

### 18 May 2022

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## 1. Private client

### 1.1 Exceptional circumstances can include moral obligations

*The FTT has found that a taxpayer was non-UK resident, despite exceeding the permitted days. The fact that she was in the UK to care for a relative who could not be helped by others met the criteria for exceptional circumstances. The FTT also rejected some of HMRC's submissions on the nature of the exemption, keeping to the statutory basis.*

The taxpayer moved to Ireland on 4 April 2015. In the 2015/16 tax year she received dividends on which over £3m of IT would have been due had she remained UK resident. In that tax year, she had to spend 45 or fewer days in the UK to be non-UK resident, but in fact spent 50 days in the UK. She argued that 6 of these days should be discounted, as she had visited the UK in December and February of that year to support her twin, who was experiencing serious ill health, and to assist in the care of her twin's children.

The FTT had to consider what the test defined as exceptional circumstances. HMRC contended that foreseeable circumstances were not exceptional, and that the taxpayer would have been aware of her sister's difficulties before she moved. The FTT found that foreseeability was not a factor which prevents circumstances from being exceptional. HMRC also argued that the exemption should only apply where a person was physically unable to leave the UK, or kept there by a legal obligation. The FTT found that moral obligations could also qualify, such as a need to attend a deathbed. HMRC also argued that the exemption should only apply to those who came to the UK and were then prevented by leaving when the circumstance arose, rather than those who came to the UK due to the circumstance. The FTT rejected this, as there was no statutory justification.

Overall, the FTT allowed the appeal. It accepted the taxpayer's evidence that she was the only person able to assist her twin sister at the time, and was under a moral obligation to come. It also agreed with her that HMRC's submission that she could have left the UK at the end of each day, then returned the next, was impractical, despite the fact that she had a private jet at her disposal.

*A taxpayer v HMRC* [2022] UKFTT 133 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/133.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/133.html)

## 1.2 Taxpayer deceived by fraudulent agent wins appeal

***A taxpayer with low income appointed an agent who then filed a fraudulent return and kept the refund. He has won an appeal against HMRC's attempt to recover the tax directly from him.***

The taxpayer, who was homeless and unemployed, earned £2,500 which he wanted to report to HMRC. He appointed an agent he met in a pub, who filed a return including a fraudulent claim to SEIS relief, and reporting a much higher income than he had had. The repayment generated was paid to the agent. The taxpayer appealed HMRC's discovery assessment, as he had never seen the return that was filed, and had just been told that the matter was sorted. He received no correspondence from HMRC as he had no permanent address.

The agent he had tried to appoint was the sister company of the one that filed his return. The FTT found that an appointed agent cannot delegate authority to file a return, so the filing agent had not been appointed by the taxpayer, and the return was invalid. The taxpayer was unsophisticated, had tried to comply with obligations, but fallen victim to a fraud, so the discovery assessment was invalid.

*McCumisky v HMRC* [2022] UKFTT 00128 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08459.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08459.html)

## 1.3 Late appeal allowed after agent fraud

***The FTT has granted an offshore oil rig worker permission to make a late appeal. Much of the delay was due to his work, and as an unsophisticated taxpayer whose agent had defrauded him, a lack of knowledge about how to appeal was understandable.***

The taxpayer, who worked on offshore oil and gas rigs, wanted to file a return to claim expenses for equipment he had purchased. The agent he appointed claimed relief for non-existent EIS investments, and kept 70% of the tax repayments generated, without giving him details. He had limited time onshore, and little contact with the world when offshore, so did not receive correspondence from HMRC.

He appealed HMRC's assessments reclaiming the tax repayments, out of time. In his shock when he finally received the assessment letter, he had not read to the end and noticed the appeal rights. He had called HMRC in the appeal period, not been told he had to appeal, and had then been offshore for two months. He had submitted a written appeal on his return. Given the nature of his work, and his lack of knowledge about tax, as well as falling victim to a fraud, the FTT granted permission for a late appeal. Given the decision reported above at 1.2, this indicates the FTT's sympathy towards taxpayers who have, through no fault of their own, fallen victim to fraud.

*Huntly v HMRC* [2022] UKFTT 135 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08466.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08466.html)

## 1.4 Non-compliance with follower notice found to be reasonable

***The FTT has cancelled non-compliance penalties issued to a taxpayer who was advised by his agent not to obey follower notices relating to a scheme they had sold him. It was reasonable for him to rely on their advice.***

The taxpayer had worked as an IT contractor, and decided to use the tax planning services of a firm recommended by his colleagues, which appeared to be of good reputation. Unbeknownst to him, a tax scheme they promoted was one in which they held a vested interest, and led to enquiries into his returns. He was issued with follower notices and advance payment notices, but was told by the firm not to comply as they were appealing.

He was issued with penalties for non-compliance. The FTT cancelled these, finding that it was reasonable for him to rely on the firm's advice. He was not tax literate, and had carefully researched to find a firm he considered reputable for the umbrella company he needed.

*Andreae v HMRC* [2022] UKFTT 142 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08473.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08473.html)

## 1.5 Closure notice application refused

***The FTT has refused an application by a partner for the enquiry into his own return to be closed while enquiries into his partnerships continued. He was involved in complex arrangements, and HMRC needed more time and information to consider claims in his return.***

HMRC opened enquiries into the returns of several partnerships that had claimed a type of capital allowance that gives 100% relief in 2016/17. The appellant was a partner in all of them, and an enquiry was also opened into his return 2017/18 regarding the partnership losses that he had set against income of that year. The taxpayer applied for a closure notice to be issued in respect of this enquiry.

The FTT refused the application. The lack of finality in his tax affairs was primarily due to his participation in several DOTAS registered schemes involving the partnerships. It was appropriate for HMRC's enquiry into 2017/18 to continue, it was not unreasonably protracted and HMRC needed more information about complex arrangements before coming to a conclusion.

*Stockler v HMRC* [2022] UKFTT 132 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08463.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08463.html)

## 1.6 Transactions in securities appeal dismissed

***The FTT has found that the transactions in securities (TIS) provisions applied to a company reorganisation for which clearance had previously been obtained. The application had not mentioned that preference shares were redeemable.***

Each of the three taxpayers owned 30% of the issued share capital in company P. A holding company J was inserted above P as part of a share reorganisation. The entire share capital of P was acquired by J. In return, each taxpayer swapped their shares for 25% of J's ordinary share capital and £600,000 £1 preference shares. HMRC granted a statutory clearance for this transaction in advance, but the application did not disclose the intention to repurchase the preference shares. The preference shares were subsequently redeemed with each taxpayer receiving £600,000. HMRC argued that the disposals should be taxed to IT, not CGT, as the TIS rules applied to the reorganisation, which had been designed to obtain an IT advantage.

The taxpayers argued that this was a commercial transaction, giving extensive evidence as to the company's affairs and why the reorganisation happened, including their retirement plans. The FTT however dismissed the appeal, finding that although there were other reasons for the transaction, one of the main ones was to extract £1.8 million from the company in the form of capital, rather than income. The clearance application did not include all material facts and this allowed HMRC to treat the clearance as void.

*Wroe & Ors v HMRC* [2022] UKFTT 143 (TC)

## 2. Business tax

### 2.1 Claim for damages against a bank not taxable as a loan relationship

***The FTT found that loan amounts released as part of a damages claim should be taxed under general principles not as a loan relationship.***

The taxpayer borrowed £5m from the bank but was only required to repay £1.5m of the loan. The remaining £3.5m was released as part of a settlement of a damages claim the taxpayer brought against its bank for the mis-selling of an interest rate hedging product. The question considered by the FTT was whether or not the £3.5m credited to the profit and loss account fell within the loan relationship rules.

To be taxed as a loan relationship the credit must 'arise from' its loan relationship and related transactions. The FTT found that in this case the credit arose as a result of the taxpayers claim for damages against the bank and not from any related transaction of its loan relationships. It is therefore taxable under general principles. The FTT left the parties to agree whether the amount was taxable as an income or capital receipt or exempt under an extra statutory concession.

*Hexagon Properties Ltd v HMRC* [2022] UKFTT 137 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08468.pdf](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08468.pdf)

### 2.2 Film production company wins appeal on Enterprise Investment Scheme

***The FTT has ruled in favour of the taxpayer, a film production company, finding that the investments did meet the risk to capital test required for Enterprise Investment Scheme (EIS) relief.***

The taxpayer was incorporated in 2015. Several small rounds of fundraising took place before the issue of EIS shares in 2019. During that time the taxpayer acquired the rights to an unpublished script for a film 'The Ballard of Billy McCrae'. Other than a small investment in another film made in conjunction with another production company, The Ballard of Billy McCrae was the only project being undertaken by the taxpayer.

HMRC refused to issue the EIS certificates on the grounds that investment did not meet the risk to capital test, as the taxpayer did not have any objectives to grow and develop the trade in the long term as evidenced by there being only one main project, nor was there any significant risk for investors. The FTT considered both these points in turn.

First, although the taxpayer did not appear to have any intention of taking on any employees, or acquiring its own film production equipment, subcontracting production is not uncommon for start-up film production companies. It is also unrealistic to characterise the company as a 'one-project' venture simply because it was starting with just one project because of limited finances. The FTT found sufficient evidence of the taxpayer's mission to develop Welsh filmmaking, and a number of ideas for future projects should the first film be successful. It therefore concluded that the taxpayer had at that time the objective to grow and develop the business in the long term.

The second point was swiftly dismissed. The prospect of any return to investors depended entirely on the commercial success of the first project and any future projects pursued. It was perfectly possible for investors to lose all of their investment. The taxpayer's appeal was allowed.

*Inferno Films Limited v HMRC* [2022] UKFTT 141 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08472.pdf](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08472.pdf)

## 2.3 Reform of capital allowances regime

***HMT has published its policy paper on the potential reform to the capital allowances regime, and is inviting comment from businesses, advisers, trade associations and research institutions.***

As announced as part of the Spring Statement, the Government is considering reforms to the capital allowances regime to stimulate capital investment and productivity. The Government has asked for views on the relative importance of capital allowances in making investment decisions, whether or not the availability of the temporary super-deduction has affected investment decisions, what more the capital allowances regime can do to support business and how far it influences decisions made by multinationals on which territory to invest in. It has also asked for views on the options set out in the Spring Statement including:

- increasing the permanent level of the annual investment allowance to £500,000;
- increasing the rate of writing down allowances (WDA) for main and special rate assets to 20% and 8%;
- introducing a first year allowance for main and special rate assets where businesses can deduct a higher amount in the first year, with the remaining expenditure then written down at standard WDA rates;
- introducing an additional first year allowance of 20% to allow the overall amount of relief that can be claimed to be more than the original cost of the asset; and
- introducing permanent full expensing.

Responses should be sent by 1 July. The Government will consider the responses ahead of the Budget later this year.

[www.gov.uk/government/publications/potential-reforms-to-uks-capital-allowance-regime-inviting-views/potential-reforms-to-uks-capital-allowance-regime-inviting-views](http://www.gov.uk/government/publications/potential-reforms-to-uks-capital-allowance-regime-inviting-views/potential-reforms-to-uks-capital-allowance-regime-inviting-views)

## 3. VAT and other indirect taxes

### 3.1 No entitlement to recover VAT if not charged by supplier

***Where a price is expressed to be exclusive of VAT and the supplier does not charge VAT in addition to the price, but it is subsequently shown that the supply was taxable, the recipient of the supply cannot claim input VAT unless additional VAT is actually charged to it by the supplier.***

The SC has ruled that where a contract for services provides for VAT to be charged in addition to the contract price, a taxable person cannot claim to deduct an amount of VAT for which it has not actually been charged.

The taxpayer supplied vitamins and minerals to consumers in the UK by mail order. Between 2006 and 2010, the taxpayer received postal services from Royal Mail in respect of the delivery of the goods, for which both parties had entered into an individually negotiated contract. Royal Mail treated the postal services as exempt from VAT.

As a result of a ruling in a separate European case in 2009, it was determined that the exemption does not apply to individually negotiated contracts.

The taxpayer took the view that the services provided by Royal Mail were inclusive of VAT and submitted a claim to HMRC for a refund of the purported VAT. Royal Mail had taken the decision that in such circumstances, it would not seek to recover VAT from its customers or issue VAT invoices, so its customers only paid the amounts equivalent to the commercial price for the delivery services.

The SC had initially referred the case to the CJEU, which gave a clear judgement that there was no entitlement to recover VAT in these circumstances. The SC therefore dismissed the taxpayer's appeal without the need for a further hearing.

*Zipvit Ltd v HMRC* [2022] UKSC 12

[www.bailii.org/uk/cases/UKSC/2022/12.html](http://www.bailii.org/uk/cases/UKSC/2022/12.html)

[www.bailii.org/eu/cases/EUECJ/2009/C35707.html](http://www.bailii.org/eu/cases/EUECJ/2009/C35707.html); [2009] ECR I-3025

### 3.2 Taxpayer wins SDLT appeal

***The FTT has found for the taxpayer in a fact specific case regarding how consideration should be apportioned between different dwellings in the same property.***

The taxpayer bought a property to establish a supported living facility, which consisted of several buildings, including a main house. An SDLT return was filed on the basis that the purchase was for a qualifying rental business, so the amount due was lower than the company rate of 15%. The law subsequently changed so the business activity would be eligible for relief from the 15% rate. HMRC disagreed that there was a qualifying rental business, but offered the taxpayer the opportunity to make a late claim for multiple dwellings relief (MDR). The question before the FTT was how to apportion the consideration between the three dwellings on a just and reasonable basis. If over £500,000 was apportioned to the main house then that only would be subject to the 15% rate.

The FTT considered arguments based on the space occupied by each dwelling, including how much land should be attributed to each, and ultimately found for the taxpayer. The facts supported its contention that each dwelling was equally important, so just floor space should be considered.

*Marcus and Marcus Limited v HMRC* [2022] UKFTT 145 (TC)

[www.bailii.org/uk/cases/UKFTT/TC/2022/TC08476.html](http://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08476.html)

## 4. Tax publications and webinars

### 4.1 Tax publications

***The following Tax publications have been published.***

- [Unincorporated farming businesses - do you fancy a change?](#)
- [HMRC to introduce transfer pricing master and local files](#)

### 4.2 Webinars

***The following client webinars are coming up soon.***

- 8 June - [S&W Sessions: Business Rates: Change is coming](#)
- 9 June - [Contemporary FD Bitesized](#)
- 9 June - [Webinar series for Professional Practices: Financial Planning for Professionals](#)
- 14 June - [Basis Period Reform - getting ready for change](#)

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

## 5. And finally

### 5.1 Pickwick and Williamson

Now we are back to commuting, we need Dickens again. One morning on the train, The Pickwick Papers came alive in our hands. First, there was the description of Mr Namby's sports vehicle as 'not a taxed cart'. Regular And finally readers will recall just what one of those is. Mr Namby, we shortly discover, is dressed gorgeously with outsize jewellery, a glaring silk handkerchief and with a swaggering manner. City type? He turns out to be a sheriff's officer whose office is, wait for it, Bell Alley, Coleman Street.

But hold on. We are in Bell Alley; or rather Bell Alley is us, Our Moorgate office occupies the whole of the Alley from one end to the other.

Mr Pickwick is escorted into the office. Its principal features are fresh sand and stale tobacco smoke. Good gracious, it *must* be 25 Moorgate! Well; possibly. The office has a front parlour, which is a coffee

room, occupied by a 19 year old cigar-smoking gin-and-water drinker, a vulgar sallow young man kicking the fire and a pale and haggard, middle aged man.

Sadly, we now have to say goodbye to our beloved Pickwickian headquarters, hence this last rose-tinted retrospect. The good news is that our glittering new office, just round the corner at 45 Gresham Street, is blessed with a front parlour coffee room just like the sheriff's. There will be no fire of course, but all 19 year old visitors are encouraged to bring cigars and gin. Well, maybe not encouraged. We'll organise the sand.

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

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