

TILEY'S REVENUE LAW, 9th edition 2020 SUPPLEMENT

This supplement draws attention to new developments, principally statutory and case law, since the publication of *Tiley's Revenue Law*, 9th ed in 2019. Notably, Finance Act 2020 (FA 2020) introduced a new Digital Services Tax (DST), which is a 2% tax on the revenues of large digital businesses including search engines, social media services and online marketplaces which derive value from UK users. The DST is expected to be paid primarily by US-based multinational companies, which makes it an especially politically sensitive tax. For more on the DST, and the other measures in FA 2020, see the *British Tax Review*, 2020, issue 4. Meanwhile, the OECD continues to advance its own work aimed at finding an international consensus on taxing the digital economy and avoiding such unilateral action by countries. Readers are directed to the OECD website for the latest developments on Pillar One, which seeks to adapt the international income tax system to new business models through changes to the profit allocation and nexus rules applicable to business profits, and Pillar Two, which seeks to ensure internationally operating businesses pay a minimum level of tax. For an interesting and alternative perspective on taxing multinationals see the new OUP book, *Taxing Profit in a Global Economy*, edited by Devereux, Auerbach, Keen, Oosterhuis, Schön, and Vella.

The Covid-19 pandemic clearly has had a deleterious impact on the UK public finances. Inevitably, tax rises will be required to pay the bills and we await with interest the Chancellor's short-term and longer-term plans. Readers are directed to recent reviews by the Office of Tax Simplification on inheritance tax and capital gains tax, which may factor into those plans: see <https://www.gov.uk/government/organisations/office-of-tax-simplification>. For more ideas on reforming IHT see the All-Party Parliamentary Group on Inheritance & Intergenerational Fairness report (Jan 2020): see <https://www.step.org/appg>. Some have argued instead that the UK should introduce a net wealth tax as a new source of tax revenues and readers are directed to a research project exploring that idea in depth: see www.ukwealth.tax. Readers should also note that a raft of temporary tax law changes were introduced in FA 2020 in response to the pandemic: see FA 2020, ss 106-110 and Sch 16 for details on those measures.

Following the passing of the European Union (Withdrawal Agreement) Act 2020, the UK exited the EU on 31 January 2020. The UK temporarily remains in the EU customs union and single market during the transition period ending on 31 December 2020. The full ramifications of Brexit post-transition for the direct taxes covered in this book, and particularly corporation tax, will depend on negotiations between the UK and EU on their future relationship and at the time of writing are unclear.

Finally, I'd like to highlight a new collected-works book from Hart Publishing, *The Dynamics of Taxation: Essays in Honour of Judith Freedman*, edited by Loutzenhiser and de la Feria. The book contains 16 chapters written by colleagues of Professor Freedman (including this writer) on the four areas of taxation scholarship to which she made her most notable contributions: taxation of SMEs and individuals, tax avoidance, tax administration, and taxpayers' rights and procedures.

Glen Loutzenhiser, Sept 2020

PART I: INTRODUCTION TO UK TAX LAW

Chapter 3 -- Sources

3.3.5 Legitimate Expectation. In line with other recent decisions, in *The Queen (oao Aozora GMAC Investment) v HMRC* [2019] EWCA Civ 1643, the CA ruled that a company that had relied on HMRC guidance had not established a legitimate expectation. Further, in the interesting case of *HMRC v Sippchoice* [2020] UKUT 149, HMRC argued, successfully, that its guidance relating to in specie contributions to registered pension schemes was wrong. Readers are also directed to Stephen Daly's new book *Tax Authority Advice and the Public* (Hart Publishing 2020).

Chapter 4 – The Setting of the Tax System

4.2.1 The Department. FA 2020, s 103 puts beyond doubt that functions given to an HMRC officer may be carried out by computerised automated processes.

4.3.1.3 The 12-Month Enquiry Window. In *R (oao Amrolia) v HMRC; R (oao Ranjit-Singh) v HMRC* [2020] EWCA Civ 488, the CA held that notices amending individual partners' tax returns under TMA 1970 s 28B(4) were not closure notices. In *JJ Management LLP and others v HMRC* [2020] EWCA Civ 784, the CA held that HMRC is entitled to conduct informal investigations into a taxpayer's affairs outside the normal statutory time limits where compliance with requests for information is entirely voluntary.

4.3.2 Discovery Assessments. For recent cases on discovery assessments and in particular the 'staleness' challenge on validity see eg *Anderson v Revenue and Customs Comrs* [2018] UKUT 159 (TCC), *R Atherton v HMRC* [2019] UKUT 41 (TCC), and *HMRC v Hicks* [2020] UKUT 12 (TCC).

4.2.2 Scrutiny. In July 2020, the Public Accounts Committee (PAC) published a report on the management of tax reliefs. In the report, PAC calls on HMRC and HM Treasury 'to markedly improve their reporting on the cost, beneficiaries, and impact of tax reliefs in order to give Parliament the information it needs to scrutinise the value for money of these schemes.' See <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/379/37902.htm>.

4.4.5.1 Judicial Review. In *R (Derry) v HMRC* [2019] UKSC 19, the taxpayer sought judicial review of HMRC's decision to open an inquiry into his tax return for 2009-10 under TMA 1970, Sch 1A and to proceed to enforcement action. The SC agreed with the CA in finding for the taxpayer, holding that the taxpayer's claim for share loss relief under ITA 2007, s 132 (see §10.4) was correctly deducted from his net income in that tax year and that HMRC had used the incorrect enquiry procedure to challenge his claim for relief.

4.5.2 Court Action. From 1 December 2020, HMRC will have secondary preferential unsecured creditor under the Insolvency Act 1986 in respect of income tax, employee NICs and student loan repayments collected through PAYE, construction industry scheme (CIS) deductions, VAT and any penalties or interest arising from such taxes. Further, company directors and LLP members are jointly and severally liable to HMRC in certain circumstances involving insolvency or potential insolvency for

amounts payable to HMRC by the company or LLP. For details see FA 2020, ss 98-100 and Sch 13.

Chapter 5 – Tax Avoidance

5.3.2.1 Disclosure of Tax Avoidance Schemes (DOTAS). For FTT consideration of the qualification criteria under DOTAS see *Hyrax Resourcing Ltd v Revenue and Customs Comrs* [2019] UKFTT 175 (TC), *HMRC v Curzon Capital Ltd* [2019] UKFTT 63 (TC) and *HMRC v EDF Tax (in creditors' voluntary liquidation)* [2019] UKFTT 598 (TC).

5.3.2.2 High-Risk Promoters, Follower Notices and Accelerated Payments. For judicial review cases quashing follower notices and related accelerated payments see eg *R (oao Haworth) v HMRC* [2019] EWCA Civ 747 and *R (oao A Locke) v HMRC* [2019] EWCA Civ 1909. See also *Beadle v HMRC* [2020] EWCA Civ 562, where the CA dismissed the taxpayer's appeal against a penalty for late payment of an accelerated payment in a partner payment notice (PPN).

5.5.3 The GAAR. At the time of writing no cases have yet been decided on the GAAR. For a list of the published GAAR Advisory Panel opinions on the application of the 'double reasonableness test' see <https://www.gov.uk/government/collections/tax-avoidance-general-anti-abuse-rule-gaar>. Note that all 17 opinions published to-date have been in HMRC's favour.

PART II. INCOME TAX

Chapter 7 – Income Tax: Basic Concepts

7.1.3 Rate Structure for Income Tax. For 2020-21, the income tax rate structure for England and Northern Ireland is as follows:

<u>Taxable Income</u> (£)	<u>Rate</u>
0 - 37,500 (basic rate)	20%
37,501 - 150,000 (higher rate)	40%
Over 150,000 (additional rate)	45%

The above rates and band apply to taxable income, above the personal allowance of **£12,500** for 2020-21. Different tax rates and bands apply in Scotland: see <https://www.gov.uk/scottish-income-tax>. For the 2020–21 tax year the UK government reduced the rates of income tax for Welsh taxpayers by 10% and the Welsh Government has set the Welsh income tax rate at 10%; thus the overall income tax rates for Welsh taxpayers are at the same level as those in England and Northern Ireland.

Chapter 9 – Taxation and Social Security

9.3 Impact of NICs. For the NIC rates and thresholds for 2020-21 see <https://www.gov.uk/national-insurance-rates-letters>

Chapter 13 – Employment Income: Scope and PAYE

13.2.2.1 Case Law Tests for Employment. In *Professional Game Match Officials Ltd v Revenue and Customs Comrs* [2020] UKUT 147 (TCC), the UT agreed with the

FTT's conclusion that the football referees were not employees due to insufficient mutuality of obligation. This finding puts yet more pressure on HMRC's position downplaying the importance of this factor. However, the UT disagreed with the FTT's findings on the application of the control test, stating that the FTT had been wrong to find that PGMOL had no effective sanction because PGMOL could only terminate the contract or not offer future matches.

Also, in *Fowler v HMRC* [2020] UKSC 22, the SC overturned the CA in ruling that deep sea divers were taxable in the UK in accordance with article 14 (Income from Employment) and not article 7 (business profits) of the UK/South Africa tax treaty. This case also has broader implications for the interpretation of tax treaties (see §76.3).

13.2.3.2 Arrangements Made by Intermediaries: The IR35 legislation. FA 2020, s 7 and Sch 1 extend the onus on a public authority to determine if the IR35 rules apply to medium and large-sized private sector clients from 6 April 2021. The case law on IR35 continues to expand and develop apace. In *Christa Ackroyd Media Ltd v Revenue and Customs Comrs* [2019] UKUT 326 (TCC), the UT upheld the FTT finding that the hypothetical contract would have been a contract of employment so IR35 applied to a BBC presenter. In *Northern Lights Solutions Ltd v HMRC* [2020] UKFTT 100 (TC), the FTT concluded that the taxpayer was part and parcel of the client organisation and thus his services were provided as an employee. In *Red, White and Green Ltd v HMRC* [2020] UKFTT 109 (TC), the FTT determined that there was sufficient mutuality of obligation and control in the services provided to apply IR35. For another HMRC win see *HMRC v Kickabout Productions Ltd* [2020] UKUT 216 (TCC). However, in *Albatel Ltd v Revenue and Customs Comrs* [2019] UKFTT 195 (TC), the FTT sided with the taxpayer in finding that ITV did not have sufficient control over the work of Lorraine Kelly to make her an employee under the hypothetical contract. In *Atholl House Productions v HMRC* [2019] UKFTT 242 (TC), the FTT held no employment relationship existed, with *Ackroyd* distinguished on the facts.

Readers may also be interested in a briefing paper from the House of Commons Library 'Personal service companies & IR35' published in 2020: see <https://commonslibrary.parliament.uk/research-briefings/sn05976/>.

Chapter 14 – Employment Income: Emoluments/Earnings

14.1.1 Tests. In *Hull City AFC (Tigers) Ltd v HMRC* [2019] UKFTT 227 (TC), the FTT held that payments made to a footballer's offshore company under an image rights contract were taxable employment income because the arrangement lacked commerciality. In *Root 2 Tax Ltd v HMRC* [2019] UKFTT 744 (TC), the FTT held that income from a spread betting scheme involving the directors was earnings.

14.6 Disguised Remuneration. FA 2020 ss 15-21 made several important changes to ease the harshness of the Loan Charge in F(No2)A 2017 Sch 11, including by removing loans made before 9 December 2010 from taxation and permitting taxpayers subject to the charge to elect to spread their outstanding loan balance evenly across three tax years. Interest charges also were reduced and provision was made for the repayment of amounts previously paid to HMRC under the original rules.

Chapter 17 – Employee Share Schemes

17.5.2 Acquisition of Option and Later Chargeable Events. In *Vermilion Holdings v HMRC* [2019] UKFTT 230 (TC), the FTT concluded that share options granted to an employee had not been granted by reason of his employment and thus were outside ITEPA 2003, s 471(3).

Chapter 21 – Business Income, Part III: Principles and Receipts

21.1.1.1 Law and Accounting. In *HMRC v NCL Investments Ltd and Smith & Williamson Corporate Services Ltd* [2020] EWCA Civ 663, the CA upheld the UTT ruling that a company's accounts prepared in compliance with generally accepted accounting practices will define a company's tax base for corporation tax purposes unless there is a specific statutory provision to the contrary. Further, the CA held that IFRS 2 debits for share options were expenses for purposes of CTA 2009, s 48 and were not disallowed by the wholly & exclusively requirement (as HMRC argued).

Chapter 22 – Business Income, Part IV: Trading Expenses

22.4.2.2 Enduring Asset or Advantage. In *Ingenious Games LLP and others v HMRC* [2019] UKUT 226 (TCC), the UT ruled that rights to income from films were capital in nature because there was a once and for all acquisition of rights, for the enduring benefit of the trade.

Chapter 24 – Capital Allowances

24.2.4.1 Statutory Prescription of Settings. In *HMRC v SSE Generation* [2019] UKUT 332 (TCC), the UT concluded that civil engineering construction related to a hydroelectric project was not excluded under CAA 2001, s 22, list B and qualified for industrial buildings allowances.

24.3 Structures and Buildings. The Capital Allowances (Structures and Buildings Allowances) Regulations, SI 2019/1087 regs 1, 2, added CAA 2001, Pt 2A, ss 270AA et seq to fill in the missing statutory detail on the operation of SBA. FA 2020, s 29 then amended CAA 2001, ss 270AA(5), increasing the SBA rate to 3% for qualifying expenditure incurred on or after 11 March 2020.

Chapter 27 – Miscellaneous Income Including Annual Payments

27.4.3 Pure Income Profit. In *HMRC v Hargreaves Lansdown Asset Management* [2019] UKUT 246 (TCC), the UT overturned the FTT and held that loyalty bonus payments made to investors were 'pure income profit' of the investors under the contractual arrangements and thus annual payments.

PART III: CAPITAL GAINS TAX

Chapter 33 – Structures and Elements

33.4 Annual Exempt Amount. The annual capital gains exemption for individuals for 2020-21 is **£12,300**.

33.10 Losses. FA 2020, s 25 and Sch 4 introduced an important change in the treatment of carryforward capital losses for companies only. For chargeable gains

accruing to a company on or after 1 April 2020, the use of carried-forward allowable losses is restricted to 50% of chargeable gains arising in an accounting period, subject to an allowance permitting unrestricted use of up to £5 million of capital or income losses per year: CTA 2010, s 269ZBA.

Chapter 34 -- Assets

34.6. Land. From 6 April 2020, UK residents who sell a residential property that gives rise to a CGT liability must file an online return and pay the tax due within 30 days of completion of the sale: FA 2019, Sch 2. This brings the rules for UK residents in line with the rules for non-residents, which FA 2019 implemented in 2019.

34.7 Exemption for Only or Main Residence. FA 2020, s 24 made a number of changes to private residence relief. Following on from its consultation, the government reduced the final period of ownership treated as owner occupation from 18 months to 9 months. FA 2020 also codified a number of ESCs that formerly applied in relation to private residence relief. When a spouse or civil partner transfers an interest in a dwelling to their spouse or civil partner (whether or not the dwelling is their only or main residence), the receiving spouse or civil partner will inherit the transferring spouse or civil partner's ownership history including their previous use of the property: TCGA 1992, s 222(7)(a). The period of occupation of a residence is also deemed to include certain periods of job-related accommodation: TCGA 1992, ss 222(8)-(9). Where for any period an individual has, or is treated as having, more than one residence but his interest in each of them, or in each of them except one, has no more than a negligible capital value on the open market, the two-year time limit for nominating one as the individual's main residence does not apply: TCGA 1992 s 222(5A). Further, with respect to relief on gains attributable to a period of letting a whole dwelling or part of it as residential accommodation, for disposals on or after 6 April 2020 the letting exemption applies only where the owner of the property shares occupancy with a tenant: TCGA 1992, s 223B.

In *D Higgins v HMRC* [2019] EWCA Civ 1860, the CA confirmed that the period of ownership for purposes of the relief begins on completion of the purchase of the property and not on exchange of contracts.

Chapter 41 – Shares, Securities and Other Fungible Assets

41.3.2 Reorganisations. In *Hancock and another v HMRC* [2019] UKSC 24, the SC agreed with the CA that a scheme intended to operate as a reorganization within the scope of TCGA 1992, ss 126-130 should be treated as two separate conversions.

Chapter 42 – Capital Gains Tax and Business

42.5 Entrepreneurs' Relief. FA 2020, s 23 and Sch 3 renamed entrepreneurs' relief (ER) as business asset disposal relief (BADR), and also reduced the £10 million lifetime limit on gains eligible for the ER 10% rate of CGT to £1 million on disposals on or after 11 March 2020.

Chapter 43 – Computation of Gains

43.2.1 Seven Categories of Allowable Expenditure. In *N Gray v HMRC* [2019] UKFTT 393, costs of litigation of an aggrieved minority shareholder against the majority shareholder were not allowable expenditure in computing the gain on the minority's shareholder sale of shares to the majority shareholder as part of a

settlement of the litigation because the costs were not ‘wholly and exclusively’ incurred for an allowable purpose and the minority’s rights and obligations in respect of the shares did not change.

PART IV: INHERITANCE TAX

Chapter 44 – Inheritance Tax: Introduction

44.4.1 Progression. The nil rate band for 2020-21 remains unchanged at **£325,000**. The residence nil rate amount is **£175,000** for the tax year 2020-21.

44.7.3 Excluded Property. FA 2020, ss 73-74 modified IHTA 1984, ss 48, 65, 74A, 82, and 157 substituting the time the domicile of the settlor is tested as when ‘property became comprised in the settlement’ for the previous when the ‘settlement was made’. On the special treatment of excluded property in relation to transfers between settlements see also IHTA 1984, ss 81B and 82A (added by the Finance Act 2020, s 74).

Chapter 45 – Transfers of Value by Disposition

45.2.3 Omission to Exercise a Right. In *HMRC v Parry and others* [2020] UKSC 35, the SC held that the taxpayer’s omission to draw benefits under a pension plan during her lifetime, with the result that a death benefit payment was made to her two sons, gave rise to a charge for IHT. The omission fell to be treated as a taxable disposition under IHTA 1984, s 3(3), and as it was gratuitous it was not excluded by s 10.

Chapter 48 – Settled Property: Introduction

48.1 Introduction. For purposes of IHTA 1984, a settlement commences at the time when property first becomes comprised in it: IHTA 1984, s 48A, added by FA 2020, s 73, which omitted the former commencement provision in IHTA 1984, s 60 that had previously defined commencement for settlements without interests in provisions. The date of the commencement of the settlement is particularly important for establishing the ten-year anniversary, a key concept in the provisions relating to relevant property settlements.

Chapter 50 – Relevant Property Trusts with No Qualifying Interest in Possession

50.3.1.1 The Property. For purposes of calculating the 10-year anniversary charge, FA 2020, s 73 amended IHTA 1984, ss 64-65 to reflect the change in the test for excluded property described in §44.7.3 above.

Chapter 53 – Exempt Transfers: Conditions and Allocation Where Partly Exempt

53.2.2.1 Charities. In *Routier v Revenue and Customs Comrs* [2019] UKSC 43, the SC held that a refusal to grant charitable relief under IHTA 1984, s 23 in respect of a transfer to a Jersey charity would constitute a restriction on free movement of capital under EU law and, further, restricting relief from IHT to trusts governed by the law of a part of the UK could not be justified under EU law.

53.2.2.2 Political Parties. In *A Banks v HMRC* [2020] UKUT 101 (TCC), the UT held that the conditions for political party exemption that did not apply to a gift to UKIP were not contrary to article 14 of the European Convention on Human Rights

nor were they a breach of the UK's obligations under article 4 of the Treaty on European Union.

PART V: CORPORATION TAX

Chapter 60 – Structure

60.5 Rates. The main rate of corporation tax for the financial year 2020 and 2021 is 19%: see FA 2020, ss 5, 6.

60.13 Limited Liability Partnerships. In *HMRC v Inverclyde Property Renovation LLP and another* [2020] UKUT 161 (TCC), the UT held that tax administration provisions in TMA 1970 were capable of applying to LLPs, and thus HMRC's enquiries and closure notices issued to two LLPs had been valid.

Chapter 62 – Computation (1): General Rules

62.2.5.1 Research Expenditure. For expenditure incurred on or after 1 April 2020, the RDEC is increased from 12% to 13%: FA 2020, s 28.

62.5.3 Restriction on Carryforward – Change of Ownership of Company and Changes in Trade. In addition to the restrictions on carryforward of losses under CTA 2010, s 45, similar restrictions apply to carryforward of post 1 April 2017 losses under CTA 2010, s 45A: see CTA 2020 s 676AA et seq.

Chapter 63 – Computation (2): Accounting-based Rules for Specific Transactions

63.2.3.1 The General Rule: Follow GAAP. For a string of recent CA decisions on the former 'fairly represent' requirement see *GDF Suez Teesside v HMRC* [2018] EWCA Civ 2075, *Smith & Nephew Overseas Ltd v HMRC* [2020] EWCA Civ 299, and *Union Castle v HMRC; Ladbrokes v HMRC* [2020] EWCA Civ 547.

63.2.7 Anti-avoidance. In *Oxford Instruments UK 2013 v HMRC* [2019] UKFTT 254 (TC), the FTT ruled that a promissory note issued by a UK subsidiary to its US parent had an unallowable purpose.

63.4.1 Introduction. FA 2020, s 31 added CTA 2009, Pt 8, Chs 16A and 16B to include certain pre-FA 2002 intangible assets acquired from related parties on or after 1 July 2020 within Pt 8, to preserve the existing rules for pre-FA 2002 assets held immediately before 1 July 2020 and to restrict debit relief in relation to transfers, licensing and other arrangements between related parties involving pre-FA 2002 assets.

PART VI: INTERNATIONAL AND EUROPEAN UNION TAX

Chapter 69 – International Tax: Introduction and Connecting Factors

Readers should take note of the introduction of the Digital Services Tax in FA 2020 and the OECD's ongoing work on the Pillars as described in the intro to this supplement.

69.6.4.1 What Sort of Control/Level of Management is Needed? In *Development Securities (No 9) Ltd v Revenue and Customs Comrs* [2019] UKUT 169 (TCC), the UT overturned the FTT and concluded that Jersey subsidiaries set up to take a single uncommercial step as part of a tax avoidance scheme were not UK resident on the basis that the central management and control was exercised in Jersey by directors who understood the scheme and properly considered the decisions they made.

Chapter 77 – European Union Tax Law

As noted in the intro to this supplement, at the date of this update the UK is in a temporary transition period after exiting the European Union on 31 January 2020. Brexit has implications for the material on EU tax law discussed in this chapter, so far as it will apply, or more likely not apply, in the UK post-transition. However, the details of the UK's and EU's future relationship, including a future trade agreement (if any), have yet to be ironed out.

77.1.1 State Aid. In *Ireland v European Commission (Apple Sales International)* (Cases T-778/16 and T-892/16), the EU's General Court sided with Ireland and Apple and annulled the decision of the European Commission that Ireland had granted the company approximately €13 billion in tax advantages constituting unlawful state aid.

PART VII: TAX-PREFERRED SAVINGS AND CHARITIES

Chapter 79 – Investment Intermediaries

79.2.1 Qualifying Expenses of Management. In *Centrica Overseas Holdings Ltd v HMRC* [2020] UKFTT 197 (TC), the FTT held that expenditure incurred by an investment company related to the sale of the businesses of a subsidiary did not qualify as expenses of management within CTA 2009, s 1219 because the decision was taken by its parent company.

Chapter 80 – Pensions

80.9.1.2 Contributions Limit 1 (Total Value). The maximum lifetime contributions allowance for 2020–21 is £1,073,100.

Chapter 81 – Charities

81.2 Tax Treatment of Gifts to Charity. The small donations limit was raised from £20 to £30, with effect from 6 April 2019: see Small Charitable Donations Act (Amendment) Order, SI 2019/337.