on the rules for off-payroll working to supplement its [existing guidance](#). This new guidance sets out what businesses need to do to comply with the rules and avoid common mistakes, including around staff training, record keeping, making status determinations, conducting internal audits and correcting any errors.

**Umbrella companies:** HMRC has issued [guidance](#) for employment businesses that work with umbrella companies. The guidance explains what these types of businesses should do to protect themselves (and the workers they supply) from non-compliant businesses in their supply chains. The measures that companies must take include obtaining correct due diligence and avoiding over-complicated supply chain structures.

**Insolvency:** HMRC has [announced](#) that it will stop providing tax clearances in Members’ Voluntary Liquidation cases, including where such requests have already been submitted. Insolvency practitioners will have to close cases without such clearance subject to their professional judgement. HMRC has highlighted

that there is no requirement or framework for it to provide tax clearance in these circumstances, and it was simply a practice that arose among insolvency practitioners and that it plans to discontinue.

**Nudge letters – Pandora Papers:** HMRC is [contacting](#) taxpayers that it suspects may have undisclosed tax liabilities following the release of the [Pandora Papers](#). HMRC has sent a second round of [letters](#) to taxpayers in December 2023 following the initial campaign in June 2023. Taxpayers who receive a letter will have 60 days to respond to it and should note that penalties of up to 200% of any tax that is found to be due may be charged.

**Nudge letters – Payment processing providers:** HMRC has started issuing [nudge letters](#) to online traders reminding them to account for VAT on the full amount charged to customers before deducting payment processing fees, and to account for sales before such fees for corporation tax purposes. These letters are being issued to businesses within the remit of the Large Business, Mid-Sized Business and Intelligence, and Surveillance and Border Control (ISBC) departments.

**Locum pharmacists:** The FT has [reported](#) on HMRC’s lengthy investigation into pharmacy businesses and whether the self-employed locum pharmacists they use should be treated as employees for tax purposes. According to the Company Chemists’ Association, HMRC has concluded that all locum pharmacists are employees and made a settlement offer to several pharmacy chains for backdated income tax and employers’ national insurance.

**VAT investigations:** HMRC has opened 109,413 VAT investigations in 2022-23, a 23% increase on the previous year, according to [the FT](#). Most of these related to the VAT affairs of mid-sized businesses, with the number of investigations opened by HMRC’s Wealthy and Mid-Sized Compliance department up by 60%.

**R&D:** CIOT has once again [written](#) to HMRC setting out its concerns that HMRC’s handling of compliance checks into R&D tax relief claims is resulting in the rejection of many legitimate claims. This has undermined confidence in R&D tax relief and businesses have been put off claiming relief.

## 4. Recent decisions – Direct tax

**Partnership profits and miscellaneous income rules:** [HMRC v BlueCrest Capital Management LP and Ors](#) [2023] EWCA Civ 1481 (For the taxpayer: Jonathan Peacock KC, John Brinsmead-Stockham KC and Edward Hellier. For HMRC: Rupert Baldry KC, Thomas Chacko and James Kirby.) – The CA held that awards under a Partner Incentivisation Plan, whereby profits were allocated to a corporate partner which in turn made payments of “special capital” to individual partners, were liable to income tax. The CA rejected HMRC’s argument that the payments to the corporate partner were liable to income tax rather than corporation tax, however, it held that the awards of special capital should be treated as miscellaneous income when received by the individual partners. The CA held that the awards had the character of income and were a form of contingent, deferred reward made at the discretion of the corporate partner.

This seems to broaden the scope of the miscellaneous income rules in ITTOIA 2005, suggesting that the conditions in section 687 will apply in more situations than previously envisaged. For example, the requirement for the income to come from an identifiable source will be met where, as here, a corporate partner has exercised its discretion to make payments to individuals. The decision may impact fund managers who have used similar arrangements.

**Payments facilitating pension contributions:** [HMRC v E.ON UK plc](#) [2023] EWCA Civ 1383 (For the taxpayer: Jolyon Maugham KC and Georgia Hicks. For HMRC: Charles Bradley.) – The taxpayer company made facilitation payments to its employees due to changes to the company pension scheme which required affected employees to make increased pension contributions. The UT held that the payment was made as compensation and was not income “from” employment. However, the CA allowed HMRC’s appeal as it concluded that although the payment was to compensate employees in respect of changes to the pension scheme, this was in effect the same as an inducement to agree to a change to future terms of employment. The payments were therefore taxable as earnings.

The decision contains a useful analysis of the tax

liability of pension compensation payments. Companies should be mindful that payments that appear to compensate employees, even outside the pension context, may be regarded as being made as a result of changes to future employment terms and therefore as income from employment.

**IR35:** [Atholl House Productions Ltd v HMRC](#) TC/2018/2263 (For the taxpayer: Keith Gordon and Ximena Montes Manzano. For HMRC: Adam Tolley KC, Christopher Stone and Marianne Tutin.) – The FTT found in favour of the taxpayer and held that the IR35 rules did not apply in relation to services supplied by Kaye Adams via a service company to the BBC. As a result, Ms Adams was to be treated as self-employed and not liable to PAYE income tax or NICs. The factors in favour of self-employment were that (i) it was custom to treat presenters as self-employed contractors, (ii) Ms Adams had her own brand, and (iii) the BBC did not treat Ms Adams as an employee.

This case has a long and complicated history. Having already previously been before the FTT, UT and CA, it was remitted to the FTT to allow the parties to put forward further evidence in light of the CA’s approach to the law. The decision provides the latest in-depth analysis of the interpretation of the IR35 rules and will assist those in similar disputes.

**R&D:** [MW High Tech Projects UK Limited v HMRC](#) [2023] UKFTT 1040 (TC) – The FTT upheld HMRC’s decision to refuse a claim for R&D credit where the taxpayer had failed to prepare its accounts on a “going concern” basis. HMRC had paid the claim but subsequently opened an enquiry and refused the claim, at which point the company was beyond the time limit for correcting its accounts to state that it was a going concern. The taxpayer appealed on the basis that the statutory provisions should be interpreted purposively, the company was a going concern, the directors were pressured into signing the accounts by the auditors, and HMRC had opened its enquiry late. The FTT rejected the submissions and held that although the relevant provisions were to be interpreted purposively that did not allow it to ignore the words of the statute.

The case highlights the strictness of the rules (including the accounting rules) for submitting a claim for R&D relief. It reinforces the importance of ensuring all statutory requirements are met, especially given HMRC’s continuing focus on this area.

## 5. Recent decisions – Indirect tax

**Bad debt relief:** [British Telecommunications PLC v HMRC](#) [2023] EWCA Civ 1412 (For the taxpayer: Roderick Cordara KC, Lyndsey Frawley and Ajay Ratan. For HMRC: Eleni Mitrophanous KC and Frederick Wilmot-Smith.) – The taxpayer made a claim for unjust enrichment relating to the UK’s historic failure to correctly implement the bad debt relief provisions of the Sixth VAT Directive. The claim related to two alleged sources of unjust enrichment. There had been a nine-month period in 1978 in which no domestic bad debt relief scheme had been implemented and the scheme subsequently in place in the “main period” from 1978 to 1989 had been incompatible with EU law. The taxpayer brought its claim in the High Court and HMRC applied for summary judgment in its favour. It succeeded in relation to the taxpayer’s claims arising from the main period but not the nine-month period. Both parties appealed.

The CA rejected the taxpayer’s appeal in relation to the main period. Parliament had intended the implemented scheme to be an exclusive remedy and common law claims for unjust enrichment would not be compatible with this intention. It also upheld HMRC’s cross-appeal that there had been no unjust enrichment during the nine-month period and main period alike because there had been no defective transfer of value on which such a claim could arise. The taxpayer had been under a legal duty to pay output tax and had failed to make a claim for bad debt relief in the relevant period.

**Philanthropic aim:** [United Grand Lodge of England v HMRC](#) [2023] UKUT 307 (TCC) (For the taxpayer: Owain Thomas KC. For HMRC: Howard Watkinson.) – This case concerned the classification of supplies made by a masonic association to its members. The appeal turned on whether the main purpose of the body was of a philosophical, philanthropic, or civic nature; if so, the supplies would be exempt. The FTT had held that the taxpayer had two main aims: the first related solely to the philosophical ideals of freemasonry, whereas the second was providing “relief”. While the UT disagreed with the FTT’s reasoning, it agreed with its decision to dismiss the taxpayer’s appeal on the basis that providing relief to members was not merely subordinate to its philosophical aim and was not by

nature a philanthropic activity.

The taxpayer had previously brought an unsuccessful appeal on a similar point. However, in its [decision](#), the UT noted that the taxpayer’s activities had changed, which prompted the taxpayer to submit a further claim to HMRC. The UT has confirmed that the taxpayer’s operations show that it does not simply have philosophical, philanthropic or civil aims as it supports its members beyond those aims.

**TOMS:** [Bolt Services UK Ltd v HMRC](#) [2023] UKFTT 1043 (TC) (For the taxpayer: Valentina Sloane KC and Jenn Lawrence. For HMRC: Eleni Mitrophanous KC and Charlotte Brown.) – The FTT has allowed Bolt’s appeal against HMRC’s decision that its supplies fell outside the Tour Operators Margin Scheme (TOMS). The FTT held that supplies of mobile ride-hailing services, without anything more, to a traveller amounted to the provision of travel facilities within the scope of TOMS. Even if something more were required, Bolt would still benefit from TOMS as it provides other services, such as the ability to arrange a journey via its app and the provision of assistance, information and advice via its app, website and blog.

It was previously clear from CJEU case law that supplies of accommodation on their own could fall within TOMS, and the decision provides welcome clarification that the same is true for passenger transportation. This is unlikely to be the end of the matter: there is a lot at stake, not least a separate TOMS appeal by Uber that is also before the FTT, so it would be surprising if HMRC did not appeal.

**Serviced accommodation:** [Realreed Ltd v HMRC](#) [2023] UKFTT 1042 (TC) (For the taxpayer: Kieron Beal KC and Tom Lowenthal. For HMRC: Isabel McArdle.) – The taxpayer appealed against HMRC’s decision that the letting of self-contained apartments was not exempt as it was not a supply of serviced accommodation. The FTT agreed with HMRC that sleeping accommodation was being provided in an establishment which was similar to a hotel, such that the letting of the apartments was not exempt.

Readers will remember that Realreed brought an unsuccessful [judicial review](#) claim against HMRC’s decision earlier this year on the basis that it had a legitimate expectation that it had applied the correct VAT treatment, given that HMRC did not challenge that treatment during its inspections. The taxpayer has applied for permission to appeal to the CA and it remains to be seen whether that will be granted.

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