

# Tax update

A round-up of recent issues

27 October 2020

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## 1. General

### 1.1 OTS recommends changes to claims and elections

*The OTS has published its recommendations on how to simplify the process of making claims and elections in the UK tax system. It recommends, in particular, improvements to online HMRC services and forms, and changes to employee tax reliefs.*

The report considers both general issues and specific claims and elections across IT, CT, CGT and VAT. It makes fifteen recommendations, but highlights three of particular importance:

- the functionality of the online personal and business tax accounts should be improved. Taxpayers should be able to make claims online and store records of past claims;
- the process for claiming employee expense relief should be simplified. This includes streamlining the many different thresholds for flat rate expenses; and
- HMRC's online forms should be improved.

The OTS also recommended harmonising time limits on claims, allowing the carry back of Gift Aid donations to be amended within normal timescales, improving the process to reclaim tax paid on loans to participators, introducing a pooling mechanism for capital allowances on short-life assets and providing a template for agreeing the value of fixtures. It specifically addressed the employment-related securities election that allows a taxpayer to be taxed upfront on the unrestricted market value of the shares acquired. The OTS recommends that this claim be reversed such that the unrestricted market value automatically applies, and an election is instead needed for the actual market value to apply.

[www.gov.uk/government/publications/ots-claims-and-elections-review](http://www.gov.uk/government/publications/ots-claims-and-elections-review)

### 1.2 FTT finds arrangements notifiable under DOTAS

*HMRC's application to have a contractor loan scheme declared as a notifiable tax avoidance arrangement has been granted by the FTT. The judge reviewed marketing documents and contracts, and found that the respondent had promoted the scheme.*

A number of individual participants entered into an arrangement whereby they contracted to supply services to a trust, or to such clients as the trust directed. The participants were entitled to receive fees from the trust, but gave these rights to an offshore company in exchange for an interest free loan. Each month the participants received a basic retainer from the trust, and a loan payment from the company. The amount of the loan matched the fees provided for under the services contract. Only the retainer was declared as taxable income, in the belief that the loan was not taxable as income.

HMRC applied to the FTT for an order that this arrangement was a tax avoidance scheme notifiable under DOTAS as a standardised product. The chief difficulty was in identifying the promoter. The respondent denied that it had promoted the arrangements, suggesting that third parties had done so, as well as arguing that they were not notifiable.

On review of the marketing and scheme documents, the FTT found that the arrangements were notifiable, and the respondent was the promoter. It had designed the form of the documents and marketed the scheme.

*HMRC v Opus Bestpay Ltd [2020] UKFTT 408 (TC)*

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07885.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07885.html)

## 2. Private client

### 2.1 Garden and grounds found to be within permitted area for private residence relief

*The FTT found that private residence relief (PRR) applied to the whole gain arising on the disposal of a property, which included land of 0.94 hectares. The land was found to be required for the reasonable enjoyment of the property.*

The taxpayers, a husband and wife, sold their property, which included gardens extending to 0.94 hectares, to a developer in 2014. They did not report the gain on their tax returns as they considered it qualified for PRR. HMRC found out about the disposal from stamp duty records, and recalculated the gain on the basis that only the standard 0.5 hectares formed part of the permitted area that was subject to PRR.

The FTT were satisfied that the whole of the grounds was required for the reasonable enjoyment of the house and so qualified for PRR, taking into account the size and character of the house. It noted that the properties identified by the taxpayers' expert witness provided a better comparison to the property in question than those put forward by HMRC's expert witness. The FTT also stated that the photos of the property showed a natural tree border around the perimeter of the property which is a factor that can justify a larger permitted area.

The FTT therefore reduced the discovery assessments made by HMRC, totalling just over £325,000, to nil.

*Phillips v HMRC* [2020] UKFTT 381 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07859.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07859.html)

### 2.2 Taxpayer refused SDLT relief on combining apartments

*Taxpayers purchasing an additional residential property are subject to a 3% SDLT surcharge, refundable if it was purchased with the intention of it being their main residence, and they sell their original main residence within three years of the purchase (replacement relief). The FTT has found that if two replacement residences are purchased with the intention of combining them into one, then replacement relief is not due, as neither was intended to be a replacement only or main residence individually.*

The taxpayer purchased two adjacent apartments from different vendors a fortnight apart, paying the SDLT rates for additional properties on both. He subsequently sold his previous residence, and applied to HMRC to reclaim the extra SDLT, on the grounds that both flats were a replacement residence, as he had purchased them to combine into one dwelling. HMRC granted a refund for one flat only, and the taxpayer appealed. Before the FTT, HMRC's position was that he was entitled to the refund for neither flat, though they did not seek to negate the refund given due to time limits. This appeal was limited to the second purchase.

The taxpayer argued that both properties were purchased as a replacement for his main residence, and that there is no express requirement in the legislation limiting the replacement to one purchase. As both purchases were completed before the sale of his previous residence, the double counting rule refusing relief where a second replacement is purchased after sale did not apply.

The judge found that the key part of the legislation was the requirement that at the effective date of the transaction the purchaser intended the purchased dwelling to be his only or main residence. HMRC argued that as the intention was to combine them into a new dwelling, neither purchase was intended to become an only or main residence. The FTT agreed with this conclusion, and denied higher rate relief on the second purchase, as the first was not in question.

*Moaref & Anor v HMRC* [2020] UKFTT 396 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07873.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07873.html)

## 2.3 COVID-19: Chancellor doubles third self-employment grant

*In an update to the Winter Economy Plan, an increase was announced last week in the level of the third grant under the COVID-19 Self-Employment Income Support Scheme (SEISS). It will now cover 40% of average profits for three months, rather than 20%.*

Due to the increased levels of restrictions, the Chancellor has improved the support available over winter for the economy. The SEISS increase is designed to mirror an amendment to the Job Support Scheme for employers.

The third taxable grant covers the period from 1 November to 31 January, and is available to sole traders and partnerships experiencing a drop in turnover because of the pandemic, but are continuing to trade, or are temporarily unable to trade as a result of the COVID-19 restrictions.

The grant covers 40% of average monthly profits for three months, capped at £3,750. Details of how to claim will be released shortly. The level of the fourth grant, covering the three months to 30 April 2021, has not yet been set.

[www.gov.uk/government/news/plan-for-jobs-chancellor-increases-financial-support-for-businesses-and-workers](http://www.gov.uk/government/news/plan-for-jobs-chancellor-increases-financial-support-for-businesses-and-workers)

[www.gov.uk/government/publications/self-employment-income-support-scheme-grant-extension/self-employment-income-support-scheme-grant-extension](http://www.gov.uk/government/publications/self-employment-income-support-scheme-grant-extension/self-employment-income-support-scheme-grant-extension)

## 2.4 Fitness training an allowable expense for divers

*Deep sea divers have to meet strict fitness requirements to practise. The FTT has found that expenses of a diver's fitness training were incurred wholly and exclusively for the purposes of his trade, and were thus income tax deductible.*

The taxpayer worked as a self-employed deep sea diver. He had to meet strict fitness requirements to do so under the terms of his contract. He claimed his training expenses as a deduction, being the cost of his gym membership, and travel to places where he could undertake outdoor training. Following joint strain caused by working in a pressurised environment, he had been advised to run on soft soil or sand, so had to travel for exercise. HMRC argued that fitness is a human need, so there was a dual purpose to the training. Other individuals might train in the same way for personal fitness.

The FTT found that the fitness expenditure was deductible in full. The taxpayer trained for 2 to 3 hours a day to meet highly specific requirements, and there was no reason to believe that he would undertake that level of training for personal fitness. He had provided detailed information about the requirements and how his training allowed him to meet them. Training at that level was essential to allow him to practice his trade, and to allow him to continue it as he aged.

*Osborne v HMRC* [2020] UKFTT 373 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07851.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07851.html)

## 2.5 Accommodation claim disallowed for sole trader

*The FTT has denied a claim for accommodation and travel for a sole trader who took a number of contracts in one place outside commuting distance from his home, as he chose to work at that distance. A claim for expenses of one contract would have been allowable.*

The taxpayer, a self-employed engineer, took a number of contracts in the vicinity of Swindon, as the rates of pay were better than near his family home. This was too far to commute from his home in Scotland, so he stayed at a hotel in Swindon for 165 nights in the tax year in question. He claimed the costs of accommodation and travel as expenses. HMRC denied the claim.

In his appeal, the taxpayer argued that travel to obtain the better pay in Swindon was a business decision. He had paid for basic accommodation solely to allow him to work there. The FTT dismissed his appeal, finding for HMRC that as he was able to work near his home, though at a lesser rate, the costs were not incurred 'wholly and exclusively' for the purposes of his trade. Had he incurred the costs for one specific

subcontract the claim would be allowed, but they were more akin to general commuting costs for his work in Swindon on various subcontracts.

*Taylor v HMRC* [2020] UKFTT 416 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07893.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07893.html)

### 3. PAYE and employment

#### 3.1 COVID-19: HMRC updates the Job Support Scheme

***The Chancellor has announced an expansion to the Job Support Scheme (JSS). The eligibility threshold for minimum hours worked has been decreased, and support has been enhanced for businesses in areas severely affected by COVID-19 restrictions.***

The Government has announced that the minimum hours an employee will be required to work in order to qualify for support has been reduced from 33% to 20%. The employer contribution for non-worked hours has also been decreased to 5%. The new measures also include relief for employers that are legally required to close due to COVID-19 restrictions, to be known as 'JSS Closed'. In these circumstances, the Government will fully fund two-thirds of normal pay, up to a maximum of £2,083.33 per month. The JSS will still run from 1 November 2020 for six months and it will be reviewed again in January 2021.

[www.gov.uk/government/publications/the-job-support-scheme/the-job-support-scheme](http://www.gov.uk/government/publications/the-job-support-scheme/the-job-support-scheme)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/928761/JSS\\_Open\\_factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/928761/JSS_Open_factsheet.pdf)

### 4. Business tax

#### 4.1 FTT ruling on SDLT for a holiday letting business

***A company was denied relief from the SDLT higher rate charge because the Shareholders' Agreement allowed the shareholders to use the property. The FTT also considered the control tests for partnerships and SDLT. It found that a trust's shareholding could be attributed to the other shareholder, but not also to her husband.***

The taxpayer was a company that had purchased a property from a connected limited liability partnership (LLP). The LLP had two members, a husband and wife, and the wife also held 50% of the shares in the company. The other 50% were owned by a trust.

The first issue was whether or not the company was eligible for relief from the 15% higher rate charge of SDLT. The company argued that it qualified for relief because the property was acquired for use in a property rental business. The FTT rejected this argument because the Shareholders' Agreement allowed the shareholders to use the property for up to five days each year. This showed that the property was not acquired exclusively for use in a rental business, regardless of the shareholder's intentions to make use of that allowance.

The second issue was the application of the SDLT partnership rules. The wife held a 50% interest in both the LLP and the company. HMRC therefore agreed that the chargeable consideration should be reduced by 50%. The wife was also associated with the trust, as a fellow shareholder, and its shareholding could be attributed to her for the purposes of the control conditions. The trust's shareholding could not, however, be attributed to the husband. The chargeable consideration was therefore not reducible to nil, and 15% SDLT was payable on half of the total consideration paid.

*Waterside Escapes Ltd v HMRC* [2020] UKFTT 0404 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07881.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07881.html)

## 4.2 FTT dismisses 'logistically impossible' ATED penalties

*The FTT found that where the first ATED return from a taxpayer is late, HMRC cannot issue a valid penalty notice for daily late filing penalties. The law requires the penalty notice to be issued prospectively; since the penalty period had passed, HMRC could not issue a valid penalty notice.*

The taxpayer, a company operating caravan parks, acquired a cottage to be used as a furnished holiday let in July 2017 and filed its first two ATED returns late, in January 2019. HMRC issued late filing penalty notices, including a notice for daily penalties for the period 1 August 2018 to 30 October 2018 in relation to the second ATED return. The penalties relating to the first return were later withdrawn, and the taxpayer appealed the remaining penalties. The FTT upheld all of them except the daily penalties, which it found were not validly issued.

The FTT held that, on a purposive interpretation of the statute, a penalty notice for daily late filing penalties cannot be issued retrospectively. It ruled that the statute does not confer on HMRC a discretionary power to backdate these penalty notices. The judgment acknowledged that this interpretation means that HMRC cannot validly issue a daily penalty notice if the first filing of ATED returns is late. By the time HMRC becomes aware that an ATED return is due, the period during which the daily penalties apply will have passed. It is therefore logistically impossible for daily penalties to apply in these circumstances.

*Heacham Holidays Limited v HMRC* [2020] UKFTT 0406 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2020/TC07883.html](http://www.bailii.org/uk/cases/UKFTT/TC/2020/TC07883.html)

## 5. VAT

### 5.1 HMRC confirms its policy on payroll services provided by charities

*Revenue & Customs Brief 16 (2020) confirms HMRC's view that payroll services provided by a charity to disabled persons are not exempt from VAT. HMRC has advised suppliers with similar arrangements to account for VAT at the standard rate, and correct past VAT returns if such supplies have previously been treated as exempt.*

The Brief sets out HMRC's position following the UT decision in *Cheshire Centre for Independent Living v HMRC*. The case examined the VAT treatment of payroll services provided by a charity to disabled persons who employed personal assistants to help them live in their homes. The FTT ruled that the services were exempt from VAT because they were ancillary to and therefore fell within the exemption for services directly connected with welfare. HMRC was granted leave to appeal by the UT, but the taxpayer withdrew its appeal. The FTT's decision has therefore been set aside and will not be remade.

HMRC maintains its position that payroll services such as these are not exempt welfare services. The Brief confirms that HMRC will reject claims for exemption in cases with facts materially similar to the *Cheshire* case. It directs suppliers with similar arrangements to account for standard-rated VAT on their supplies.

[www.gov.uk/government/publications/revenue-and-customs-brief-16-2020-vat-liability-of-payroll-services/revenue-and-customs-brief-16-2020-vat-liability-of-payroll-services](http://www.gov.uk/government/publications/revenue-and-customs-brief-16-2020-vat-liability-of-payroll-services/revenue-and-customs-brief-16-2020-vat-liability-of-payroll-services)

[www.bailii.org/uk/cases/UKFTT/TC/2019/TC07182.pdf](http://www.bailii.org/uk/cases/UKFTT/TC/2019/TC07182.pdf)

## 6. Tax publications and webinars

### 6.1 Webinars

*The following client webinars are coming up over the next few months.*

- Preparing for the new IR35 rules coming into force in April 2021

<https://smithandwilliamson.com/en/events/>

## 7. And finally

### 7.1 A Cavil with the OTS

We don't like disagreeing with the OTS when it's doing a good job, but we have to take issue with one little point in their latest report on claims and elections: their Recommendation 15 that the default position on elections on restricted shares, so-called s431 elections, should be reversed so that an election is automatic unless actively reversed. Yes, that makes things simpler, but it means that the employee is automatically paying more tax on receipt than is necessary, because the employee pays on a higher, hypothetical, share value. Furthermore, if the share does grow in value the employer also misses out on a larger, albeit later corporation tax deduction.

We know there are arguments the other way; but we fear that with simplification, tax advisers may, if even asked, be lazy and not fully consider the implications of the s431 election because they prefer the that simple life. Each s431 election needs to be just on its merits, and making life simple shouldn't be that high on the list, particularly if the tax position could be very much worse if simplicity wins. We fear the OTS change could bring that result about more often. For the taxpayers, less tax is better than more simple.

[www.gov.uk/government/publications/ots-claims-and-elections-review](http://www.gov.uk/government/publications/ots-claims-and-elections-review)

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		

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