August 2023

Tax Update

Contents

1. General

1.1 Legislation day: consultations and new policies

The draft Finance Bill for 2023/24 has been published. This includes draft legislation for measures announced at the last Budget, alongside some new consultations and policy documents.

Key points include:

The Government has stated that it wants to simplify the process for taxpayers who become liable to the high income child benefit charge. It plans to allow payment through tax codes rather than placing taxpayers in self-assessment if not otherwise necessary. Details have not yet been provided.

A consultation on the taxation of employee ownership trusts and employee benefit trusts has been published. The purpose of this consultation is to check how the tax incentives are being used, ensure that they meet policy objectives, and prevent misuse.

The policy paper relating to the previously announced abolition of the lifetime allowance as has been published, There is an indication that some pension beneficiaries, where the member dies when under the age of 75, may become subject to IT in future.

A summary of responses to the consultation on research and development tax reliefs has been published, alongside the statement that a decision on whether or not to merge the two schemes from April 2024 will be announced at a future fiscal event.

www.gov.uk/government/publications/draft-finance-bill-2023-24-legislation-impacting-definitions-and-declaration

https://questions-statements.parliament.uk/written-statements/detail/2023-07-18/hcws972#:~:text=Administrative%20Changes%20to%20the%20High%20Income%20Child%20Benefit%20Charge

www.gov.uk/government/consultations/taxation-of-employee-ownership-trusts-and-employee-benefit-trusts

1.2 Treasury Committee calls for wholesale review of tax reliefs

The House of Commons Treasury Committee has published a new report on tax reliefs. Its key finding is it that the current system is too complicated, and it believes that not enough is known about the effectiveness of the over 1,000 tax reliefs in force.

Its recommendations include:

- A full review of all tax reliefs to identify opportunities for simplification
- HMRC to publish full costings for tax reliefs
- More public consultation on tax reliefs
- Five year reviews of individual tax reliefs by the Government to ensure that any reliefs that become ineffective are abolished

https://publications.parliament.uk/pa/cm5803/cmselect/cmtreasy/723/summary.html

1.3 HMRC interest rates to increase again

HMRC yearly interest rates on overdue tax will increase by 0.25%, following the Bank of England base rate increase from 5% to 5.25%.

The rate applied to the main taxes will become 7.75%. The rate of interest on repayments from HMRC will become 4.25%.

This change will apply from 14 August for quarterly instalment payments and 22 August for non-quarterly instalment payments.

www.gov.uk/government/news/hmrc-late-payment-interest-rates-to-be-revised-after-bank-of-england-increases-base-rate--14

2. Private client

2.1 Online sales found to be a trade

The evidence confirmed HMRC's view that his many sales of items online amounted to self-employment.

The taxpayer had not declared any income from self-employment, but HMRC identified an active eBay account in his name. A range of items were available for sale, and the account had received almost 800 items of feedback in the previous year. He also had an account on another trading platform.

The FTT rejected his contention that his accounts had been hacked over the four year period for which HMRC had raised discovery assessments. His bank statements backed up HMRC's position that he was trading, due to the deposits from websites and his payments to delivery companies that implied he was shipping the items. It upheld the assessments and penalties for deliberate behaviour.

The rise of online marketplaces in recent years has made it easier to make some extra cash by having a 'side hustle' selling unwanted items to buyers across the world. In this case the taxpayer was selling items on eBay and Amazon, but other platforms are available. Aside from online marketplaces, others make money through being an influencer on platforms such as TikTok, Instagram or YouTube. Many individuals may not be aware that they might have to pay tax on this income. HMRC is taking an interest in this area and sent a 'nudge letter' in January to those it believed might have these types of income using information gleaned from third party sources, including records from online marketplaces.

Milasenco v HMRC [2023] UKFTT 620 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08861.html

2.2 Intention to retire to America did not displace UK domicile

The FTT found that the taxpayer had an English and Welsh domicile of origin, that had not been displaced by a Massachusetts domicile while living in London despite his home there, where he now lives, and an intention to end his days there.

The taxpayer was born in England. His father had immigrated from Scotland. The FTT considered his late father's links to Scotland, including his choice to educate the taxpayer in Scotland, but found that he had acquired an English and Welsh domicile of choice during the taxpayer's minority, giving the taxpayer an English and Welsh domicile of origin.

On leaving university in 1965, the taxpayer moved to the USA, where he met and married his first wife. He subsequently lived in several different countries and American states, and became a US citizen. During his second marriage to another American he moved to England in 1987. They retained property in the USA, in Connecticut, but the FTT found that given he never had a strong connection to that state, it being his wife's former home, he had never acquired a domicile of choice in that state.

On retirement, the couple remained in London despite owning a home now in Massachusetts, where the wife had many relations, and they spent holidays. The FTT agreed with HMRC's assessment that they had a full social life and network in London, and that the US property was merely a holiday home. The taxpayer argued that his move to London was only ever temporary, and his long-term intention had always been to return to the USA, where he had thought he had already acquired a domicile of choice, and his daughter lived. In 2020, he suffered a sudden decline in health and he moved to his Massachusetts home.

The FTT found that where a person has two homes, a domicile of choice can only be established in a jurisdiction if the person has his 'chief' or 'principal' home in that jurisdiction and this must be established following a multi-factorial test. This in turn forms the foundation for a finding about intention, not the other way around. On this basis his English and Welsh domicile of origin had not been displaced until his move to Massachusetts.

The FTT also found that the taxpayer was careless for not seeking advice on his domicile position before submitting his tax returns (he only obtained advice later in 2018, although that advice was that he had a domicile of choice outside the UK).

HMRC also has the burden of proving that the loss of tax was 'brought about' by the carelessness. As HMRC was not able to show that had the taxpayer taken earlier advice, the loss of tax would have been avoided, it did not meet that burden. Two of the earlier assessments were therefore not valid.

Strachan v HMRC [2023] UKFTT 617 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08858.html

2.3 New online tool for checking tax codes

HMRC has launched a new online tool designed to help taxpayers understand what the numbers and letters in their tax code represent, and how much tax that means they will pay.

On putting in income and tax code, the tool tells you how much income tax is deducted at source every week, 4 weeks, month, and year, and what your prefix means.

Tax codes are often poorly understood, so this will be useful for many taxpayers, particularly if they are concerned that the code may be wrong. It is likely to represent part of HMRC's ongoing push to get taxpayers to use digital services to understand their own tax rather than calling helplines.

www.gov.uk/guidance/check-what-your-tax-code-means

2.4 HMRC wins appeal on exceptional circumstances

The UT has overturned an FTT decision, finding that a taxpayer who exceeded the permitted days in the UK by 5 days was UK resident. The fact that these days were to care for her ill twin and her twin's minor children in an emergency did not constitute exceptional circumstances. Moral obligations are not exceptional but part of normal family life.

The taxpayer moved to Ireland on 4 April 2015. In the 2015/16 tax year she received dividends on which over £3m of IT would have been due had she remained UK resident. In that tax year, she had to spend 45 or fewer days in the UK to be non-UK resident, but in fact spent 50 days in the UK. She argued that 5 of these days should be discounted, as she had visited the UK in December and February of that year to support her twin, who was experiencing serious ill health, and to assist in the care of her twin's children.

The FTT found that she was non-UK resident as this qualified as exceptional circumstances. It accepted that she was the only person able to assist her twin sister at the time, and was under a moral obligation to come.

The UT took a different view, allowing HMRC's appeal. The FTT had found that her visit was not due to the risk her twin might commit suicide and the need to ensure her safety, as the psychiatric notes indicated that her twin was not suicidal at the time, though made several suicide attempts subsequently. The UT agreed. The FTT had allowed the appeal on the other ground, her argument that she had felt her twin was unable to care for her children due to her psychiatric and addiction issues, so had remained in the UK extra days to ensure their safety. The UT noted that this was not different from the distress in families with alcoholism generally. It found that moral obligations are not themselves exceptional circumstances; the person is not prevented by exceptional circumstances from leaving the UK but instead prevented by a sense of moral obligation.

Although the taxpayer was aware she would be relying on the exceptional circumstances test, she did not make any record of what she had done on each day of the visits even in outline, or why she had concluded at the end of each day that the sister's condition was such that she was prevented from leaving the UK. Therefore, the UT could not find that each part of the statutory test for exceptional circumstances was satisfied on each day, and the taxpayer was UK tax resident in 2015/16.

HMRC v A Taxpayer [2023] UKUT 00182 (TCC)

www.gov.uk/tax-and-chancery-tribunal-decisions/the-commissioners-for-his-majestys-revenue-and-customs-v-a-taxpayer-2023-ukut-00182-tcc

2.5 Partial win for taxpayer on child benefit

The FTT found that a taxpayer was liable to pay the high income child benefit charge (HICBC), but as he had a reasonable excuse the penalties were cancelled and the older assessments were out of time.

The taxpayer's partner had claimed child benefit for their child and her child from a previous relationship. The taxpayer did not know that she claimed this, and had done so since before they met. On receiving a nudge letter from HMRC about potentially needing to pay HICBC, the taxpayer gave this letter to his partner, who rang HMRC and cancelled her claim when she was told she was not entitled. She thought that the matter was then resolved, being unaware of the HICBC.

When HMRC next contacted the taxpayer he understood the position, but claimed that he had a reasonable excuse as he was not aware that child benefit was being claimed. The FTT accepted this. The older assessments were also cancelled, as he had not been careless so a lesser time limit applied, but the most recent two assessments were upheld. The taxpayer had appealed those as one of the children claimed for was not his, which the FTT found was irrelevant, and that HMRC should have been aware all along that child benefit should not be paid, as it knew his salary, which the FTT also dismissed.

Lee v HMRC [2023] UKFTT 651 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08872.html

3. Trusts, estates and IHT

3.1 'Home loan' scheme ineffective for IHT

The FTT found that no deduction from the value of an estate could be given for a promissory note given by the deceased. The scheme under which she had remained in her home but it had technically been transferred to a trust was invalid for IHT.

The taxpayer sold her home to the trustees of a trust called the life settlement. She had an interest in possession (IIP) in this trust. In exchange, she received a promissory note. She then assigned the note to another trust, the family settlement. She was excluded from benefitting under this trust, in which her three children had IIPs. She remained living in the property rent-free until her death.

The intention of the scheme was that the assignment of the note was a potentially exempt transfer, and she did in fact survive more than seven years after that transfer. The estate was calculated with the property being deemed to form part of her estate under her IIP in the life settlement, but with a deduction for the value of the note, which was worth the same as the property had been at the time of transfer.

HMRC's position was that there should be no deduction from the value of the deceased's interest in the property for the value of the note, or alternatively that the note should be part of her estate for IHT.

There were various problems with the implementation of the scheme, including undated documents, documents signed on different days to those planned, and the executors becoming the registered owners of the property after death rather than the trustees. HMRC argued that these indicated that the arrangements were a sham. The FTT disagreed, finding that the anomalies were due to errors and forgetfulness rather than an intention to disregard the scheme. The scheme documents had the intended effect in law.

The case report is very detailed and covers a raft of technical arguments. The two key points coming out on the case are that:

- The liability, under the note, which was deductible in her estate was reduced to nil.
- The executors did however avoid double taxation, as the FTT agreed with them that the value that was repayable under the note was not an asset in the estate.

The Executors of Elborne & Ors v HMRC [2023] UKFTT 626 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08863.html

4. PAYE and employment

4.1 Consultation on tax incentives for occupational health

HMRC and the Treasury have opened a new joint consultation on incentivising employers to offer occupational health (OH) services to their employees through the tax system. The idea is to increase labour market participation.

The consultation document sets out the current Government support, including what elements such as some eye tests are covered under benefit in kind exemptions. It also discusses a few elements that could be included in this exemption in future, including health screenings. Information is sought on what OH services are currently provided by employers, which are most effective, and how much they cost. Other suggestions for alternative tax incentives are also requested.

The consultation will close on 12 October.

www.gov.uk/government/consultations/joint-hmt-hmrc-consultation-on-tax-incentives-for-occupational-health

4.2 UT allows refund of NIC on car allowances in two cases

The UT heard two separate appeals from FTT decisions on car allowance schemes in one sitting. One case was appealed by HMRC and the other case appealed by the taxpayer. The UT found for the taxpayer in both appeals and NIC refunds were allowed.

The taxpayers paid car allowances to support their employees with running their personal cars. If the allowances were made in respect of the use of a qualifying vehicle, they would be 'relevant motoring expenses' (RME). Where allowances are RMEs, no NICs are due on the allowances although relief is restricted to the qualifying amount (business miles x 45p for the first 10,000 miles). The taxpayers later tried to reclaim Class 1 NIC on these car allowances having realised NIC might not have been due, but HMRC denied the claims.

The UT interpreted RME more widely, as had the FTT in the earlier *Wilmott Dixon* case, than the original interpretation found in the *Laing O'Rourke* FTT case. The UT pointed out that the provisions were not about how employees spent RME payments or how the allowances were calculated, but the fact that the payments were made to ensure that the employees had suitable vehicles available for business use. HMRC has been granted an extension to 4 September 2023 to appeal the decision.

Irrespective of HMRC's decision to appeal, affected taxpayers may wish to submit protective claims to prevent periods falling out of time. If you would like any advice on this matter, please get in touch with our employer solutions team www.evelyn.com/services/business-tax/employer-solutions/

Laing O'Rourke Services Ltd v HMRC [2023] UKUT 155 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2023/155.html

5. Business tax

5.1 UT upholds FTT finding that intangible assets transferred at nil value

The UT has upheld an FTT decision that a business transferred from an LLP to a company, where the same individual was the majority partner in the LLP and owned the company, was transferred for tax purposes at its market value of £1. No intangibles relief was therefore available to the company for the amount it paid for the business. In the second part of the case, the UT overturned the FTT decision, and ruled in HMRC's favour that the payment made to the individual was a distribution by the company.

A company, one of the appellants, acquired a business in 2008 from an LLP in which the other appellant (J) was the majority partner. J was also the sole shareholder of the holding company that owned the appellant company. He declared his share of the proceeds as a capital gain and the company claimed relief for amortisation of the goodwill under the intangibles regime on the consideration paid. HMRC argued that the valuation used was overstated and that the market value of the intangible assets transferred, which did not include right to use trademarks, was £1.

The FTT agreed with HMRC that the value of the assets transferred was only £1, as they were only capable of operating as a business with the addition of the trademarks, which the company already had a right to use through a separate agreement. This decision was upheld by the UT and so no intangibles relief is available.

The FTT had concluded that the individual had received the £8.25m payment in his capacity as partner not as shareholder. The UT overturned the FTT decision arguing that the onus should be on the shareholder to explain in what capacity the funds were received if they were not in their capacity as shareholder, and so the FTT had reached a decision it was not entitled to make.

HMRC v Conran [2023] UKUT 166 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2023/166.html

5.2 Loan interest payable disallowed due to unallowable purpose

The UT has upheld the findings of the FTT that the main purpose of a loan relationship to which the taxpayer was party to was to obtain a UK tax advantage. The loan therefore had an unallowable purpose, and no deduction was allowed for the resulting interest expenses.

The taxpayer, a UK incorporated company, was a member of a multinational group with its ultimate parent company in the US. It was set up to acquire a US group worth $1.1bn. The transaction involved a series of steps that sought to maximise group interest deductions while minimising taxable credit interest. Overall, the funding arrangements provided a deduction for third party interest in the US, and group interest in the UK with no taxable credits in the US, UK, or Cayman Islands where a finance company had also been set up.

The FTT found that the presence of free-standing loan relationship deficits that were surrendered by way of group relief to UK members of the group, without any corresponding taxable receipts, did mean that the taxpayer had secured a tax advantage by being party to the loan relationship. Evidence, including reports and internal emails, showed the sole purpose of the funding arrangement was to obtain a UK tax advantage. The UK and Cayman Island companies had no employees or tangible assets, which further evidenced the lack of genuine commerciality in the loan agreements.

The taxpayer appealed the FTT decision on the grounds that it had looked too widely, considering why the taxpayer, as opposed to another group company, was party to the loan rather than focussing on the motives of the taxpayer company alone. The UT rejected this argument stating that narrowing the interpretation of the law would go against Parliament's intention.

Having agreed that the main purpose of the loan was the avoidance of UK tax, the UT went on to consider to what extent the debits should be attributed to that purpose and thus disallowed. The FT's logic that this need only be considered if the taxpayer could prove that tax avoidance was not the main, or one of the main purposes was rejected. It was noted, that when reaching its conclusion that the whole loan had an unallowable purpose and so the interest payments should be disallowed in full, that the FT had considered all the evidence available to it and so the UT saw no reason to rule otherwise.

JTI Acquisition Company (2011) Limited v HMRC [2023] UKUT194 (TCC)

https://www.bailii.org/uk/cases/UKUT/TCC/2023/194.html

6. VAT and Indirect taxes

6.1 Sewage treatment plant part of garden and grounds

The FTT has found that the fact that a property had a septic tank on part of the grounds that also served adjacent properties did not mean that it was not wholly residential for SDLT. It was an essential part of living in that area of countryside, and part of the garden and grounds of the property.

The taxpayers bought a property with two registered titles. One was for a home with outbuildings, pool, and equestrian facilities. The other was for a few acres of adjacent lant on which was a sewage treatment plant, facilitating the home and 10 neighbouring flats. The taxpayers initially paid the residential rate of SDLT on the purchase, but later made a claim for

overpayment relief on the grounds that this was a mixed-use residential and non-residential property purchase. HMRC disallowed the claim, and the FTT agreed with HMRC.

The only parts of the plant visible on the surface were manhole covers, and two small structures containing the electrical controls and for storage. An access road was used four times a year for the plant, and the costs of running it were split between the taxpayers and the owners of the flats. The taxpayers argued that they did not use this part of the property due to occasional smells, that as it is a shared facility it prevented their exclusive use of the property, and that they had tried to purchase the property without this area of land but this had not been possible.

The FTT found that regardless, this area was part of the "garden and grounds" of the property. The fact that there was a covenant between the taxpayers and the flat owners on waste treatment did not mean that this was a commercial agreement nor venture. It was a fair split with no profits made. The treatment plant was an essential part of living in this area of countryside, and as HMRC had noted it was part of one continuous plot next to a tennis court, and the two titles had a strong historic connection.

An interesting contrast between this and the recent *Suterwalla* case is in the use of land for horses. The area of land used for the plant had been used for horses until the taxpayer moved in on completion, which included third parties having use of the stables and menage. Although it was unclear whether or not that had been commercial in nature, the continuation of the arrangement might have strengthened the taxpayer's case, given that in the *Suterwalla* case land let to a third party for equestrian use under a commercial arrangement resulted in a victory for the taxpayer on mixed use treatment.

Bloom & Anor v HMRC [2023] UKFTT 00628 (TC)

https://financeandtax.decisions.tribunals.gov.uk/judgmentfiles/j12777/TC%2008866.pdf

Suterwalla v HMRC [2023] UKFTT 450 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2023/TC08826.html

6.2 Former marital home not main residence after separation

The FTSTC has agreed with RS that a property the taxpayer had moved out of had ceased being his main residence, although he had no other permanent accommodation and his children remained there with his separated wife. He was therefore not entitled to a refund of the additional dwelling supplement (ADS), as it was over 18 months between leaving the first property and purchasing a second.

The taxpayer moved out of a jointly owned property in 2015 on the breakdown of his marriage. In 2019 he purchased a new home, and paid the ADS. In 2021 he transferred his interest in the first property to his former wife and received a capital sum. He then applied for a refund of the ADS.

RS refused as under the legislation the first property must be the claimant's only or main residence at some point in the 18 months before the second property is purchased. The taxpayer appealed, arguing that despite personal circumstances meaning he could not live in the first property, it remained his main residence until purchase of the second, as he had no other permanent accommodation.

The tribunal was sympathetic, but upheld the RS decision. It was simply a fact that the taxpayer had not lived in the property in the 18 months in question, though the discussion of a dwelling was interesting. Although his children remained there, it was impossible under those circumstances to view it as his main residence. That being the case, the tribunal had no power but to agree that no refund of the ADS was due, as the legislation made no provision for extenuating circumstances.

Duran v RS [2023] FTSTC 2

www.taxtribunals.scot/decisions/[2023]%20FTSTC%202.pdf

7. Tax publications and webinars

7.1 Tax publications

The following Tax publications have been published.

- VAT Tour Operators Margin Scheme (TOMS): does the scheme apply to the supply of serviced apartments
- VAT and duty reliefs: Lessons learnt from the Caerdav case

8. And finally

8.1 Think you have a UK domicile? Think again

This month's domicile case at 2.2 illustrates a point little appreciated outside tax circles: there is no such thing as a UK domicile. Or a US domicile for that matter. Why? Well, you can only be domiciled in one legal jurisdiction, and the UK is not one but three. "UK domicile" is just used as a convenient shorthand to avoid typing out the whole list, given that insisting on that might see us cruelly accused of pedantry.

This rule very rarely makes any practical difference, so those with Scottish, NI, or English and Welsh domicile are lumped together. In the USA, domicile is by state, and in Canada by province, which again makes little difference – until you want to use a connection to one state to assist with a domicile claim in another. The taxpayer at 2.2 managed to crash into this rule in two different countries, which whilst an excellent education in the rules of domicile has caused him significant practical inconvenience. How lucky that we are fans of esoteric tax rules, or we might start to worry that this is overcomplicated.

Glossary				
Organisations		**Courts**	**Taxes etc**	
ATT – Association of Tax Technicians	ICAEW - The Institute of Chartered Accountants in England and Wales	CA – Court of Appeal	ATED – Annual Tax on Enveloped Dwellings	NIC – National Insurance Contribution
CIOT – Chartered Institute of Taxation	ICAS - The Institute of Chartered Accountants of Scotland	CJEU - Court of Justice of the European Union	CGT – Capital Gains Tax	PAYE – Pay As You Earn
EU – European Union	OECD - Organisation for Economic Co-operation and Development	FTT – First-tier Tribunal	CT – Corporation Tax	R&D – Research & Development
EC – European Commission	OTS – Office of Tax Simplification	HC – High Court	IHT – Inheritance Tax	SDLT – Stamp Duty Land Tax
HMRC – HM Revenue & Customs	RS – Revenue Scotland	SC – Supreme Court	IT – Income Tax	VAT – Value Added Tax
HMT – HM Treasury		UT – Upper Tribunal	LBTT – Land and Buildings Transaction Tax	