

# UK Tax Disputes Digest

March 2023



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# Introduction

Welcome to the March 2023 edition of our UK Tax Disputes Digest: a high-level summary of key developments in contentious tax over the last few months for heads of tax, finance directors, general counsel and other in-house professionals.

In our last edition (November 2022), we noted that pressure on the Government to recover money through closing the tax gap and related announcements would inevitably see HMRC ramping up activity. Since then, we have noticed a marked increase in HMRC investigations across various areas. Both individual and corporate taxpayers would be well-advised to check their tax position as soon as possible to prepare for any potential HMRC investigation into their tax affairs. Please also see the “Other developments” section for new announcements made in the Spring 2023 Budget on how the Government intends to tackle the tax gap.

In this edition, we look at just a few of the latest developments, including an update on HMRC’s use of financial institution notices (where our team has helped to secure an important victory for financial institutions and taxpayer privacy), corporate criminal offences, transfer pricing and diverted profits tax investigations, and the latest series of HMRC nudge campaigns (including a new campaign on R&D tax relief).

We also cover a number of notable tax cases and other interesting procedural decisions, including a recent win for a high-profile taxpayer on IR35.

In addition, we are conscious that the media has been awash with stories about the terms of a settlement between HMRC and a certain former Chancellor regarding his personal tax affairs, and in particular that the tax errors in question had been treated as “careless” rather than “deliberate”. While we make no comment on the individual settlement in question, this edition provides a helpful summary of what those terms mean in the context of penalties for tax errors.

## About the team

With 14 partners in our London office, the CMS tax team is one of the largest in the City and advises high-profile clients across a wide range of sectors and all areas of tax. As part of that general tax practice (and the CMS global network with tax capability in over 70 offices), our tax team regularly helps both individuals and corporates with all aspects of tax dispute prevention, management and resolution.

The CMS disputes team is one of the UK’s leading contentious practices with some 500 disputes lawyers in the UK alone. We regularly appear before all courts and have more sector and practice expertise among our disputes lawyers than any other firm. We are one of only a few firms to routinely appear in The Lawyer’s annual reports on leading cases both for first instance and appeal cases.

The firm’s contentious tax practice pools the resources of the CMS tax and disputes teams, including dedicated tax disputes specialists.

For more information on our team and the type of work we undertake, please see [here](#).

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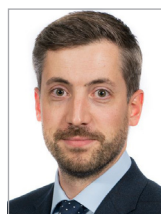


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With thanks to Elizabeth Sherwood, Hannah Jones, Yao Chua, Alexander Oldland, Isabella Ramsay and Josh Avis for their contributions.



# In focus: "Voice of rugby" wins IR35 appeal

In *S&L Barnes Limited v HMRC* [2023] UKFTT 00042(TC), the First-tier Tribunal (Tax Chamber) ("**FTT**") upheld the IR35 appeal of a well-known rugby commentator and pundit, deciding that he should be treated as a self-employed individual in business on his own account (rather than as an employee) for tax purposes. This is the latest in a series of high-profile cases considering the application of the IR35 regime to individuals working in the media industry. Although these types of cases are heavily fact-based, the decision is useful in setting out the potential approach that the Courts may take.

## Background

The appellant in this case was S&L Barnes Limited ("**SLB**"), the personal service company of Stuart Barnes (the former England and British Lions rugby union player turned commentator/pundit, often referred to as the "voice of rugby"). Through SLB, Mr Barnes provided his services in relation to rugby union to a range of media organisations/broadcasters.

The appeal concerned whether the intermediaries legislation (commonly known as "IR35") should apply to contractual arrangements between SLB and Sky TV Limited ("**Sky**") for the provision of services of Mr Barnes to Sky in the period from 6 April 2013 to 5 April 2019. If the IR35 regime applied, as HMRC submitted, SLB would face liabilities to income tax and National Insurance Contributions ("**NICs**") in the total amount of over £695,000 (excluding any interest or penalties).

The IR35 legislation in relation to income tax is set out in section 49 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**"), which provides as follows (so far as relevant):

### **49 Engagements to which this Chapter applies**

- (1) *This Chapter applies where —*
- (a) *an individual ("the worker") personally performs, or is under an obligation to perform, services for another person ("the client"),*
  - (aa) *the client is not a public authority,*
  - (b) *the services are provided not under a contract directly between the client and the worker but under arrangements involving a third party ("the intermediary"), and*

- (c) *the circumstances are such that –*
  - (i) *if the services were provided under a contract directly between the client and the worker, the worker would be regarded for income tax purposes as an employee of the client or the holder of an office under the client, or [...]*

- (4) *The circumstances referred to in subsection (1)(c) include the terms on which the services are provided, having regard to the terms of the contracts forming part of the arrangements under which the services are provided.*

The equivalent provisions for NICs are set out in regulation 6 of the Social Security Contributions (Intermediaries) Regulations 2000. The wording of the two sets of provisions is materially the same for relevant purposes and we therefore refer only to the income tax provisions below for ease of reference.

There was no dispute between the parties that Mr Barnes was the "worker", that Sky was the "client" and that SLB was the "intermediary" for the purposes of section 49(1)(a) and (b) ITEPA. The dispute concerned whether the services provided by Mr Barnes to Sky via SLB were under a contract for services (i.e., self-employment, as argued by SLB and Mr Barnes) or a contract of service (i.e., employment, as argued by HMRC) for the purposes of section 49(1)(c) ITEPA.

## The arguments

As set out by the High Court in *Usetech Limited v Young* [2004] EWHC 2248 (Ch), to determine whether the condition in section 49(1)(c) ITEPA is satisfied, the first task is to construct a hypothetical contract (in this case, between Mr Barnes and Sky) and then to assess

whether, in the context of that hypothetical contract, the individual would have been regarded as an employee for tax purposes.

The relevant test to be applied to the hypothetical contract to make this assessment is the three-stage test set out in *Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, broadly that an employment arrangement will exist where:

- (i) there is a "mutuality of obligation" (i.e., in consideration for a wage or other remuneration, the individual provides his own work or skill in the performance of some services for the other party);
- (ii) there is sufficient exercise of control by one party over the other so as to create a "master-servant" relationship; and
- (iii) the other provisions of the contract are consistent with its being a contract of employment.

HMRC submitted that Mr Barnes' hypothetical contract during the relevant period would have been practically identical to the terms of the actual contract with SLB. HMRC argued that Mr Barnes should not be considered to be in business on his own account because, for example:

- Sky had first call on Mr Barnes' services, restricting his ability to exploit the wider market place;
- Mr Barnes' fees were akin to a monthly salary, with him being engaged for extended periods rather than for specific tasks or projects; and
- Mr Barnes' working arrangements were materially similar to those of one of his co-commentators, who had been treated as an employee at all material times.

SLB, on the other hand, conceded that the first two conditions in the Ready Mix Concrete test were met, with its case focused on the third condition. SLB's case was that Mr Barnes was in business on his own account, providing his expert opinion on national and international rugby fixtures as a freelance rugby commentator, expert pundit, journalist and author. To that end, the following facts were highlighted (amongst others):

- Mr Barnes was in business on his own account with several clients over a period of more than 25 years, which SLB argued was inconsistent with his being an employee of any organisation;
- none of Mr Barnes' other engagements were regarded as contracts of employment, and in particular the engagement with Sky was substantially similar to one he had with another media organisation (which HMRC had accepted was not within the IR35 regime);

- Mr Barnes had been engaged to provide his expert insight on rugby union and there was no "control" over what he said or wrote (and a provision in the contract stating that Mr Barnes had to "comply with all directions and requests" had to be construed in light of the commercial purpose of the contract);
- Mr Barnes took the same financial risks as any freelancer, with his success or failure depending on his "profile" as a rugby expert; and
- Mr Barnes worked with several other media organisations and broadcasters, demonstrating that he was not professionally or financially dependent on Sky (in the relevant tax years, around 60% of his total income typically came from his engagement with Sky, with the balance still representing a significant sum).

SLB submitted that the Court of Appeal's decision in *HMRC v Atholl House Publications Ltd* [2022] EWCA Civ 501 is authority that the first two conditions in the three-stage test set out by Ready Mix Concrete are "threshold conditions", and that meeting the first two conditions does not set up a presumption of employment – rather, whether the hypothetical contract is one of employment depends on all the circumstances of the case.

A key issue was therefore the extent to which wider factors should be taken into account in the construction of the hypothetical contract.

## Decision

The FTT agreed with the approach outlined by SLB and upheld the appeal.

Having heard all of the relevant evidence and the parties' arguments, the FTT set out what it considered were the material terms of the hypothetical contract between Sky and Mr Barnes during the relevant period. Based on those terms, the FTT held that the first two conditions of the test in *Ready Mix Concrete* were met (i.e., mutuality of obligation and the exercise of control) – not surprising, given that this had already been conceded by SLB. But the FTT then applied *Atholl House* to consider 12 other factors which indicated self-employment, including (amongst others):

- Mr Barnes was predominantly a commentator and pundit, which the FTT decided was significantly different from the role of a presenter;
- although Sky could stipulate the maximum number of days that Mr Barnes could work in a given year when fixing his annual fee, the actual number of days worked varied from 90 to 120 days. This was significantly less than the maximum permitted, which meant that the fee more closely resembled a block fee or retainer for having the first call on his services, rather than a salary;

- provisions regarding intellectual property in the actual contract with SLB would not prevent Mr Barnes' from reproducing elsewhere his opinions that had been given during a live broadcast for Sky (indeed, he often reproduced such opinions for other media organisations);
- on the facts, there had been much latitude in Mr Barnes' availability for matches, with Mr Barnes afforded a fair amount of leeway on his schedule;
- on the facts, having looked at the history of various work done by Mr Barnes for other media organisations, the FTT held that Mr Barnes was in business on his own account;
- drawing an analogy with the decision in *Basic Broadcasting Ltd v HMRC* [2022] UKFTT 00048 (the IR35 dispute between Adrian Chiles and HMRC regarding his services provided to the BBC and ITV), the FTT held that there was a reputational risk for Mr Barnes every time he appeared on air (which it said was part and parcel of being in business on his own account); and
- on the facts, Mr Barnes was not financially dependent on Sky during the relevant period.

Having regard to these and various other factors, together with the terms of Mr Barnes' hypothetical contract, the FTT determined that Mr Barnes should not be treated as an employee for tax purposes.

### Comment

This is the latest in a series of high-profile cases considering whether the IR35 regime should apply to individuals working in the media industry. One should be careful in trying to draw close parallels between this decision and others. IR35 cases are heavily fact-based. For example, a key factor in the FTT's decision in this case was that Mr Barnes was a pundit rather a presenter. Moreover, in each of these media cases, you are essentially dealing with an individual as a unique "brand" (in this case, Mr Barnes as the "voice of rugby"). For this reason, the FTT dismissed attempts by both sides to draw comparisons with other contractual arrangements (for example, that of his co-commentator who was treated as an employee, or even arrangements between Mr Barnes and other media organisations which HMRC accepted were not employment contracts). The FTT's decision is also not binding precedent and potentially subject to appeal by HMRC.

However, the FTT's decision is useful in setting out the approach that the Courts may take when applying IR35 legislation and what wider factors outside of the contract may be relevant. Those facing similar investigations by HMRC may therefore find the decision useful when trying to ensure that all relevant evidence is presented and the arguments adapted accordingly.

# In focus: HMRC reverse position on collecting customer IP data from financial institutions

On 26 January 2023, the first report on HMRC’s use of financial institution notices (“**FINs**”) was laid before Parliament. The report includes a number of important updates, including an unexpected retreat on HMRC’s proposal, previously undisclosed, to use FINs to collect data held by financial institutions on where customers have accessed their online or mobile accounts (i.e., their geographical location by reference to an IP address, “**Location Data**”).

The CMS Tax Disputes & Investigations team has been advising representatives of the UK banking and financial services industry to help secure this significant victory for financial institutions and taxpayer privacy.

## Background

HMRC have statutory powers under schedule 36 to the Finance Act 2008 (“**Schedule 36**”) to compel the sharing of information in order to investigate the tax affairs of both businesses and individuals.

Amongst other types of information notices outlined in Schedule 36, HMRC can issue “third party notices” to require third parties (including financial institutions) to provide certain information where (amongst other conditions):

- the information is “reasonably required” by HMRC for the purpose of checking the tax position of, or collecting a tax debt from, a known taxpayer; and
- approval has been given in advance by the FTT, unless the relevant taxpayer has already consented in advance to the information being disclosed to HMRC.

The FTT can only approve a third party notice where various conditions have been met, including that HMRC would be justified in issuing the notice in the first place (i.e., that the information is actually reasonably required and that HMRC are not simply on a ‘fishing expedition’).

FINs were introduced from June 2021 as a new type of information notice aimed specifically at financial institutions (although, importantly, HMRC still have the option of issuing third party notices to financial institutions instead).

As with third party notices, information required by FINs must be “reasonably required” by HMRC for the purpose of checking the tax position of, or collecting a tax debt from, a known taxpayer.

However, unlike third party notices, no prior approval is required from the FTT and no consent is needed from the relevant taxpayer before FINs can be issued. There is also no right of appeal. The decision as to what is “reasonably required” is, in practice, left to HMRC by default.

This removal of the key safeguards normally associated with HMRC information notices generated widespread criticism from tax professionals and the financial services industry. HMRC attempted to justify the removal of any judicial oversight for FINs on the basis that it was taking too long to comply with exchange of information

requests from overseas tax authorities (12 months on average compared with the six-month target set under international standards).

In light of such controversy, an annual report is now required to be laid before Parliament on HMRC’s use of FINs in order to keep this new power under review. In responses to freedom of information requests submitted by our team, HMRC had suggested that the first report might even be published as early as last spring (much earlier than anticipated). However, following delays and the discussions referenced below, that report has finally now been published.

## Location Data

The report includes a number of important updates, most notably an unexpected retreat on HMRC’s proposal, previously undisclosed, to use FINs to collect Location Data. Location Data might be relevant in order to determine, for example, the residence of a taxpayer (by establishing the number of days spent in or outside the UK in a particular tax year). The possibility of using FINs in this way was not specifically considered at any time during the consultation process prior to their introduction in June 2021.

As Location Data contains information about an individual’s geographical location at a certain point in time, it is clearly somewhat sensitive (arguably tantamount to surveillance). In the context of non-criminal investigations (FINs and other Schedule 36 information notices are civil powers only), it is arguable that Location Data will therefore be invariably disproportionate. Location Data is also inherently unreliable given the possibility of disguising an IP address (e.g., through the use of VPNs).

For these reasons, Location Data would arguably not be “reasonably required” by HMRC within the meaning of Schedule 36 under any circumstances. Given the lack of independent judicial oversight, this would create potential legal and data privacy issues for financial institutions.

Fortunately, as made clear in the report, HMRC have decided not to go ahead with this proposal following discussions with representatives of the industry. Having advised on these discussions, we are very pleased to have helped secure this significant victory for financial institutions and taxpayer privacy.

## Employee and contractor information

As part of the discussions with HMRC referenced above, HMRC also raised the possibility of using FINs to obtain information on employees and contractors of financial institutions (as opposed to their customers). Again, this use of FINs was not specifically considered as part of the consultation process. In addition, as mentioned in the report, concerns were raised that this would unfairly put financial institutions in a different position to other employers. The report notes that HMRC still plan to go ahead with this proposal.

## Other observations

Prior to the introduction of FINs, HMRC previously suggested that FINs were expected to have a “negligible impact on about 20 financial institutions, such as banks and building societies”. Similarly, the new report claims that the “number of FINs issued has not substantially increased the number of third-party information notices issued, when compared with previous years”. However, based on the latest available data, HMRC issued 426 FTT-approved third party notices in the year ended 31 March 2020 (whether to financial institutions or otherwise) and the report reveals that HMRC have already issued 355 FINs in the nine-month period from 1 July 2021 to 31 March 2022. It will be interesting to see how FINs impact the number of third party notices (i.e., under the old powers) being issued – the potential concern being if HMRC effectively try to replace third party notices to some extent with FINs, thereby avoiding judicial scrutiny.

Unfortunately, the report does not specify the type or number of individual institutions that have received a FIN to date. Contrary to HMRC’s previous suggestions, the legislation defines “financial institution” very widely and can apply to a broad range of entities (and not just a small number of banks and building societies).

Less than 40% of the FINs issued up to 31 March 2022 related to international information requests. HMRC point out that it would be unlawful for them to issue FINs solely in relation to international requests, but given this was the entire justification for introducing FINs in the first place, it does seem odd that the overwhelming majority of FINs have apparently been issued in connection with domestic tax matters.

Moreover, the report states that HMRC are still not quite meeting their six-month target for responding to international information requests, at an average of 197 days (although HMRC expect this figure to improve as legacy cases are resolved).

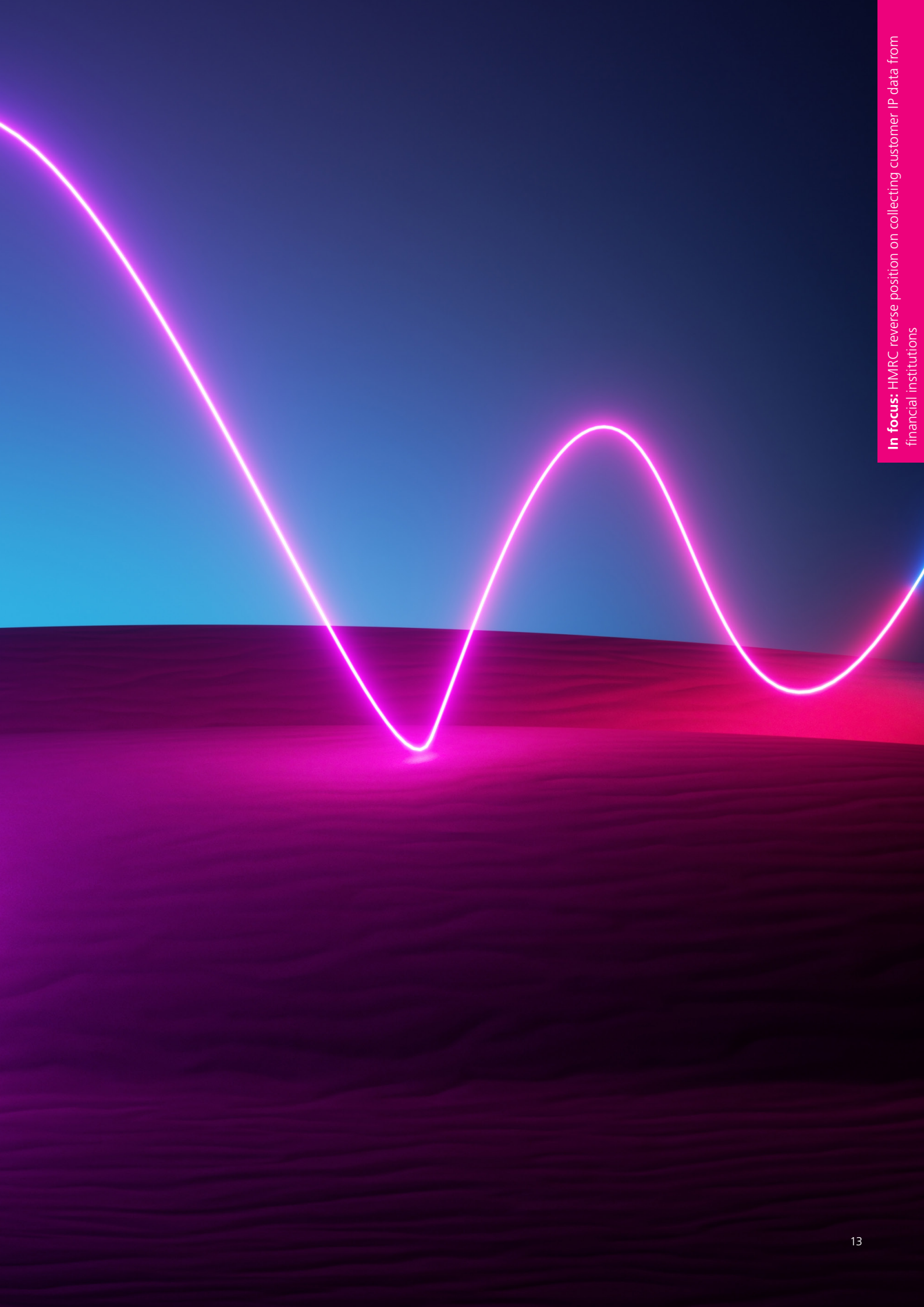
Given the lack of judicial oversight, HMRC have also previously emphasised other safeguards built into the legislation, in particular that FINs must be approved by an authorised officer of HMRC. In practice such approval is not going to be difficult to obtain. Indeed, the new report states that authorised officers have approved over 91% of the applications put to them.

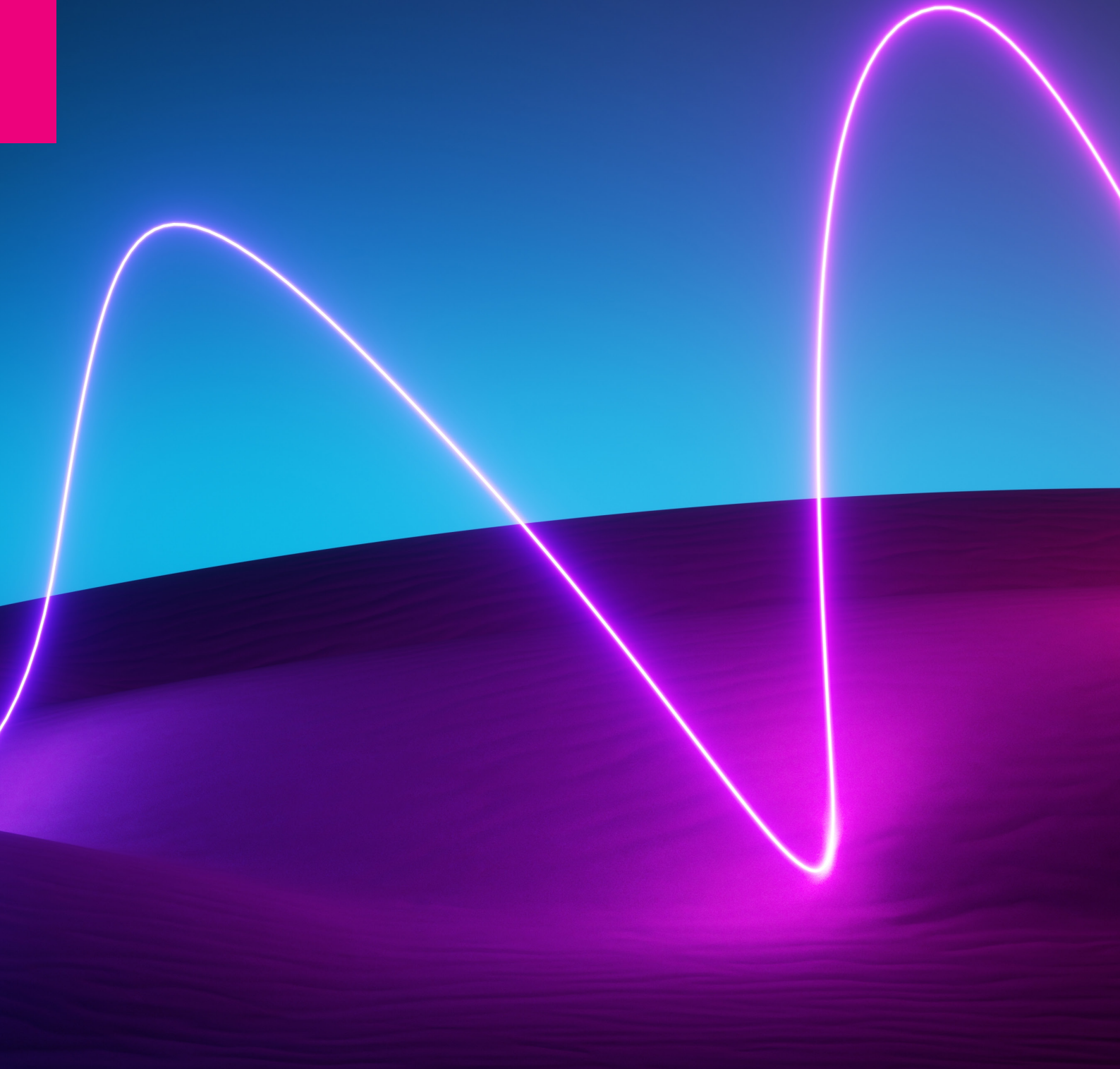
## Comment

FINs represent a significant and potentially wide-reaching power in HMRC’s arsenal. The latest information indicates that HMRC are willing to use this power in previously unanticipated ways and potentially on a scale larger than expected. All financial institutions potentially affected – not just a handful of banks and building societies - should ensure that they are adequately prepared.

Many financial institutions are likely to already have procedures in place for dealing with information requests from law enforcement authorities, such as HMRC, to ensure that data privacy and other relevant obligations are properly complied with. Such institutions may want to consider whether those procedures should now be reviewed.

Whilst there are no grounds for appealing against FINs, there may be scope for other potential methods of challenge (including, where appropriate, judicial review and appealing against penalties for non-compliance).





# In focus: a quick guide to penalty behaviours

In recent months, the media has been awash with stories about the terms of a settlement between HMRC and a certain former Chancellor regarding his personal tax affairs. In particular, HMRC were reported to have treated the tax errors in question as “careless” rather than “deliberate”. While we make no comment on the individual settlement in question, please see below a high-level summary of what those terms mean in the context of penalties for tax errors.

## Relevant legislation

Schedule 24 to the Finance Act 2007 (“**Schedule 24**”) can impose penalties where a taxpayer has “carelessly” or “deliberately” provided HMRC with an inaccurate document (e.g., a tax return) which leads to an understatement of liability or overstatement of repayment. The level of penalty imposed will be determined according to the seriousness of the error:

- errors which are neither careless nor deliberate will not attract any penalty;
- careless errors will attract a penalty of up to 30% of the “potential lost revenue” or “**PLR**” (i.e., the amount of tax effectively underdeclared);
- deliberate (but not concealed) errors will attract a penalty of up to 70% of the PLR; and
- deliberate and concealed errors will attract a penalty of up to 100% of the PLR.

Higher penalties can be imposed in certain circumstances, potentially even as high as 200% for certain offshore matters. Equally, penalties can be heavily mitigated by the quality and timing of taxpayer disclosure (and, in many cases, eliminated altogether).

## What is careless behaviour?

HMRC define “careless” as the failure by a person to take reasonable care, viewed in light of that person’s abilities and circumstances. For example, a different level of knowledge or expertise would be expected from a large multinational group than a self-employed unrepresented individual. HMRC would also expect a higher degree of care to be taken over large and complex matters than more straightforward ones.

In particular, it would be considered reasonable to expect a taxpayer who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or seek appropriate advice. If, after that, a taxpayer is still unsure of the position, they should draw attention to the uncertainty when submitting the relevant return or other document to HMRC.

Therefore, an example of an error that is made despite having taken reasonable care (and therefore outside the scope of penalties under Schedule 24) might include acting on advice provided by a competent adviser that later proves to be wrong (provided that all relevant details were made known to that adviser at the relevant time).

Examples of careless behaviour given by HMRC guidance include, amongst others, failing to keep accurate records, failing to seek appropriate advice, and not having adequate procedures in place to help prevent errors from occurring.

## What is deliberate (and not concealed) behaviour?

A deliberate (and not concealed) error occurs when a taxpayer provides a document to HMRC that they know contains an error. This is a subjective test and the Courts will consider what the taxpayer's knowledge was at the relevant time.

Indicators of deliberate behaviour cited by HMRC guidance include, amongst others, knowingly failing to record all sales and deliberately describing transactions inaccurately or in a way that is likely to mislead. The Supreme Court has also suggested obiter that "recklessness" as to the truth of a statement in a document can constitute deliberate behaviour in certain circumstances.

All penalties imposed under Schedule 24 are civil, rather than criminal, penalties. However, where deliberate behaviour is discovered, HMRC may decide to start a criminal investigation for potential tax fraud offences.

## What is deliberate and concealed behaviour?

Schedule 24 makes a distinction between deliberate errors which are and are not "concealed" (defined by HMRC as meaning where "active steps" are taken to hide the error, either before or after the tax return or other document has been submitted to HMRC).

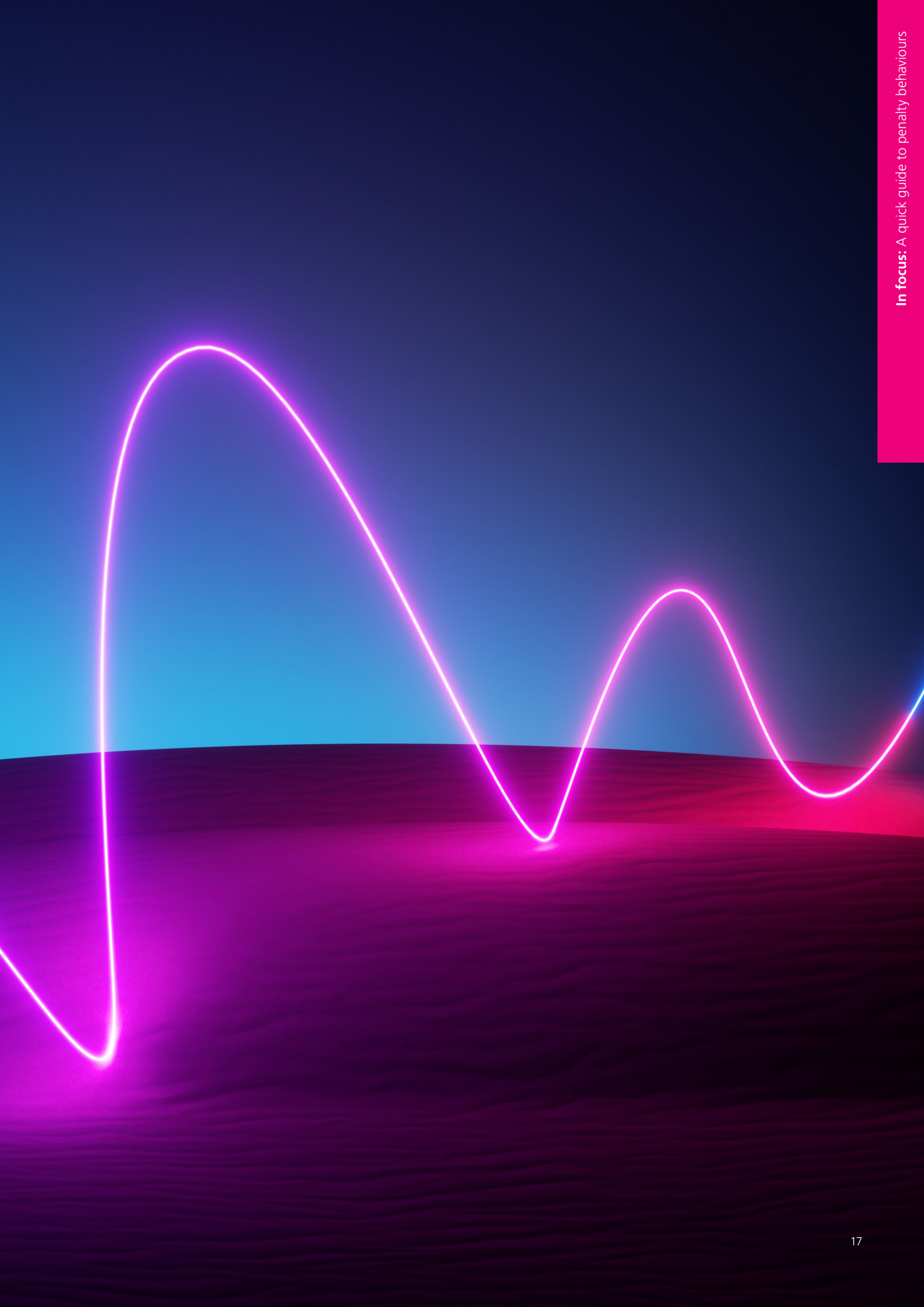
Examples of concealment given by HMRC guidance include, amongst others, creating false invoices, backdating or postdating documents, and destroying records.

## The benefit of voluntary disclosures

The penalty system described above is designed to encourage transparency and cooperation. Penalties for tax errors can be heavily mitigated by the timing and quality of taxpayer disclosure and, in many cases, eliminated altogether (or, in the case of careless penalties, potentially suspended). For example, increased levels of mitigation will usually be possible where disclosures are "unprompted" (i.e., made at a time when the person making the disclosure has no reason to believe that HMRC have discovered or are about to discover the error in question).

In many cases, the potential penalty reductions will outweigh any professional fees involved in making a disclosure. A full and unprompted disclosure should also prevent taxpayers from being publicly "named and shamed" for any deliberate errors and reduce the risk of HMRC commencing a criminal investigation.

The information above is a high-level summary only and should not be relied upon as advice for any specific case. If you would like any detailed information in relation to this area, our team would be happy to assist. We regularly manage multi-jurisdictional internal investigations to identify tax errors for clients and, where applicable, make detailed disclosures in order to regularise the position (including under official disclosure facilities such as the Profit Diversion Compliance Facility, Worldwide Disclosure Facility and Contractual Disclosure Facility).





# Other notable tax cases

## *Finanzamt M (C-596/21)*

In this case, the European Court of Justice considered whether a trader could be refused the right (as contained in the Principal VAT Directive) to deduct input tax where they were “one-step” removed from a fraudulent VAT transaction. If so, was the right to deduct limited only to the loss suffered by the tax authority, or could the right be refused entirely in respect of the transaction in which the trader was involved? Unsurprisingly, given previous well-trodden case law in this area, the Court held that the trader in question could be refused the right to deduct where he “knew or ought to have known” that the purchase in question was linked to fraud – it was irrelevant that the trader had not been involved in the vendor’s prior fraudulent VAT transaction (nor had actual knowledge of it). This case highlights the importance of robust vendor and supplier due diligence procedures.

## *Christian Peter Candy v HMRC [2022] EWCA Civ 1447*

In this case on time limits (a subject frequently making its way through the tax courts in various guises), the taxpayer unsuccessfully argued that the normal 12-month limit for amending a land transaction return did not apply in the circumstances. The taxpayer paid the Stamp Duty Land Tax (“**SDLT**”) arising when an agreement for lease was substantially performed, but subsequently novated the agreement and amended the return to reclaim the SDLT (outside of the 12-month limit). The Court of Appeal rejected the taxpayer’s argument that section 44(9) of the Finance Act 2003 (which provides that a repayment can be claimed by way of amendment where, at any later time after the initial substantial performance, the contract is not carried into effect) should operate as an exception to the normal 12-month limit – despite the provision bringing into effect this limit applying “except as otherwise provided”. Alternative recourse may be provided by making an overpayment relief claim under paragraph 34 of schedule 10 to the Finance Act 2003, which has a longer (four-year) time limit. However, HMRC also refused the taxpayer’s claim on this basis, which is now the subject of a separate appeal.

## *Urenco Chemplants Limited & Anor. v HMRC [2022] EWCA Civ 1587*

This Court of Appeal decision is less relevant to the majority of taxpayers in respect of the substantive issue (whether expenditure incurred by the taxpayer on the construction of a nuclear deconversion facility qualified for capital allowances) than the Court’s approach to statutory interpretation where there appeared to be a drafting error. The decision notes that there is precedent in case law for referring to antecedent legislation in narrow (but clear) circumstances: “when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve”. As such, the Court of Appeal was able to read words into the relevant provisions of the Capital Allowances Act 2001 with reference to its antecedent legislation which had been rewritten as part of the Tax Law Rewrite.

## *HMRC v Jason Wilkes [2022] EWCA Civ 1612*

In another case in which the taxpayer won on a point of statutory interpretation, the Court of Appeal found that the drafting of the provisions which allow HMRC to issue a discovery assessment did not permit an assessment for unpaid High Income Child Benefit Charge (HICBC). HMRC failed in their argument that the requirement of a discovery of “income which ought to have been assessed to income tax” could also mean a discovery of an amount which should have been assessed to income tax. The Court of Appeal roundly dismissed this argument, given that the HICBC was neither “income” (as required by the statute) nor even an amount which ought to have been assessed to income tax. Further, unlike in *Urenco* (see above), the Court of Appeal refused to “rectify” the legislation, given they did not consider the high bar to do so to be met. Given that the Finance Act 2022 amended (and widened) the discovery provisions so that an assessment can now be made where HMRC discover that an amount of income tax or capital gains tax has not been assessed which ought to be assessed, this decision is primarily valuable for demonstrating where (in contrast to *Urenco*) the Courts will not (and cannot) “rectify” statute.

### *Mainpay Limited v HMRC* [2022] EWCA Civ 1620

The Court of Appeal rejected the taxpayer's arguments that its supplies of medical staff to an agency which contracted with NHS Trusts were exempt from VAT as supplies of medical care. Focusing on the "commercial and economic reality" of the supplies, the Court of Appeal held that the taxpayer did not have control, direction or supervision of the supplied staff, who effectively became part of the NHS Trusts (which did provide medical care to patients). As such, the taxpayer's supplies were supplies of staff and standard-rated. The Court also rejected the taxpayer's further grounds for appeal – first, that the purpose of the exemption is to prevent VAT increasing the costs of healthcare, and second, relying on the principle of fiscal neutrality, that a self-employed doctor would have the benefit of the VAT exemption, while those with the taxpayer's model would not. This is an important decision for those operating in the healthcare agency industry.

### *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7

The Supreme Court held that the taxpayer had been incorrect to treat supplies of digital newspapers as "newspapers" within the meaning of section 30 of the Value Added Tax Act 1994 ("VATA"), with the result that such supplies were not exempt from VAT. The decision involves a consideration of potentially conflicting legal principles. The first such legal principle requires the courts to interpret statutes taking into account changes that have occurred since the statute became law, unless it is clear from the words of the statute that the relevant provision is tied to a historic interpretation (known as the "always speaking" principle). The second is the principle deriving from EU law that zero-rating provisions must be interpreted strictly, because they constitute exemptions to the general principle that supplies of goods and services by taxable persons should be subject to VAT. Finally, it was accepted that the "standstill provision" contained in Article 110 of the Principal VAT Directive in this case meant that the categories of zero-rating could not be expanded beyond those which existed on 31 December 1975. The Supreme Court's decision was reached essentially on the basis that the EU law principles referred to above overrode the "always speaking" principle of UK statutory interpretation.

Note that this decision only directly affects supplies of digital newspapers in periods prior to 1 May 2020 (from that date, the legislation was amended so as to extend zero-rating to newspapers "when supplied electronically", subject to certain exceptions). In the future, one consequence of Brexit is that UK courts will have more freedom to depart from EU law principles. It will be interesting to see whether this leads to application of the "always speaking" principle of UK law in the context of technological advances in circumstances where this would previously have been constrained by EU law.

### *Thomas William Good v HMRC* [2023] EWCA Civ 114

This Court of Appeal case involves a tax avoidance scheme in which the taxpayer had, using a combination of his own money and borrowed funds, invested in film distribution rights. Those rights had subsequently been assigned by the taxpayer in return for an entitlement to an ongoing share of profits, subject to a "minimum annual payment" sufficient to meet the taxpayer's interest obligations under the loan. The lender took security over the "minimum annual payments" and they were directed to be paid to it, to be applied to interest and capital in respect of the loan. The aim of the scheme was to generate a tax loss eligible for sideways relief and deductions for interest on the loan. The issue before the Court of Appeal was whether the taxpayer was "entitled to" the minimum annual payments and whether they represented income "from" the non-trade business of exploiting films, for the purposes of section 609 of the Income Tax (Trading and Other Income) Act 2005, so that he was liable for income tax on them under section 611 of that Act.

The Court decided both of these issues in the affirmative, concluding that the taxpayer had retained a real interest in the minimum annual payments, notwithstanding their payment to the lender. The lender was obliged to use the payments to meet the loan obligations and that relieved the taxpayer of obligations in relation to the loan. Further, the taxpayer had a right to redeem his rights to the amounts once the loan was paid off. Therefore, despite the income being paid to a third party, the taxpayer derived benefit from it, which was sufficient to demonstrate his entitlement to it for income tax purposes. It was acknowledged that the outcome will have been unpalatable for the taxpayer. Not only did he lose his initial investment, he was subject to tax in respect of income which he had not received.

### *Greenspace (UK) Ltd v HMRC [2023] EWCA Civ 106*

The taxpayer supplied and installed insulated roof panels to residential customers, fitted onto customers' existing conservatory roofs. The issue before the Court of Appeal was whether the roof panels were "insulation for roofs" so as to benefit from a reduced rate of VAT (pursuant to section 29A and Note 1 Group 2 Schedule 7A VATA). The Court held that the test was whether the relevant supplies are of "insulation for roofs" using those words in their ordinary sense, applied strictly but not restrictively. The panels did provide insulation, but they also protect the conservatory from the elements. On that basis, they were not "insulation for roofs" and accordingly the reduced rate of VAT did not apply.

### *Fenix International Ltd v HMRC (C-695/20)*

This case concerned the VAT treatment adopted by a certain website/online social media platform. However the significance of the decision stems less from the substance of the case and more from the fact that this represents the very last decision of the Court of Justice of the European Union ("CJEU") in a reference from the FTT (and possibly any other UK court or tribunal). The FTT referred a question to the CJEU on 15 December 2020. On 31 December 2020, the ability of UK courts and tribunals to make references to the CJEU effectively ended. However, the terms of the UK's withdrawal from the EU meant that the CJEU retained jurisdiction to entertain the FTT's reference and that the FTT would be bound by the CJEU's decision. That decision finally came on 28 February 2023.



# Interesting decisions from the tribunals

## Director personally liable for penalties after Google Street View exposes deliberate errors

In *Apollinaire Ltd and Zakir Hussain Hashmi v HMRC* [2022] UKFTT 432 (TC), a director was found to have deliberately understated his company's input VAT and therefore made personally liable for penalties. The evidence gathered by HMRC included images from Google Street View that directly contradicted assertions made by the appellants.

### Background

Apollinaire Ltd ("**Apollinaire**"), a male outfitters business, was registered for VAT with an effective date of 6 October 2015. Mr Hashmi was the sole shareholder and director. Apollinaire subsequently submitted a repayment claim for the period from its date of registration to 31 January 2016 in the amount of £98,191.21, which primarily resulted from five invoices dated 11 November 2015 (totalling £573,756 inclusive of VAT) purportedly issued by a different VAT-registered entity called Snow Whyte Ltd ("**Snow**") for the sale of clothing stock.

On further investigation, it emerged that Mr Hashmi had also been the shareholder and director of Snow. However, it was asserted that Snow had been sold to a Mr Narinder Singh for a total of £25,000 in October 2015 and that Snow was in fact an entirely separate business from Apollinaire as at the date of the invoices.

However, the evidence gathered suggested that this was not accurate. For example, both Snow and Apollinaire had been trading under the same name of "Benny Hamish", the same till had been used by both businesses (with no significant break in trade), and the same members of staff were used by both businesses. HMRC therefore denied the repayment claim, issuing VAT assessments and deliberate penalties to Apollinaire for inaccuracies in its VAT returns, including on the basis that the sale of stock had in fact been a Transfer of a Going Concern ("**TOGC**") (meaning that no VAT was in fact chargeable on the purported sale of stock). HMRC also issued a Personal Liability Notice ("**PLN**") to Mr Hashmi under paragraph

19(1) Schedule 24, making him personally liable for the penalties, on the basis that the inaccuracies had been caused deliberately. Apollinaire appealed against the assessments and Mr Hashmi appealed against the PLN. The appeals against the underlying penalties were time-barred.

### Decision

The FTT dismissed the appeals against both the VAT assessments and the PLN, finding that the sale of stock was indeed a TOGC. The FTT referred to an "extensive conflict in the evidence" for the appellants, even going as far as to question whether the mysterious Mr Singh had ever actually existed. In any case, the FTT found that Mr Hashmi had been the "controlling mind" of both Apollinaire and Snow at all relevant times.

One particular issue for the appellants was the suggestion that the premises used by Apollinaire had been empty prior to it taking on the lease from November 2015, and that Snow had operated from a different address. However, the FTT was presented with images of those premises from Google Street View dating from July 2015. Unfortunately for the appellants, those images showed the premises bearing prominent signage for "Benny Hamish", shop front windows with both mannequins and stock, and banners advertising a sale and discounts. The images also showed further stock, displays and even people inside the premises and, perhaps most damningly, a bright neon sign saying "OPEN".

The FTT referred to the fact that Mr Hashmi had been the director of a number of dissolved/phoenixed companies (typically with the same trading name) which had a history of non-compliance. On that basis, together with the evidential issues referenced above, the FTT held that the inaccuracies in the tax returns were deliberate and that the PLN had therefore been correctly issued.

### Comment

The case highlights the fact that HMRC have access to an increasingly wide pool of information in order to investigate taxpayers, including as part of their Connect software. This includes not only the predictable sources of information such as from banks/financial institutions or data that may be shared with other UK Government departments (e.g., council tax or Land Registry records). Sources of information may now include, for example, social media, Amazon, eBay and similar sales websites, flight and passenger information, and (as in this case) even Google Street View. International initiatives have also seen unprecedented levels of transparency and cooperation between international tax authorities, meaning taxpayers now face an unprecedented level of scrutiny.

Where errors are discovered by taxpayers, the best course of action is usually to make a voluntary disclosure to HMRC. Penalties for tax errors can be heavily mitigated by taxpayer disclosure and, in many cases, eliminated altogether. A full and unprompted disclosure may also prevent taxpayers being publicly “named and shamed” for any deliberate errors – see our quick guide to penalty behaviours above for further information.

## HMRC entitled to withhold information already in public domain

In *Gordon v The Information Commissioner & HMRC* [2022] UKFTT 437 (GRC), the First-tier Tribunal (General Regulatory Chamber) (also referred to as the “FTT” for simplicity) upheld the Information Commissioner’s decision that HMRC were entitled to withhold information in response to a request under the Freedom of Information Act 2000 (“**FOIA**”), even though the information in question was a taxpayer’s name in a reported Supreme Court case (and therefore already in the public domain).

### Background

Mr Gordon, a tax barrister, submitted a Freedom of Information (“**FOI**”) request and received an internal HMRC email relating to the loan charge written by HMRC’s counter avoidance unit. Certain information was redacted in the email including as follows:

*“Someone said to me that the loan charge doesn’t apply to loans taken out from 6/4/19. Is that right? If so, what is our plan for those and why won’t there be an explosion of new DR schemes? Are we just hoping [REDACTED] will put people off?”*

In response, Mr Gordon submitted a further FOI request to query whether the redaction was still appropriate. HMRC refused to provide the redacted information, relying on section 23 of the Commissioners for Revenue and Customs Act 2005 (“**CRCA**”), which provides that information relating to a person (the disclosure of which is prohibited by section 18(1) CRCA) is exempt information by virtue of section 44(1)(a) FOIA if its disclosure would enable the identity of such a person to be deduced.

Mr Gordon then submitted a further FOI request asking HMRC to confirm whether the redaction related to the name of a taxpayer who had been in litigation with HMRC and, if so, whether there had been a published decision. When met with refusals on the same grounds as before, Mr Gordon appealed on the basis that the redacted information was in fact the name of a Supreme Court case and not the name of a taxpayer.

### Decision

On appeal, the FTT agreed with HMRC that the redacted information was prohibited from disclosure on the following basis:

- The name of a published case to which HMRC were a party is information “about, acquired as a result of, or held in connection with” HMRC’s tax litigation function. The name of the other party (as it appears in the reported name of the case) is information “in respect of” that person within the meaning of section 19(2) CRCA.

- The name of a published case is “held by the Revenue and Customs in connection with a function of the Revenue and Customs” as a result of HMRC’s assessment and collection of tax from the taxpayer and therefore was information to which section 18 CRCA applied. The fact that the name of that taxpayer may have entered the public domain does not mean that section 18 CRCA ceases to apply.
- Disclosure of the name of a published case “would specify the identity of the person to whom it relates”.

Therefore, it followed that section 23 CRCA applies to the name of a published case, and it would be exempt under section 44(1) FOIA from disclosure by a FOI request. The fact that this was a published case was not relevant for disclosure purposes.

The FTT did have some sympathy with Mr Gordon’s arguments that the taxpayer’s name would already be in the public domain by virtue of the case being reported and that HMRC would therefore not be in breach of their duty of confidentiality to the taxpayer. The FTT also stated that it was unlikely that Parliament intended for the names of reported tax cases to be exempt from a FOI request under section 44 FOIA. However, the FTT did not feel that it was able to rewrite the statutory test or add limitations on its scope, even to “exclude information that is so widely known to the public that all confidentiality in it has been destroyed”.

### Comment

This is an interesting decision that will likely be seen as counter-intuitive to many. It will be interesting to see just how far HMRC regard themselves as bound by the confidentiality principle set out in this case, which taken to its logical conclusion might arguably preclude them from referring to any decided case concerning a taxpayer.

## HMRC's reply to email held to be appealable decision

In *Isle of Wight NHS Trust and others v HMRC* [2023] UKFTT 23 (TC), in response to strike out applications made by HMRC, the FTT held that HMRC's reply to correspondence in respect of the VAT treatment of certain supplies constituted an appealable decision within the FTT's jurisdiction.

### Background

The various appellants in this case were NHS Trusts, Health Boards or Community Interest Companies (referred to as the "NHS Trusts" for simplicity). The substantive issue broadly concerned whether supplies to the **NHS Trusts** of temporary doctors should be exempt from VAT pursuant to Item 5, Group 7 of Schedule 9 VATA.

On 30 June 2021, the NHS Trusts' adviser sent an email to HMRC enclosing what they described as a "technical submission" on behalf of "a growing number of NHS and healthcare organisations across the UK". The email attached an opening letter, a technical submission and appendices (together, the "**Submission**"). The email stated that formal claims under section 80 VATA would follow in due course and that "sample" figures had been included in respect of some, but not all, of the NHS Trusts.

On 3 August 2022, HMRC sent their response (the "**Reply**") to re-affirm their current published guidance (in paragraph 6.5 of VAT Notice 701/57 and elsewhere). The Reply included the following statement:

*"For the avoidance of any doubt, HMRC does not share the views set out in your letter/report."*

The Reply noted that each case is fact-specific and would be considered on its own merits. It also pointed out that any claims under section 80 VATA would need to be made by the supplier of the relevant supplies, rather than the recipient (as the NHS Trusts were in this case). The Reply did not refer to any appeal rights. The NHS Trusts' advisers notified appeals to the FTT on the basis that the Reply constituted an appealable decision under section 83(1)(b) VATA.

The subject of the present hearing was HMRC's subsequent applications for the appeals to be struck out on the basis that:

- The FTT lacked jurisdiction because no appealable decision had been made. HMRC had simply issued a letter responding to the Submission, which they viewed as a speculative, theoretical and general enquiry. No decision had been made in respect of the VAT liability of any specific supply or a particular taxpayer.

- Even if the FTT did have jurisdiction, the appellants lacked the necessary standing to appeal.

### Decision

Having analysed the scope of section 83(1)(b) VATA and relevant case law, the FTT agreed with the NHS Trusts that there was no need to identify a specific supply or an amount of VAT to be determined. Rather, one should identify the chargeability to VAT of a type of supply where there is actual tax chargeable and actual supplies made.

The FTT held that the Submission had identified the nature of the supplies and principles involved in considerable detail. On the facts, it was clear that HMRC could have understood and recognised the issue at hand. For the FTT, the crucial factor was the "for the avoidance of any doubt..." statement in the Reply, indicating (in unequivocal terms) that the Submission had been considered and rejected, with no scope provided for further dialogue. Indeed, the FTT noted that HMRC would have had a much stronger argument had those particular words been omitted from the Reply.

The FTT also held that the NHS Trusts did have the necessary standing. Each appellant had sufficient financial, or other interest, to appeal as recipients of the supplies of locum doctors.

On that basis, the FTT refused HMRC's strike out applications. The substantive issues under appeal are therefore expected to be heard in due course.

### Comment

The FTT is a creature of statute and there is therefore no general right of appeal save where provided for in legislation. It can, therefore, be difficult to obtain an appealable decision outside of formal enquiries, assessments or claims. In this case, formal claims (under section 80 VATA) were not possible – indeed, HMRC alleged that it was only when the NHS Trusts' adviser realised this that they used the Submission as a way of arguing their point "by the back door". The case therefore usefully highlights that it is possible in certain circumstances to obtain an appealable decision outside of the normal formal process. More specifically, the case also highlights that the recipient of a supply can appeal a VAT decision in certain circumstances.

## Loan charge and public law arguments before the FTT

In *Douglas Lambourne v HMRC* [2022] UKFTT 00466 (TC), the FTT considered the taxpayer's right to appeal against the decision by HMRC not to make a refund of tax under the Disguised Remuneration Voluntary Repayment Scheme 2020.

### Background

The loan charge was announced at Budget 2016 and was implemented into UK legislation under the Finance (No.2) Act 2017. This was a tax clawback targeted at tax schemes which essentially disguised employment remuneration as loans in order to avoid paying income tax and national insurance contributions.

The loan charge initially applied to disguised remuneration loans and quasi-loans granted after 6 April 1999 where part or all of it was outstanding at the end of 5 April 2019. Following criticism on the implementation of the loan charge, HMRC commissioned Sir Amyas Morse to conduct an independent review in 2019 (the "Review"). One recommendation from the Review was that the loan charge should not apply to loans made before 9 December 2010. Moreover, where taxpayers had entered into a settlement agreement after 2016 in respect of such loans and paid employment taxes which could not legally be collected, HMRC should refund such amounts.

In response to that recommendation, HMRC established a scheme known as the Disguised Remuneration Voluntary Repayment Scheme (the "Scheme"). Much judicial ink has been spilled over the loan charge, not least a string of cases which challenged the legality of the loan charge on the basis that the legislation was retrospective and incompatible with the Human Rights Act 1998 (see *R (Cartref Care Home Ltd) v HMRC* [2019] EWHC 3382 and *R (on the application of Cartref Care Home Ltd) v Revenue and Customs Commissioners* [2020] EWCA Civ 1744).

The taxpayer in *Lambourne* received contributions from his employer to a "remuneration trust" in 2004/2005. HMRC considered these contributions to constitute earnings of the taxpayer and sought to recover employment taxes payable under the contributions from his employer. In 2019, the taxpayer entered into a settlement agreement with HMRC under which he agreed to pay £6,480 being employment taxes which his employer failed to pay to HMRC in respect of the remuneration trust arrangements.

Following the introduction of the Scheme, the taxpayer made an application for refund on the amounts paid under the settlement agreement. The application was refused by HMRC on the grounds that HMRC were legally entitled to recover the amounts from his employer. The taxpayer's application for a review of the decision was also rejected on the same grounds.

The FTT was asked to adjudicate on essentially a question of "fairness" in *Lambourne* as the taxpayer sought to argue that individuals in his position, who had not voluntarily disclosed nor paid loan charges to HMRC, were in a better position than himself as a result of the amnesty on loans granted before 9 December 2010.

### Decision

The FTT struck out the taxpayer's appeal, citing the case of *R&J Birkett v HMRC* [2017] UKUT 89 (TCC) on the limitations to its jurisdiction. This meant that it did not have the powers to decide on issues relating to HMRC's determination of the taxpayer's application under the Scheme. This is because the FTT, as a creature of statute, is bound by the powers conferred to it under statute. As much as the FTT was sympathetic towards the taxpayer's circumstances, the ambit of the legislation implementing the Scheme does not expressly (or as a matter of statutory construction) grant powers of review to the FTT. The FTT was therefore unable to exercise jurisdiction on the ground of appeal raised by the taxpayer.

### Comment

The tone of the FTT decision rings of frustration, evident from its recommendations for: (i) Parliament to expressly legislate to introduce a right to appeal for taxpayers caught under similar circumstances; and (ii) HMRC to "consider carefully" whether to issue a termination notice under the Scheme. As noted in the FTT's decision, the only potential recourse for the taxpayer is to make an application for judicial review (which the FTT also noted might be out of reach for most taxpayers given the cost and complexity involved).

In his Review, Sir Amyas Morse had advocated for fairness in the way the loan charge is implemented and recommended steps to build trust between the HMRC and taxpayers as "trust in HMRC is an important part of the integrity of our tax collection system and is worth protecting". Given the unequal treatment of taxpayers in *Lambourne*, the decision arguably goes against the spirit of the Review. This is amplified by the fact that the taxpayer's employer was in insolvent liquidation, which brought into doubt the ability for HMRC to recover the amounts owed from the employer. However, the decision in this case was somewhat inevitable given the limitations to the FTT's jurisdiction.

## FTT hearing proceeds without taxpayer's representative following catalogue of failures

In *ATN Marketing Limited v HMRC* [2023] UKFTT 00030 (TC), a catalogue of procedural failures by the taxpayer's representative led to two hearings being adjourned and the FTT finally deciding to proceed with a hearing in their absence (at the third attempt).

### Background

This case concerned appeals against VAT assessments and related "deliberate" penalties in excess of £280,000. However, the real interest in this case stems more from the somewhat shocking procedural history rather than the substantive issues.

At all relevant times (including in respect of the submission of the relevant VAT returns, HMRC's subsequent investigation and the proceedings before the FTT), the taxpayer was represented by the same chartered accountant (who shall remain anonymous).

A hearing was first listed to take place remotely on 27 June 2022 (the taxpayer's representative having previously confirmed that she had a reliable broadband connection and the ability to access the electronic hearing bundle whilst simultaneously attending the remote hearing). Prior to that date, the FTT had issued directions requiring the taxpayer to provide a list of documents on which it intended to rely at the hearing, together with any witness statements and a skeleton hearing. The taxpayer's representative subsequently provided a response by email (several weeks late) providing a list of documents (consisting of only 24 items which could not be identified as having been previously disclosed) and confirming that she would be attending the hearing alone (although not as a witness and no witness statements were served). The representative only provided a skeleton argument by email at 9.36am on the day of the hearing itself (i.e., about half an hour before it was due to start), which was only three pages long and largely consisted of assertions (which plainly constituted witness evidence), without any cross-references to supporting documents.

Soon after the FTT had explained these various shortcomings in the opening exchanges of the hearing, the representative lost her internet connection and, following several failed attempts to reconnect, finally re-joined by phone. Contrary to the previous confirmation given, the representative explained that she lived in a remote part of the country with unreliable broadband.

The FTT decided to re-list the appeal for a second hearing, this time to be held in-person on 6 October 2022. Fresh directions were issued requiring a proper skeleton

argument and making clear the requirements as to witness evidence. However, no amended skeleton argument or witness statements were filed and, on the morning of the hearing itself, the representative was absent (having emailed the FTT that morning to say that her train had been delayed). The FTT generously decided that it would be in the interests of justice to re-list the hearing (for a third time) for 27 October 2022, delaying the start time to 11am to accommodate travel time and extending the deadline to comply with the previous directions.

However, no amended skeleton argument or witness statements were provided within the extended time limit. Worse still, the representative sent an email at 7.09am on the morning of the re-listed hearing to explain she had contracted a virus and to request that the hearing be adjourned again. Following HMRC's inevitable objections, the FTT decided that it would be in the interests of justice to proceed with the hearing in the representative's absence, noting that the failure to comply with the previous directions meant that she would have been able to make only limited submissions in any case. Notwithstanding that, the FTT decided to take the existing skeleton argument into consideration (although many of the documents referenced therein could not be identified).

### Decision

The substantive matters before the FTT involved the taxpayer's claims for input tax deductions totalling more than £200,000. The VAT assessments in this case had been made pursuant to section 73 VATA, which broadly permits HMRC to assess the amount of VAT due to their best judgment in the absence of filed information. The FTT was shown various correspondence in which the taxpayer's representative claimed to have provided documents to HMRC to challenge the basis of the assessments but then never in fact did so. "Deliberate" penalties had also been assessed on the basis that the taxpayer (and its representative) must have known that the claims were not accurate (which HMRC said explained why no supporting information had been provided). Moreover, reduced mitigation was given in respect of such penalties on the basis of the failure to provide information. In the absence of any substantive evidence being provided on behalf of the taxpayer, the FTT held that there was no basis to disturb these assessments and penalties.

## Comment

This case serves as a rather extreme example of how important it is for taxpayers to ensure that they comply with the relevant procedures when making appeals. In this case, the lack of any substantive supporting evidence means that it is unclear whether it would have made any difference had the representative properly complied with the various directions (or whether it would have even been possible to comply in any meaningful way). However, even in that case, the taxpayer could have been spared a rather damaging public decision and penalties could likely have been mitigated further. Taxpayers should seek specialist legal advice as soon as any potential dispute with HMRC arises.

## Taxpayer refused permission to make late VAT appeal even after Covid-19 confusion and being “actively misled” by adviser

In *Golden Grove Trust v HMRC* [2023] UKFTT 00027 (TC), a taxpayer charity was refused permission to make a late appeal even in circumstances where it had been “actively misled” by its adviser as to the circumstances of the delay.

### Background

Where a taxpayer disagrees with a decision made by HMRC in respect of VAT, the taxpayer must file a notice of appeal to the FTT (or otherwise choose to have that decision reviewed internally by HMRC) within 30 days. Where a review is requested and the taxpayer does not agree with the conclusion of that review, the taxpayer will have 30 days to notify its appeal to the FTT. It is important to ensure these statutory time limits are followed. Whilst late appeals can be made in certain circumstances, permission is required.

The taxpayer in this case was a small registered charity (the “Trust”) which sought to make late appeals against HMRC’s decisions to deny input recovery for an amount totalling £92,644. HMRC initially issued a VAT assessment on 7 February 2019 (the “Assessment”) and, following further correspondence, HMRC agreed to extend the time limit for requesting a review or making an appeal to 3 May 2019. No such review was requested nor appeal made within that extended time limit. On 5 December 2019, in response to a new point raised by the Trust’s adviser on 3 October 2019, HMRC issued a subsequent decision which included rights of review/appeal (the “Decision”). A further extended time limit was agreed through subsequent correspondence before a statutory review was finally requested on 10 February 2020. The conclusion of that review (upholding the Decision) was sent by post on 26 March 2020 (the “Review Conclusion”), which unfortunately coincided with the first Covid-19 lockdown.

At all relevant times, the Trust was represented by the head of VAT at a well-known London firm of accountants (who shall remain anonymous). When the Review Conclusion was issued, the firm’s office was closed and the adviser was working from home. Mindful of the issues caused by the lockdown, HMRC emailed the adviser just before the deadline for appealing the Review Conclusion to ask if the Trust intended to make an appeal. After it became apparent that the adviser had not received the Review Conclusion, a copy was sent by email and, on 27 April 2020, the adviser emailed to confirm that “we will be appealing the decision and applying for hardship”. However, no notice of appeal was apparently received by the FTT until an online notice was submitted on 17 September 2021 in respect of both the Assessment and the Decision (i.e., well outside the necessary time limits in each case).

### Decision

The adviser gave witness evidence that he had sent a paper notice of appeal form to the FTT and that it had been lost in the post or by the FTT, and that he had contacted the FTT to establish what had happened to that paper notice of appeal. Strikingly, however, the FTT held that this evidence “lacked credibility” and that no such paper notice of appeal or follow-up contact with the FTT had been made. The FTT pointed to various conflicting evidence given by the adviser about when the notice of appeal was filed.

On that basis, the FTT held that a notice of appeal had in fact only been made at the time of the online filing in September 2021 and applied the well-known test in *William Martland v HMRC* [2018] UKUT 0178 (TCC). Per *Martland*, the starting position is that permission should not be granted unless the taxpayer demonstrates that it should be. A three-stage test then requires an evaluation of: (i) the length of the delay; (ii) the reasons for the delay; and (iii) all the circumstances of the cases, conducting a balancing exercise to assess the merits of the reasons for the delay and the prejudice that would be caused to the respective parties by the grant or refusal of permission. The FTT held that the Trust had not satisfied the requirements under this test and dismissed the appeals. For example, in light of its finding of fact about the date of the notice of appeal, the FTT held that the delay had been over two years in respect of the Assessment and over one year in respect of the Decision, and that such delay was plainly serious and significant.

While the FTT recognised that the Trust had reasonably relied on its adviser - and even that the adviser had “actively misled” its client as to what had happened in relation to the notice of appeal – it held that there were sufficient “warning signs” and that the Trust was therefore not without responsibility for the delay.

### Comment

This case shows the importance of complying with the statutory time limits for making appeals. Serious delays will provide a high bar to overcome, and reliance on a professional adviser (potentially even in circumstances where that adviser has “misled” its client) will not provide a sufficient defence in most cases. Given the strict time limits for commencing any form of tax litigation, it is critical to seek specialist legal advice as soon as any potential dispute arises.

## FTT approves information notice issued to law firm to obtain information on client

Applications for third party information notices made by HMRC to the FTT are held in private, with the decisions not normally published. In *HMRC v Third Party & Taxpayer* [2023] UKFTT 00071 (TC), however, the judge felt that publication was in the public interest because the notice was to be issued to a firm of solicitors.

### Background

Please see our article on FINs above for more information on third party notices and Schedule 36. In addition to the rights of appeal and other safeguards described in that article, there are certain restrictions on the type of information or documents that HMRC can request. For example, paragraph 23 of Schedule 36 makes clear that information or documents subject to legal professional privilege (“LPP”) do not need to be provided.

In this case, HMRC had applied to the FTT for approval of a third party notice to be issued to a law firm representing a taxpayer. The notice sought information in respect of the purchase and sale of properties by the taxpayer. HMRC argued that such information was necessary as they suspected that the taxpayer had not fully disclosed worldwide assets held through three offshore trusts. In relation to the purchased property, HMRC requested information on the client account and client ledger account, correspondence between the firm and taxpayer in respect of the purchase, evidence provided in respect of the source of funds and details of any mortgage taken out. In respect of the disposal, HMRC requested a completion notice, details of how any net proceeds were distributed and correspondence between the third party and the taxpayer.

A key argument made against HMRC’s application was that the requested information and documents were protected by LPP.

### Decision

The FTT held that it was highly unlikely that all information and documents held by a law firm in relation to a conveyancing matter would be subject to LPP. The decision went on to state that, in relation to transactional matters (i.e., where litigation privilege is not normally relevant), only legal advice will benefit from LPP. In that case, communications between a solicitor and client will generally only benefit from legal advice privilege if they are both made for the purposes of seeking or giving legal advice and confidential as between solicitor and client.

Notwithstanding the FTT’s decision, it remains possible for the law firm in question to dispute the application of LPP to any of the requested documents after the third party notice has been issued, in accordance with a special procedure.

In consideration of the other relevant grounds, the FTT also determined that the requested information and documents were “reasonably required” and approved the application.

### Comment

This decision reiterates that not all information held by law firms, nor all communications between solicitors and their clients, will automatically be subject to LPP, particularly in the context of transactional or conveyancing matters. Moreover, following the Supreme Court’s decision in *R (Prudential plc) v Special Commr. of Income Tax* [2013] UKSC 1, advice provided by accountants or other non-legal advisers will not benefit from legal advice privilege. Taxpayers who are unsure as to the scope of LPP should seek specialist legal advice.



# Other developments

## Spring Budget 2023 announcements on closing the tax gap

At the Spring Budget, Chancellor Jeremy Hunt announced various measures designed to help tackle the tax gap, including:

- a further £47.2 million investment in HMRC's debt management capability to "allow HMRC to better distinguish between taxpayers who can afford to settle their tax debts but choose not to";
- a consultation on the introduction of a new criminal offence for promoters of tax avoidance;
- the doubling of the maximum sentences for the most egregious forms of tax fraud (from 7 to 14 years);
- amendments to self-assessment forms (starting from the tax year 2024/25) to require amounts relating to cryptoassets to be identified separately;
- new legislation to render void assignments of income tax repayments, to take effect from 15 March 2023 (aimed at repayment agents); and
- new legislation to close what is described as an avoidance loophole that can leave HMRC out of time to assess tax on capital/chargeable gains when an asset is disposed of under an unconditional contract (to apply in relation to contracts entered into on or after 1 April 2023 for corporation tax and 6 April 2023 for capital gains tax).

## HMRC announce nine live corporate criminal offence investigations

From 30 September 2017, Part 3 of the Criminal Finances Act 2017 ("**CFA**") created new, strict liability corporate criminal offences relating to the failure to prevent the facilitation of tax evasion by associated persons.

In figures published on 1 January 2023, it was revealed that HMRC currently have nine live CFA investigations, with no charging decisions made as at that time. A further 26 live opportunities were stated to be under review, with a further 77 opportunities reviewed and ultimately rejected.

CMS has a multi-disciplinary team advising on the CFA offences, encompassing both tax and corporate crime/fraud expertise. We have advised a number of clients in relation to the implementation of reasonable preventative procedures, the only defence in law to the new CFA offences. Our e-learning programme, designed by CMS, provides training for clients' management and employees on the CFA (a key part of their reasonable preventative procedures).

## Arrests made as part of HMRC investigation into Euro Pacific Bank

In February 2023, HMRC announced that two individuals had been arrested on suspicion of tax evasion and money laundering as part of an investigation that is linked to the collapsed Puerto Rican-based Euro Pacific Bank.

The Euro Pacific Bank is suspected of harbouring tax evasion and money laundering for its worldwide client base. In the UK, HMRC's investigations as to whether UK customers evaded UK tax or laundered the proceeds of crime are underway, with tax enquiries, criminal investigations and intelligence operations ongoing. Last year, we reported on HMRC's nudge letter campaign targeting those who have been identified as holding accounts with the bank.

## Latest transfer pricing and diverted profits tax ("**DPT**") investigation statistics

On 7 February 2023, HMRC published their latest transfer pricing and DPT statistics for 2021 to 2022. The statistics show that this remains a key area of focus for HMRC, with a sharp rise in the number of enquiry cases being settled, as well as the number of Mutual Agreement Procedure cases being resolved. The net amount of DPT received in the period was £198 million (not including amounts repaid as a result of cases being settled on the basis of transfer pricing adjustments and associated corporation tax being paid instead). HMRC are currently carrying out around 100 reviews into multinationals with arrangements to divert profits (including those registered under the Profit Diversion Compliance Facility) and the total amount of tax under consideration in those cases was £2.4 billion as at the end of March 2022.

## HMRC publish new manual on Alternative Dispute Resolution (“ADR”)

On 1 February 2023, HMRC published a new manual on ADR. Where appropriate, taxpayers can apply for their tax dispute to be subject to ADR proceedings by way of formal mediation. The ADR process is non-statutory and entirely voluntary, meaning any application for, or entering into, ADR should not affect a taxpayer’s statutory rights of appeal or review. Unlike commercial mediation, an HMRC employee will act as the mediator (“independent” in the sense that they will come from a specialist ADR team within HMRC and have had no prior involvement with the case). In some circumstances, and at the taxpayer’s cost, it is also possible to appoint a third party to act as co-mediator.

In some cases, ADR can present a faster and more cost-effective solution that achieves the best commercial result for clients. In principle, ADR is available to all taxpayers (both individuals and corporate) and for all taxes. However, not all cases are suitable for ADR, depending on the facts and issues involved. Any taxpayers who wish to consider ADR as part of a tax dispute should contact a member of our team.

## HMRC publish new manual on the Litigation and Settlement Strategy (“LSS”)

On 6 February 2023, HMRC published a new manual on the LSS, HMRC’s framework for conducting disputes with taxpayers. Broadly, the LSS provides that any settlement must accord with HMRC’s interpretation of relevant law and that HMRC cannot settle for less than they think they can get by litigating. HMRC cannot, therefore, “do deals” with taxpayers.

The new guidance does not change the LSS itself and has no force of law. However, it does offer some useful new insight into HMRC’s approach for any taxpayers entering into settlement discussions.

## HMRC urged to review late payment interest rates

HMRC are required by statute to charge interest where tax is not paid by the required date. The rate of interest charged fluctuates but tracks at 2.5% above Bank of England rates. The recent interest rate increase to 4% announced by the Bank of England therefore means that taxpayers now face a rate of 6.5% (the highest level since 2007). In light of this, the Chartered Institute of Taxation has reportedly called on HMRC to review the position on interest rates.

Interest will continue to accrue until tax is paid, even where it is agreed with HMRC that payment of tax may be postponed pending the outcome of litigation. The

increased rates of interest charged by HMRC may be particularly controversial in circumstances where, for example, a taxpayer feels that HMRC have unreasonably delayed litigation proceedings.

Whilst there is no formal appeal procedure in respect of the amount of statutory interest charged, it is open to taxpayers to raise objections to statutory interest on certain limited grounds. Objections will normally be considered by HMRC’s Interest Review Unit once any underlying tax has been paid (so that the amount of interest chargeable is known). Taxpayers who wish to raise an objection should seek professional advice as to whether this may be possible in their particular circumstances and also to discuss related strategy.

## HMRC publish next steps in tackling issues regarding repayment agents

In January 2023, HMRC published proposed next steps following a consultation regarding issues surrounding repayment agents, which assist individuals in claiming tax rebates. According to HMRC, the consultation arose as a result of frequent cases where repayment agents have “pushed the boundaries of eligibility, exploited customers or made fraudulent claims”. HMRC have also noted increasing numbers of complaints from customers who have used repayment agents. Furthermore, HMRC have apparently seen large numbers of ineligible claims submitted by repayment agents, which has caused delays in processing genuine claims.

HMRC will now legislate to render void assignments of income tax repayments and explore mandatory pre-contractual disclosure forms for repayment agents. HMRC will also introduce new transparency requirements for agents and a new requirement for repayment agents to register with HMRC.

## Change in modes of address for FTT and UT judges

On 1 December 2022, the Lord Chief Justice and Senior President of Tribunals issued a press release announcing that there is to be a change in the modes of address relating to judges in a number of courts and tribunals (including the FTT and UT). The practice of addressing a judge of the FTT and UT in court as “Sir” or “Madam” will change to simply refer to them as “Judge”. The press release states the reason for the change is to reflect “modern and simple terminology... whilst maintaining the necessary degree of respect”. Non-legal members will continue to be addressed as “Sir” or “Madam”.

## Latest HMRC nudge letter campaigns

The behavioural science of “nudge theory” has become an increasingly used weapon in HMRC’s arsenal over the last decade or so – i.e., the idea that people can be better directed towards a desired course of action through suggestion rather than obligation. UK taxpayers may have noticed the same concept at work when completing their online tax returns, where certain information is now pre-populated based on figures held by HMRC (the idea being that the taxpayer will likely accept those figures by default). Over the last few months, HMRC have launched several new nudge letter campaigns on various issues, as summarised below.

### Differences in the loss position of Company Tax Returns (December 2022)

HMRC are sending nudge letters to companies whose corporation tax returns (CT600 forms) report a loss amount that is different from the accompanying tax computations. In particular, recipients appear to have included brought-forward losses in the CT600 which are no longer allowed under the reformed corporation tax loss relief rules introduced on 1 April 2017. In the first instance, HMRC will use the tax computations as an accurate loss amount for the company for the relevant periods. However, if the taxpayer does not agree with this approach, they should contact HMRC via the details provided.

### Mixed membership partnership rules (December 2022)

Nominated partners of mixed membership partnerships have been sent nudge letters asking them to check that they are correctly applying the mixed member partnership rules. The letter is explicit that it is not being sent as part of a compliance check, but notes that the rules are ones which taxpayers often find difficult to apply correctly. Recipients are asked to check HMRC’s guidance on the regime (at PM21300), but are not requested to respond or, for example, complete a “Certificate of Tax Position”.

### Checking claims for Research and Development (“R&D”) tax relief (January 2023)

HMRC have issued letters to directors of companies who have made R&D tax relief claims. The letter states that the reason for this nudge letter campaign is the increase in fraudulent claims for R&D tax relief, and in particular that letters are being sent to those who operate in sectors which are being deliberately targeted by third parties to make inaccurate claims. While the letter is stated to be part of compliance enforcement activity, it is explicit that it does not form part of a compliance check into the relevant companies’ corporation tax returns. Recipients are asked to check that corporation tax returns – which included R&D tax relief claims – are complete and

correct. They are directed to HMRC’s guidance on R&D claims. Should a recipient consider that a corporation tax return is incorrect, they should make amendments online in the first instance.

### Incorrect rate bands used in Annual Tax on Enveloped Dwellings (“ATED”) returns (January 2023)

HMRC’s Individuals and Small Business Compliance team is issuing nudge letters to companies who they believe have filed ATED returns containing the incorrect bands – and who therefore have underpaid ATED. The letter suggests that HMRC have solid evidence that the band used in the return is incorrect and that more tax is due.

Recipients are asked to check that the correct amount of ATED has been paid. If not, the recipient must fill in and return to HMRC the enclosed “Notice of Intention to Disclose”, as well as a “Certificate of Tax Position”. Importantly, if HMRC do not hear from the taxpayer within 40 days of the date of the letter, they will make an assessment of what they believe the company owes – and, further, may open an investigation and charge higher penalties. The letter appears clear that HMRC intend to charge penalties even where the individual responds to the letter – but doing so will mitigate the amount.

### Under-declaration of income earned from online marketplaces and from creating content on digital platforms (January 2023)

HMRC have issued letters (i) to individuals on whom they have information showing that they have received income from online marketplaces, but have not declared some or all of that income via Self-Assessment, and separately (ii) to individuals who HMRC believe have failed to report some or all of the income they have earned from creating content on digital platforms. Recipients of each letter are advised to make a voluntary disclosure on HMRC’s Digital Disclosure Facility, and are also asked to complete the appended “Certificate of Tax Position”.

### Exceeding the Business Asset Disposal Relief lifetime limit (February 2023)

HMRC are sending nudge letters to individuals who have made Business Asset Disposal Relief (“BADR”) claims in their self-assessment returns for tax year 2021/2022, and whose records with HMRC show either (i) that they have exceeded the BADR lifetime limit of £1 million prior to submitting the return, or (ii) that the claim in their return has caused them to exceed the lifetime limit. Recipients are advised to check their self-assessment returns and remove the claim for BADR if appropriate.

### Income from short-term property letting (February 2023)

Letters have been sent to individuals who have earned income from short-term property letting, and who HMRC allege have not informed them of that income. Recipients are asked to fill in the "Certificate of Tax Position" appended to the letter and make a disclosure on the online Digital Disclosure Service. Subsequently, HMRC will issue an "acknowledgement letter" to the taxpayer, and the recipient will have 90 days from the date of the letter to calculate and pay any tax due. The letter contains a warning that HMRC may open an enquiry into the recipient's tax affairs if they fail to respond.

### Super-deductions and special-rate first year allowances (March 2023)

HMRC have started two nudge letter campaigns relating to super-deductions:

- the first letter has been sent to companies who have claimed the super-deduction or special-rate first-year allowances on plant or machinery costs, and whose includes leasing. Recipients are asked to check that the relevant expenditure properly qualified for such allowances, given that plant and machinery expenditure will not generally qualify where purchased for the purposes of lease or hire to someone else;

- the second letter has been issued to companies who made a claim for the super-deduction during an accounting period which straddled 1 April 2021 – the date when the super-deduction was introduced. The letter requests that recipients check whether they properly claimed such super-deduction, given that it could only be claimed in relation to new and unused plant and machinery purchased after 1 April 2021 (and before 1 April 2023). In particular, recipients are reminded that the super-deduction cannot be claimed if the contract to purchase the plant or machinery was entered into prior to 3 March 2021 – even if the company made the payment for it after 1 April 2021.

### Action points

Any taxpayers who receive nudge letters, even those confident of their tax position, should seek professional advice as soon as possible. Whilst nudge letters do not make specific accusations and are rarely overtly threatening in tone, they are generally based on actual data held by HMRC. Taxpayers who ignore these letters do so at their peril – failure to take action or respond is likely to mean that there is an imminent risk of HMRC starting an investigation (either under civil procedures or, in cases of suspected fraud, using their criminal powers). Early disclosure may also mitigate penalties.







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