



Tax Updates – November 2023

Highlights

- The main event of the month was the Autumn Statement, followed closely by the publication of the Finance Bill 2024.
- HMRC has launched a voluntary disclosure facility that taxpayers can use to disclose unpaid tax on income or gains from cryptoassets.
- HMRC has started sending nudge letters to individuals involved in property tax planning schemes and companies within the scope of the new Pillar 2 legislation.
- The phase two testing of the Wealthy Compliance Portal has begun.
- The Supreme Court has published two tax decisions, one on the application of the Transfer of Assets Abroad rules and one on the “revenue rule”.

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1. Upcoming hearings

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

CA: *HMRC v Dolphin Drilling Limited* (Case ID: CA-2022-002088) – Hearing date: 14 December 2023 – Taxation of oil contractor activities. Stewarts have [reviewed](#) this case in advance of the hearing.

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

2. Legislation and consultations

Autumn Statement: The Chancellor gave the Autumn Statement on 23 November 2023.

Highlights include:

- **Capital allowances:** The full expensing [regime](#) allowing businesses to write off the cost of certain capital expenditure on new plant and machinery against their taxable profits has been made permanent.
- **R&D:** The Government has announced a [single merged scheme](#) combining the current RDEC and SME schemes. All companies, regardless of size, will receive an above the line credit allowing them to claim for their qualifying R&D costs including contracted out R&D, although there is an exception for R&D-intensive SMEs.
- **Tax avoidance:** The Government is [introducing](#) a new criminal offence affecting promoters who continue to promote tax avoidance scheme after receiving a Stop Notice, and a new power enabling HMRC to seek disqualification of directors involved in promoting tax avoidance.
- **Pillar 2:** There will be [amendments](#) to the draft legislation on the multinational top-up tax and domestic top-up tax, which aim to ensure consistency with the OECD rules and guidance.

Finance Bill 2024: Following the Autumn Statement, the Government published the [Finance Bill 2024](#), which incorporates many of the announced changes.

ESS: HMRC ran a [consultation](#) during November on draft regulations that will introduce interest charges on the late payment of electronic sales suppression (ESS) penalties. New powers and penalties were introduced in Schedule 14 to the Finance Act 2022 making it an offence to possess or supply ESS tools.

Infrastructure levy: The [Levelling-up and Regeneration Act 2023](#) received Royal Assent on 26 October 2023, introducing changes to the housing and infrastructure delivery and planning process. The Act has given the government the power to introduce regulations to introduce a new infrastructure levy regime. The levy would fund the delivery of new infrastructure required to support new property developments.

3. HMRC guidance, campaigns and other news

Crypto: HMRC has launched a voluntary disclosure facility that taxpayers can use to disclose unpaid tax on income or gains from cryptoassets. HMRC has published [guidance](#) explaining how taxpayers can use the service. It has also sent an education email to some taxpayers explaining how disposals of cryptoassets are taxed. The FT has [reported](#) on this.

R&D: HMRC has published [new guidelines](#) to help taxpayers establish if their work qualifies as Research and Development for the purposes of R&D tax relief. This expands on HMRC's view of the meaning of R&D and confirms that the definition of R&D is set out in statutory guidelines issued by the Department for Science, Innovation & Technology. HMRC says that it continues to see misunderstandings of what is and is not R&D. The guidance also aims to assist taxpayers in completing the additional information form that, since 8 August 2023, must be submitted alongside R&D claims.

Pillar Two: HMRC is developing a Pillar 2 [online service](#). The first stage of the online service will allow businesses to register and make payments on account. HMRC is hoping to complete this by Spring 2024.

Umbrella companies: HMRC has published [guidance](#) explaining how companies in the labour provision sector can reduce their risk of using an umbrella company that operates an avoidance scheme. The recommended steps include performing adequate due diligence on the whole supply chain, adding necessary clauses in contracts with umbrella companies, and checking HMRC's list of tax avoidance schemes.

Participation of junior counsel: The Lady Chief Justice, the Master of the Rolls and other court Presidents have issued a [statement](#) encouraging greater participation of junior counsel in general, and female junior counsel in particular, in court and tribunal hearings. "[J]udges will be expected to ask whether a speaking part for junior counsel has been considered, and will generally be amenable to both junior and leading counsel addressing the court or tribunal."

Crypto-Asset Reporting Framework: CARF is a new international agreement developed by the

OECD that will provide for the automatic exchange of information between tax authorities on crypto exchanges for the purpose of combating offshore tax avoidance and evasion using cryptoassets. The Treasury has published a [joint statement](#) from the signatories (48 countries) announcing their intention to implement the framework to commence exchanges by 2027.

Nudge letters – Pillar 2: HMRC has started a second Pillar 2 [nudge letter](#) campaign. It has started sending letters to businesses that may be in scope of the new Domestic Top-up Tax and Multinational Top-up Tax, advising them to consider how the rules will impact them. The letters are being sent by Large Business to customers signed up by their CCM, and by WMBC to customers who have signed up to receive email updates.

Nudge letters – Property schemes: HMRC's Wealthy Team has started sending [nudge letters](#) to agents and their clients involved in property tax planning utilising a hybrid business model involving an LLP and corporate member (as highlighted in [Spotlight 63](#)). HMRC advises recipients to withdraw from the arrangement and settle their tax affairs. If recipients do not make a disclosure by 31 January 2024, HMRC may open an enquiry.

Wealthy Compliance Portal: HMRC's Wealthy team has sent out [letters](#) to a number of agents inviting them to take part in phase two testing of the Wealthy Compliance Portal. This is a direct channel for taxpayers and agents to contact HMRC's Wealthy team and for HMRC to provide support with complex issues with potential tax implications.

List of avoidance schemes: HMRC has [added](#) Bluestar Financial Solutions Limited and Excala Solutions Limited to the list. Both of these are disguised remuneration schemes involving umbrella companies.

Global Tax Evasion Report: The EU Tax Observatory has published a [global tax evasion report](#). The Tax Observatory was launched by the European Commission in June 2021. The report estimates that offshore tax evasion has declined by a factor of three over the last 10 years but is increasingly happening domestically. The report makes six proposals to address issues identified, including a global minimum tax on billionaires, equal to 2% of their wealth.

4. Recent decisions – Direct tax

Transfer of Assets Abroad: [HMRC v Fisher](#) [2023] UKSC 44 (For the taxpayers: Phillip Baker KC, Rory Mullan KC and Imran Afzal. For HMRC: David Ewart KC, Brendan McGurk, Barbara Belgrano, Ben Elliott and Emilia Carslaw.) – The Fisher family established a large betting business. Part of this business was transferred from a UK resident company to a Gibraltar based one. HMRC argued that this transfer engaged the Transfer of Assets Abroad (TOAA) regime and the income of this Gibraltar entity should be treated as deemed income of the Fishers proportionate to their shareholding in the company. The Supreme Court found in favour of the taxpayer: the most natural interpretation of the legislation is that it does not apply to someone who is not the transferor. Where a transfer is made by a company in which the taxpayer is a shareholder, regardless of their shareholding, there are no principled criteria in the statute to determine the circumstances in which a shareholder should be treated as responsible for the transfer made by the company.

It is interesting that the Supreme Court favoured a narrow interpretation to the definition of a transferor. Given the uncertainty inherent in the legislation and the fact that its purpose is to prevent tax avoidance, the Court preferred to err on the side of the taxpayers rather than giving HMRC free rein to apply it broadly.

Share exchange: [HMRC v Delinian Ltd \(formerly Euromoney Institutional Investment plc\)](#) [2023] EWCA Civ 1281 (For the taxpayer: Kevin Prosser KC. For HMRC: David Ewart KC and Sadiya Choudhury.) – HMRC had denied the taxpayer relief on a share for share exchange on the basis that the transaction was caught by the anti-avoidance provision in s. 137 of TCGA 1992, because it was said that the exchange was part of a scheme of which the main purpose, or one of the main purposes, was avoidance of CGT liability. The Court of Appeal found in favour of the taxpayer and held that the anti-avoidance provision had to be applied to the whole scheme, not to a selected part of it. Here, it could not be said that the entire exchange had an avoidance purpose.

This is the second decision on the interpretation of anti-avoidance provisions that we have had in a month. It provides welcome clarification as to the

anti-avoidance test in the context of the share for share exchange provisions and confirms it does not apply as broadly as HMRC has argued in the past.

Revenue rule: [Skatteforvaltningen \(SKAT\) v Solo Capital Partners LLP \(in special administration\)](#) [2023] UKSC 40 (For the appellants: Kieron Beal KC, Nigel Jones KC, Lisa Freeman and Laurence Page. For the respondent: Lord Pannick KC, Andrew Scott KC, Jonathan Schwarz, Abra Bompas, James Ruddell and KV Krishnaprasad.) – SKAT, the Danish tax authority, sought to recover money said to have been defrauded from it by way of “refunds” of Danish dividend withholding tax made to persons who were not shareholders in the relevant companies. The revenue rule normally applies to prohibit courts from enforcing the tax laws of another country. However, the Supreme Court held the rule only applies in relation to demands for tax by foreign tax authorities, not to cases like this one where the amounts in issue are not tax: they are refunds that should never have been paid.

The revenue rule is a principle of international law that comes up occasionally. The Supreme Court’s judgment makes it clear that there are limits to it and, in some circumstances, the amounts sought can be framed as not constituting tax.

Capital allowances: [Gunfleet Sands Ltd v HMRC](#) [2023] UKUT 260 (TCC) (For the taxpayer: Michael Jones KC. For HMRC: Elizabeth Wilson KC.) – The taxpayers claimed capital allowances on the fabrication and installation of windfarms. HMRC denied the claim in part. The FTT allowed some, but not all, of the expenditure claimed. The UT upheld the FTT’s finding that the wind turbines and array cables at each windfarm comprised a single item of plant, but further restricted the items that qualified for capital allowances. In particular, the UT held the design and safe, effective installation of plant did not constitute the provision of plant, and expenditure relating to those was not incurred “on the provision of plant”.

This decision is worrying, as the very narrow interpretation of the words “on the provision of plant” will impact a wide range of operators who may not be able to recover expenditure incurred in relation to the design and safe installation of various items of plant. Stewarts have published an [article](#) on this case.

5. Recent decisions – Indirect tax

Single supply: [GAP Group Ltd v HMRC](#) [2023] UKFTT 970 (TC) (For the taxpayer: Philip Simpson KC. For HMRC: Ben Hayhurst.) – The FTT held that a supply of red diesel was separate to the supply of plant hire, rather than forming a single composite supply, as HMRC argued. Allowing the taxpayer’s appeal, the FTT held that, while the contracts did not mention fuel, the parties paid limited attention to them. The customer had a genuine economic choice as to whether to return the plant with a full tank at the end of the hire period. The supply of fuel was only made at the end, when it was known how much fuel would need to be supplied depending on whether the customer filled up the tank.

It is interesting that the FTT accepted that, although there were written agreements in place, the taxpayer and its customers did not necessarily act in accordance with them. The FTT focused on the economic and commercial reality, which was confirmed in evidence and was in line with industry practice. This is a different approach to that taken in other recent cases, where the FTT has focused heavily on the contracts to the virtual exclusion of the economic reality.

Consideration: [Simple Energy Ltd v HMRC](#) [2023] UKFTT 976 (TC) (For the taxpayer: Amanda Brown KC. For HMRC: Isabel McArdle.) – Bulb operated a “refer a friend” scheme, by which customers were sent referral links to share with friends and family. If the person they “recruited” signed up to Bulb, both the referrer and the new customer got a credit against their energy charges. The FTT held that the successful referral amounted to the provision of a service to Bulb, amounting to non-monetary consideration for the supply of energy. There was reciprocity between the referrer and Bulb, as Bulb asked the referrer to share the link in a personal way in the hope that the recipient would sign up; Bulb therefore obtained a benefit and there was a relationship between that and the credit it made to the referrer.

This case is likely to have wide ramifications, as referral schemes are widely used. The decision provides a good summary of the law on non-monetary consideration, reiterating that the concept of reciprocity can be interpreted broadly and that

the way in which a supplier gives value to their counterparty is immaterial.

Medical care: [Vision Dispensing Ltd v HMRC](#) [2023] UKFTT 991 (TC) (For the taxpayer: Nicola Shaw KC. For HMRC: Brendan McGurk.) – The FTT dismissed an appeal where the taxpayer, who made online sales of contact lenses, sought to argue that its supplies fell within the VAT exemption for medical care. The FTT found that the services did not constitute medical care and, even if they did, they were not wholly performed or directly supervised by registered opticians. A fiscal neutrality argument was also given short shrift, as the supplies were materially different to those made by high street dispensing opticians.

This is the latest in a line of recent cases on the medical care exemption and it provides useful guidance on when the requirements of the exemption will be satisfied.

Cultural services exemption: [Derby Quad Ltd v HMRC](#) [2023] UKFTT 904 (TC) (For the taxpayer: Gavin West. For HMRC: Max Schofield.) – The FTT held that the purchase of a cinema ticket to see a live relay of a theatre production, in circumstances where the cinema was operated by a charity or other eligible body, did not qualify for the VAT exemption for cultural services. There is a fundamental difference between a live performance and a relay, such that the possibility of a live relay was not contemplated under the exemption and the “always speaking” doctrine did not apply.

The decision will be of increasing interest as live relays become more popular, but will also have wider application given its consideration of the “always speaking” doctrine. Of particular interest is the FTT’s application of the narrow approach to the interpretation of the doctrine taken by the Supreme Court in [News Corp UK & Ireland Ltd v HMRC](#) [2023] UKSC 7.

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