February 2024

# Tax Update

## Contents



# 1. General

### 1.1 Nudge letters: CGT on share disposal

*HMRC has launched a new campaign of 'one-to-many' letters, which are being sent to taxpayers for whom data indicates shares may have been sold but the disposal not reported on their tax return.*

The letter warns them that they may need to pay CGT, explains what is meant by 'disposal' and asks them to check their return.

Whether or not the recipient believes that CGT is due, they must contact HMRC within 60 days of the date on the letter and either explain why nothing is payable, amend their return, or make a disclosure if out of time to amend.

www.icaew.com/insights/tax-news/2024/feb-2024/hmrc-prompts-disclosure-of-cgt-liability-on-sale-of-shares

# 2. Private client

### 2.1 Appeal dismissed on rescinding transaction

*The FTT refused to discount the tax consequences of a transaction that had been reversed. The doctrine under which relief is given only applies when the mistake is about the nature of the transaction, not when the tax consequences have been misunderstood.*

The taxpayer transferred ten commercial properties into a company owned by his wife. He believed that the no gain no loss spousal rules for CGT applied to exempt these transfers. When he discovered that they do not apply where the transfer is to a company, the company rescinded the transfer. He asked the FTT to disregard the transaction for CGT as it had been reversed.

The FTT dismissed the appeal. He was relying on the doctrine of common mistake, but for that to apply then the mistake must affect the subject matter of the transaction. The fact that they were mistaken about the tax consequences did not affect the basic nature of the transaction.

*Mahmood v HMRC* [2024] UKFTT 114 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2024/TC09056.html

### 2.2 Entrepreneurs' relief not available

*The FTT has found that entrepreneurs' relief (ER, now known as business asset disposal relief) was not available for the sole beneficiary of a trust as the company was not his personal company.*

A company with one share was incorporated in 2009. The sole shareholder and director (P) transferred this to the trust in 2012, and it was sold to a third party in 2015. P was the principal beneficiary of the trust. The trustees claimed ER on the sale, but the claim was denied by HMRC.

The FTT dismissed the trustees' appeal. It was accepted that P was a qualifying beneficiary of the trust in that he was a director of the company and the principal beneficiary, but the company was not his personal company. This was because he had not held a 5% shareholding in his personal capacity for a year in the 3 years before the sale. As there was only one share, the trustees owned 100%. The fact that P could exercise the voting rights for the trust did not alter the position. He had that power only jointly with his co-trustee, and had to consider the capital beneficiary in his decisions, as well as himself as income beneficiary. Over £250,000 of CGT rested on this decision.

*Trustees of the Peter Buckley Settlement v HMRC* [2024] UKFTT 00029 (TC)

https://financeandtax.decisions.tribunals.gov.uk//judgmentfiles/j12930/TC%2009022.pdf

## 2.3 CGT relief not available

*The FTT has found that private residence relief (PRR) was not available on a house sale, as there was no evidence that the taxpayer had ever lived there.*

The taxpayer owned a property for just over six years before selling it in 2016. HMRC's case was that he remained living with his parents throughout the period of ownership. He claimed that he lived there together with his partner and a tenant. It was common ground that he lived with his parents before the purchase and after the sale.

The FTT had to determine whether or not he had resided there with the requisite degree of permanence or continuity. The taxpayer did not produce any documents showing his address as the property. His address with the electoral roll, HMRC, and his bank remained that of his parents throughout, which he explained as not seeing the need to change address. Most information was received online, and he could pick up post from his parents easily. He explained that his housemate was responsible for the council tax.

The FTT found for HMRC and denied PRR. The burden of proof was on the taxpayer, and he had no evidence that he had lived there, so had not discharged it. He had failed to produce, for example, witness statements from the tenant or his partner, or his marriage certificate or payslips which would cover the claimed time at the address.

*Patwary v HMRC* [2024] UKFTT 53 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2024/TC09035.html

## 2.4 HMRC nudge letters on inferred distributions

*HMRC has looked at company accounts, and identified some with a large fall in profit and loss account reserves. On the assumption that this may have been due to a dividend being declared, HMRC has written to shareholders in these companies asking them to check whether or not they have declared all distributions received.*

If they need to declare more income then the letter explains how, and that they must do so within 30 days of the date on the letter.

If the shareholders have nothing to declare, or the dividend was covered by allowances then they are asked to contact the team who issued the letter within 30 days of the date on it to explain.

www.tax.org.uk/hmrc-one-to-many-letter-inferred-distributions

## 2.5 Appeal against child benefit penalties allowed

*A taxpayer has partially won his appeal on the high income child benefit charge (HICBC). He was liable for the charge, but it was reasonable for him not to have realised this until a 2021 nudge letter. Earlier assessments, and all penalties, were cancelled.*

The taxpayer's wife claimed child benefit from 2010. The taxpayer was never in self-assessment, but his income increased to over the £50,000 threshold in 2016/17. The primary reason was because of taxable car benefits, not salary. He did not realise that there was an overclaim. HMRC sent him a nudge letter in 2019, which he claimed not to have received. The FTT found that HMRC had not proved to the required standard that it was sent.

He did receive a further HMRC letter in 2021, which he responded to within a fortnight, so he had acted without undue delay, and had a reasonable excuse for failing to notify up to the date of the 2021 letter.

His appeal against penalties was allowed. The appeal against the 2016/17 assessment was allowed as the ordinary four year time limit applied and this assessment was therefore out of time. The assessments for 2017/18 and 2018/19 were upheld.

*Harwood v HMRC* [2024] UKFTT 46 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2024/TC09027.html

### 2.6 Enquiry notice valid

*The FTT found that an enquiry notice into a gilt strip scheme was validly issued, despite the fact that the actual document was missing. The notices had been issued to a large group of taxpayers.*

The taxpayer invested in a tax avoidance scheme based on gilt strips. In due course HMRC disallowed the vast majority of the loss and informed him that he must repay almost £370,000 in a closure notice. The taxpayer appealed on the basis that the original enquiry notice was not valid.

The scheme related to the 2003/04 tax year. HMRC stated that they had issued an enquiry notice on 28 April 2005, but the taxpayer claimed that this was never issued, served, nor received. Due to his accountants representing many participants in the scheme, negotiations were carried on on behalf of the group as a whole. In June 2005, HMRC wrote to the accountants offering a sample agreement, and the accountants sent back a list of individuals who wanted to accept this, including this taxpayer, in July. If the original notice was invalid HMRC argued that this led to an estoppel by convention. The taxpayer had acted as though under enquiry, so could not do back from that position now.

The FTT found on the balance of probabilities that the original notice of enquiry was validly issued. HMRC did not have a copy of it nor a record of its position, but had other notes referring to it, and notes on his record indicating that actions were taken at the time it should have been issued. The HMRC spreadsheet of affected taxpayers had a column for the date each was issued with a notice of enquiry, and there was an entry in his. Therefore the estoppel point did not arise.

*Cattrell v HMRC* [2024] UKFTT 67 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2024/TC09039.html

# 3. PAYE and employment

### 3.1 UT dismissed taxpayer appeal on termination payment

*The UT has upheld an FTT judgement that a payment made by a bank to an ex-employee was a termination payment, and taxable as such. It was made to settle employment tribunal (ET) proceedings brought by the employee, who had argued that this was a settlement payment relating to her discrimination claims, so non-taxable.*

A bank entered into a settlement with its regulator under which it was ordered to pay a penalty of $600m and sack several employees. In consequence, the taxpayer's employment with the bank was terminated the following week. The bank offered her compensation 'for the termination of her employment'. She refused the initial offer but settled with her former employer for £6m after commencing ET proceedings prior to a hearing.

The taxpayer argued that the payment was in relation to her case against the employer. She believed that the ET might have awarded her a small amount for injury to feelings, but nothing for financial loss or unfair dismissal. Instead, she held that the payment was in relation to her 'moral claim', based on discrimination, as the bank's reluctance for this to be publicised led to the settlement. Essentially, she argued that the payment was unrelated to the termination of employment.

The FTT dismissed her appeal, finding for HMRC. The termination was an integral part of her claim, the trigger for it, and the reason she was able to negotiate from a strong position. The payment was made at least 'otherwise in connection' with the termination, so the amount over the £30,000 limit was subject to tax. The settlement agreement drawn up at the time referred to termination payments, and was structured to take advantage of the exemption for legal costs, and with reference to the £30,000 tax-free limit.

The UT dismissed her appeal. There was no error of law in the FTT decision, and there was enough evidence to show that the termination was central to her ET discrimination claim.

*Mathur v HMRC* [2024] UKUT 38 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2024/38.html

## 3.2 HMRC consultation on off-payroll working

*HMRC is consulting on how to offset tax already paid by an intermediary against that due from a deemed employer.*

HMRC has published the draft statutory instrument that is intended to address an issue in off-payroll working cases. When an investigation deems the client to be an employer, or a client voluntarily discloses amounts paid to deemed employees, the amount of PAYE for which they are assessed will be reduced to account for amounts paid by the worker and intermediary. No offset will be available for any Class 1 (employer) NIC that is assessed.

The consultation closes on 22 February 2024.

www.gov.uk/government/consultations/calculating-paye-liabilities-in-cases-of-non-compliance-for-off-payroll-working-ir35

## 3.3 Appeal dismissed on temporary workplaces

*The UT has upheld a judgement that workers supplied by an umbrella company were employed by means of a series of short contracts, not one overarching one, so each of their workplaces was permanent under that contract. Travel and subsistence expenses were therefore non-exempt.*

The taxpayer was an umbrella company that supplied construction workers to various clients for different assignments it employed to various agencies. The FTT had found that the taxpayer did not employ the individuals employed each worker under a single employment but rather as a series of contracts that began and ended with each assignment. Therefore each workplace was a permanent, if short-term one, so workers could not claim reimbursement for travel and subsistence free of IT and NICs.

The taxpayer appealed, still arguing that the workers were travelling to a series of temporary workplaces, under one continuous employment contract. The courts therefore had to consider whether mutuality of obligation existed between contracts, as the taxpayer argued it did.

The UT looked at case law, but came to precisely the same conclusion as the FTT. The travel and subsistence payments were in relation to travel to a permanent workplace, and taxable as employment income benefits.

*Exchequer Solutions Ltd v HMRC* [2024] UKUT 25 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2024/25.html

# 4. Business tax

## 4.1 Partners subject to income tax on capital sums received

*The taxpayer, a management consulting firm, was part of a complex group structure involving partnerships and corporate entities. The partners received payments on disposal of what were termed 'capital interests'. The FTT has ruled that these payments were of an income nature for tax purposes.*

The taxpayer argued that the capital interest gave individual partners interests in the goodwill of the UK LLP, whilst HMRC argued that the capital interests were cash rights that would crystallise in certain circumstances. In reaching its decision the FTT first considered whether the capital interest should form part of the taxable profit share, finding it should not as there was not a clear link between the profits of the UK LLP and the value of the capital interest.

The FTT went on to consider if the payments were income, and under what provisions they should be taxed. They concluded the payments were income in nature, as they were awarded in recognition of a person's seniority and length of service, they could be calculated annually, were designed to incentivise and were in substance a pre-determined retirement/departure payment. For those reasons, the payments should be taxed as miscellaneous income. If not taxed as miscellaneous income the payments would be caught by the anti-avoidance rules directed against schemes designed to turn income from an occupation into capital.

The FTT also considered the 'mixed members rules' and whether a reallocation of profits between the individuals and the corporate partner was necessary. They found it was not as there was no evidence that the individuals' profit shares, and

resulting tax amounts were artificially reduced, and that there was no evidence of an intention to divert profits to the corporate partner purely to exploit the tax advantages.

Procedural points were also discussed including whether HMRC has the power to amend allocations of profits, not just the total taxable profit. The legislation provides HMRC the power to 'make good the deficiency', a statement drawn widely enough to capture both changes to overall taxable profit, and the allocation between partners. Separately, the taxpayer had appealed the discovery assessments raised by HMRC. The appeals in relation to certain years were upheld on the grounds that HMRC had either not shown that the errors in those years had been careless, or because a hypothetical HMRC officer could have been aware of the error based on the information made available to them at the time.

*The Boston Consulting Group UK LLP v HMRC* [2024] UKFTT 00084 (TC)

www.bailii.org/uk/cases/UKFTT/TC/2024/TC09049.html

## 4.2 Companies denied double tax relief on foreign dividends

*Following a number of court decisions, it is now agreed that specific aspects of the UK tax system relating to foreign dividends were incompatible with EU principles of freedom of establishment. This case considers not that principle but rather how UK tax rules should be applied to claims in relation to foreign tax relief, when the ability to claim such relief was only established after the time-limit for such claims had expired.*

Within its detailed and wide ranging decision, the UT reversed the FTT's decision that the taxpayers had made valid claims via their correspondence with HMRC. When these issues were first raised the taxpayers had argued that the foreign dividends were not within the charge to UK tax. The UT held that the dividends should have been reported as UK taxable and a claim for double tax relief then made to reduce the UK tax liability to nil. As a result, the claims were not correctly made, even though in principle the double tax relief would have been available.

Having decided upon nineteen separate issues altogether the UT has referred the cases back to the parties to establish the effects of its decision on each taxpayer, with any disputes to be resolved by the FTT.

*The Commissioners for His Majesty's Revenue & Customs v Applicants in the Post Prudential closure notice application litigation group* [2024] UKUT 23 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2024/23.html

## 4.3 R&D claim refused as computation was submitted late.

*The Court has found in HMRC's favour and ruled that it was within its rights to refuse an R&D claim where the supporting computation was not submitted by the claim deadline.*

The deadline for making the claim was 31 December. The taxpayer's accountant submitted a revised tax return on 23 December, but no computation was submitted at that time because of what appears to have been a computer error. The accountant contacted HMRC shortly after the new year and the computation was eventually submitted on 19 January.

HMRC refused to accept the R&D claim saying that there is a requirement to submit a computation with the return and as the computation was not submitted on time, a valid claim had not made until after the deadline. The Judicial Review found that HMRC was within its rights to refuse the claim as it was incomplete at the deadline, and that it was also not unreasonable of HMRC to refuse to extend the deadline in this case.

This finding raises the broader question of whether including a computation with a return is a legal requirement. There is no specific instruction in the legislation which just states that the return must contain 'such information as HMRC may reasonably require'. HMRC argued here and the court agreed that it is clear from its manuals and agent updates that computations are required to be submitted in the case of R&D claims. The Courts generally view HMRC manuals as guidance rather than law and so the decision in this case is a departure from their normal stance.

*The Advocate General for the Commissioners of His Majesty's Revenue & Customs v Bureau Workspace Limited* [2024] ScotCS CSOH_1

www.bailii.org/scot/cases/ScotCS/2024/2024_CSOH_1.html

# 5. VAT and Indirect taxes

## 5.1 UT overturns FTT decision on floorspace-based VAT override

*The taxpayer, Hippodrome Casino Ltd, carried out an extensive refurbishment of a property in Leicester Square to create a Las Vegas style experience with casinos, bars, restaurants, and theatres. When computing exempt input tax, the taxpayer applied a 'standard method override' (SMO) by reference to floor space used for the exempt supply of gaming versus the floor space used for the taxable supply of hospitality. They stated this gave a fairer result than using the standard partial exemption method based on turnover.*

The FTT had previously ruled in favour of the taxpayer agreeing that an alternative method for VAT apportionment based on floor space gave a fairer result. The UT found that in making its decision the FTT had erred in law by failing to consider the key argument put forward by HMRC that the areas treated as relating to the taxable activities had a dual purpose.

When considering the issue of dual use, the UT found that facilities such as the bars and restaurants were designed to encourage customers to use the gaming activities or were subsidised by the gaming activities and so did have a dual purpose. Consequently, calculations based on floor space did not give a fairer result than using the standard partial exemption method and use of the floor space SMO was denied.

When using a SMO taxpayers must be able to demonstrate that the alternative does produce a fairer result, representing the economic reality.

*HMRC v Hippodrome Casino Limited* [2024] UKUT 27 (TCC)

www.bailii.org/uk/cases/UKUT/TCC/2024/27.html

## 5.2 SDLT saving scheme for house purchase defeated at UT

*The CA has upheld a UT judgement that taxpayers who purchased a house in a company, which was then distributed to them due to a reduction in share capital, were personally liable for SDLT on the purchase. The arrangements made meant that they had the power to call for conveyance, as well as the company.*

The taxpayers, a married couple, subscribed for all the shares in a newly incorporated company. It used the funds to place a deposit on a house; then, on completion of the purchase, it reduced its share capital to £2, making a distribution in specie of the house to the taxpayers. The original subscription to the company was made by the taxpayers giving promissory notes payable on the day of completion of the house purchase. No SDLT returns were made, on the basis that there was no consideration paid for the transfer of the house to the taxpayers. HMRC assessed the taxpayers for SDLT as though they had purchased the house personally.

The FTT and UT found that the arrangement constituted a transaction under which a person other that the purchaser (the company) was entitled to call for conveyance. The distribution was contingent on the house purchase being completed. The FTT found that the consideration was the subscription to the company, but the UT found that it was the slightly lower amount the company paid as a deposit for the house, due to conveyancing costs.

The CA agreed with the UT. It looked at the scheme as a whole, noting that the deposit paid by the company came from the money subscribed by the taxpayer for shares. The taxpayers accepted that the scheme did not work, but brought two procedural points. They argued that HMRC could not bring its point that the company and taxpayers were connected persons as this was not raised at the FTT and the UT had decided not to deal with it. The CA found that that was not a refusal to admit the point, and that as it was a pure point of law without needing fact-finding it was admissible. They also argued that HMRC should have made a separate determination on the point they now relied on, relating to a notional land transaction by the taxpayers of the land rather than the real acquisition of the land by the company. The CA found that this notional transaction was under a deeming provision, it did not need a separate determination.

*Brown v HMRC* [2024] EWCA Civ 92

www.bailii.org/ew/cases/EWCA/Civ/2024/92.html

# 6. Tax publications and webinars

## 6.1 Tax publications

*The following Tax publications have been published.*

- What could the Spring 2024 Budget mean for businesses?
- Tax planning in tricky times
- Farm business diversification and BPR
- National minimum wage compliance traps for businesses in 2024

## 6.2 Webinars

*The following client webinars are coming up soon.*

- 27 February - Talking Tax and Tax year end planning
- 7 March - Business Exit - Pre-exit planning for business owners

# 7. And finally

## 7.1 95% ain't bad

…except for the estimated 1.1 million who missed the self-assessment tax return deadline. Our congratulations to those who filed on time, even the almost 33,000 who filed with less than an hour to go but what becomes of those who missed the eleventh hour?

Well, the faster they file the better. While many will have perfectly reasonable excuses, the £100 fine on each of the others is becomingly a sizeable chunk of income for HMRC. Many will also end up paying tax late, which at an interest rate of 7.75% a year is quite an expensive pursuit. There will always be some who miss any deadline, but cumulative penalties can rack up fast.

The much delayed quarterly filing with making tax digital for income tax is now due to become compulsory for some from April 2026. With more deadlines to miss, we can only ask HMRC to be forgiving on penalties initially, as often happens when something new comes in.

www.gov.uk/government/news/a-record-115-million-tax-returns-filed-by-the-deadline

| 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 | |

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