



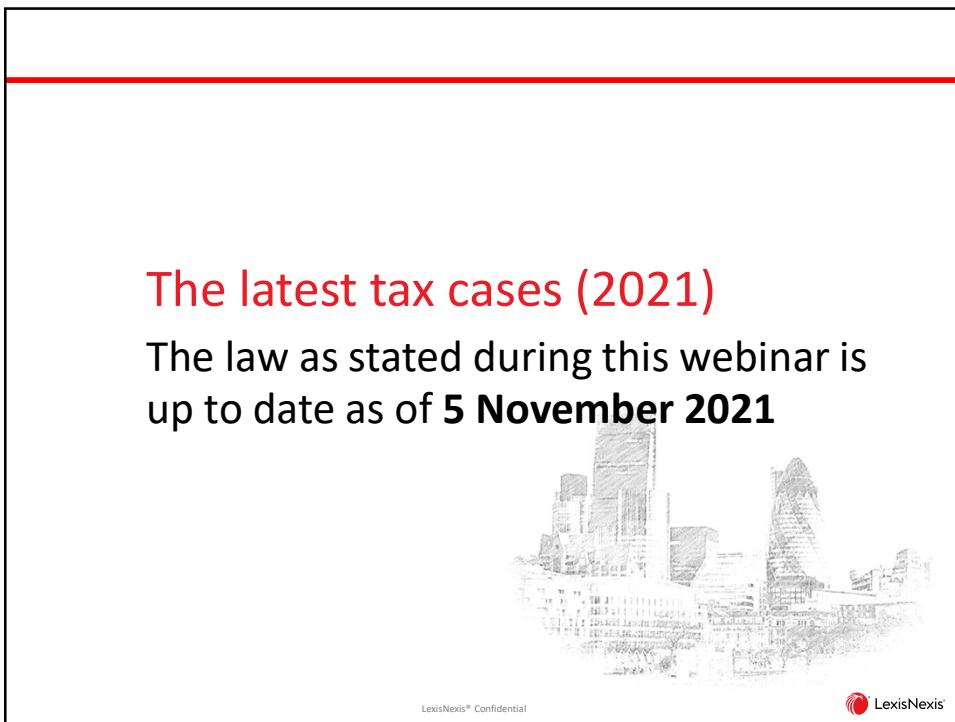
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## The latest tax cases (2021)

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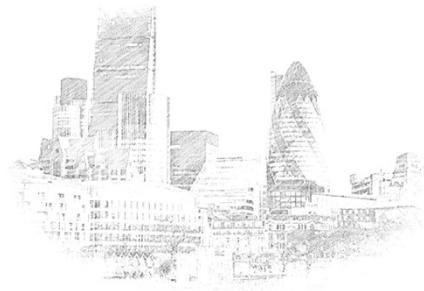
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## Agenda

- In detail
  - *Kwik-Fit Group Ltd and others v HMRC*
  - *Euromoney Institutional Investor plc v HMRC*
  - *HMRC v Tooth*
  - *Vermilion Holdings Ltd v HMRC*
- In overview
  - *Vitol Aviation UK Ltd and others v HMRC*
  - *Tartaruga Insurance Ltd v HMRC*
  - *Centrica Overseas Holdings Ltd v HMRC*
  - *K Murphy v HMRC*  
*The Queen (oao I Clamp and another) v HMRC*
  - *Balhousie Holdings Ltd v HMRC*  
*Target Group Ltd v HMRC*

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## Kwik-Fit Group Ltd v HMRC [2021] UKFTT 283 (TC)

### Facts

- HMRC challenged deductibility of interest expense on intra-group debt under the 'unallowable purpose test' in s. 441 CTA 2009.
- A network of intra-group debt had arisen over time in the Kwik-Fit group, for good commercial reasons. One entity (Speedy 1) also had a significant carried forward non-trading loan relationship deficit (NTD).
- Under a reorganisation:
  - loan receivables were transferred to Speedy 1
  - interest rates were increased to LIBOR +5%, said to be arm's length
  - Speedy 1 made a small number of additional loans to allow the reorganisation to take effect.
- A main purpose of the reorganisation was to allow Speedy 1 to utilise its carried-forward relief, which it could do within three years rather than around 25 years.
- HMRC denied interest deductions each year equal to the NTD used.

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## Kwik-Fit Group Ltd v HMRC [2021] UKFTT 283 (TC)

### • Tax advantage

- Endorsed *Oxford Instruments* view that straightforward borrowing can still give rise to a tax advantage: para [75]
- Interest expense for debtor companies, and relief of interest receipts by NTDs were both tax advantages: para [77]
- At least in this case, no need for a comparator transaction.

### • Purpose of the loans?

- The pre-existing loans retained a commercial main purpose after the reorganisation: para [116]. This may not have been so clear if novated.
- The tax purpose of the reorganisation was in effect attributed to those loans an additional main purpose: para [116]
- This was partly because the companies all agreed to participate in the reorganisation: para [112].
- But increasing the rate of interest on these loans was a very important factor. Evidence that this was just to comply with TP rules was rejected as no consistent application of the TP rules in the group: para [115]
- New loans had only a tax main purpose: para [117]

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**Kwik-Fit Group Ltd v HMRC [2021] UKFTT 283 (TC)**

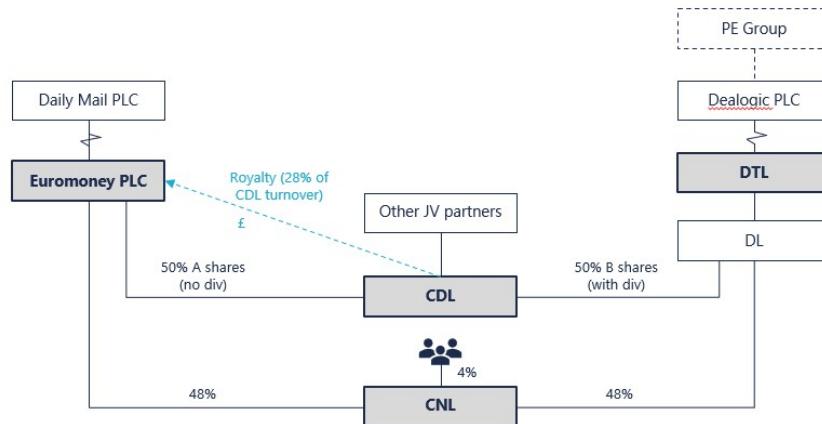
- **Attribution of debits - just and reasonable apportionment**
  - Tribunal wary of re-writing test set out in the legislation: para [129].
  - In principle rejected 'but for test' formulated in *Oxford Instruments*
  - In practice, that was the test they essentially applied here: para [136]
- **Outcome**
  - No interest deduction on new loans
  - No deduction for increased interest rate on pre-existing loans
  - Subject to cap on disallowance of the amount of the NTDs
- **Comment**
  - Only a decision of the FTT
  - But part of a developing pattern of case law
  - Very conventional planning can be caught by unallowable purpose rules
  - The main defence is the "attribution" rules – now slightly cloudier

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**Euromoney Institutional Investor plc v HMRC [2021] UKFTT 61(TC)**



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*Euromoney Institutional Investor plc v HMRC [2021] UKFTT 61(TC)*

- ‘Arrangements’

- The “*scheme or arrangements must be considered as a whole, rather than considering one element in isolation from the other elements*”
- “*To identify the arrangements in this appeal as those concerning only the preference shares would give a wholly distorted view of the circumstances*”, as the preference shares only formed a comparatively small part of the consideration

- **Purposes of arrangements**

- Key findings of fact were that:
  - tax avoidance was a purpose of the arrangements, but
  - the commercial deal would have gone ahead if the consideration was cash instead of preference shares
- ‘Main’ purpose is a matter of subjective intention – on the facts, the main purposes of the arrangements were commercial (although tax avoidance was a purpose)

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*Euromoney Institutional Investor plc v HMRC [2021] UKFTT 61(TC)*

- **Key points**

- Scope of arrangements was key to overall decision
- One of few examples where the court found a tax avoidance purpose, but relief was not held to be disallowed
  - Cp *Blackrock Holdco 5 LLC v HMRC [2020] UKFTT 443 (TC)*, on loan relationships ‘unallowable purposes’ rule in the context of a debt-funded share acquisition
- Importance of factual evidence
- Future relevance – appeal?

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***HMRC v Tooth [2021] UKSC 17***

- **Discovery assessments**
  - "Discovery"
  - Insufficiency of tax
  - Brought about carelessly or deliberately
  - Limitation period for issuing assessment extended to 6 years (if careless) or 20 years (if deliberate)
- **Discovery**
  - Confirms that 'discovery' is a low bar – no new information required and no 'collective knowledge' of HMRC
  - A 'discovery' was made here when a new officer reviewed the taxpayer's file and concluded that a discovery assessment should be made
- **Staleness**
  - Contrary to previous case law that 'staleness' of discovery may prevent assessment being issued, held that a concept of staleness would be contrary to statutory scheme
  - Taxpayers protected by (i) statutory time limit (running from the end of the year of assessment) and (ii) possibility of judicial review

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***HMRC v Tooth [2021] UKSC 17***

- **Deliberate inaccuracy**
  - Inaccuracy must be assessed in light of the whole tax return – it was irrelevant that the return was read on receipt by a computer, which looked at each part of the return separately
  - 'Deliberate':
    - CA: literal reading of statute – requirement only for a deliberate statement which is inaccurate
    - SC: requirement for statement which is deliberately inaccurate  
Require "*an intention on the part of the taxpayer to mislead the revenue as to the truth of the relevant statement or, perhaps, recklessness as to whether it would do so, rather than merely a deliberate statement which was inaccurate*"
    - No requirement for the insufficiency to be deliberate (only the inaccuracy)
  - Signifies a return to the previous position and departure from the CA's overly literal reading  
However: potential for recklessness to amount to deliberateness – where will the line be drawn?

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## *Vermilion Holdings v HMRC [2021] CSIH 45*

### **Introduction**

- Employment tax case, specifically on employment related securities
- Split decision of the Court of Session
- Unexpectedly limits the application of an HMRC-friendly deeming provision
- Finds on facts that newly issued options were not by reason of employment
- HMRC expected to appeal to the Supreme Court

### **Facts and issue**

- Mr N provided services to Vermilion. V issued share options to his company.
- V ran into financial difficulties.
- It was agreed to replace them with lower value ones.
- But this was part of a restructuring in which Mr N had become a director.
- If those new options were provided by reason of his directorship, they would be employment-related securities, and income tax charges would apply.
- Section 471(3) ITEPA 2003 deems securities provided by an employer to be provided by reason of the employment.

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## *Vermilion Holdings*

### **Court of Session**

- Majority was two short judgments of Lords Malcolm and Doherty
- Not the same, though Lord Doherty referred to substantial agreement: [63]
- Both seem to support Oliver LJ in *Wicks v Firth* that you look for the “operative” cause and that excludes some “but for” causes: [51], [69]
- Lord Malcolm took a broad view that Mr N had not acquired anything: [52]
- Both say the deeming provision did not apply in the limited situation where employment is known not to be an operative reason for the grant: [60], [67]

### **Impact**

- The FTT finding, that the existing option was the operative cause, was critical.
- HMRC’s position seems to have been that the inter-conditionality of the option and the directorship made the option “by reason of” the directorship.
- They framed this (para [35]) as being very close to a “but for” test.
- For now, this leaves real ongoing risk on amendments to ERS arrangements.

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*Vitol Aviation UK Ltd and others v HMRC [2021] UKFTT 353 (TC)*

- **Background:** parallel corporation tax enquiry and DPT review period – application for closure notice
- **Legal test:** were there reasonable grounds for HMRC to refuse to issue a closure notice?
- **Key factual finding:** HMRC had reached a conclusion on the only open issue (the appropriate transfer pricing)
- **Decision:**
  - » Purpose of the DPT legislation is to ensure that companies pay the right amount of corporation tax on their profits – there is no “preference” for DPT in the legislation
  - » If HMRC had already reached a conclusion on the appropriate transfer pricing adjustments, the legislative purpose was served by the issue of closure notices (not a refusal to do so)
- **Subsequent developments:** proposed amendment to DPT legislation so that a closure notice cannot be issued to a company with an open DPT review period (even if the tribunal has directed that one should be issued)

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*Tartaruga Insurance Ltd v HMRC [2021] UKFTT 0007 (TC)*

- **Background:** location of risk for IPT purposes in context of North Sea insurance
- **Legal test:** (broadly) location of building to which risk relates, otherwise where policyholder is established
- **Decision**
  - ‘Look-through’ approach – relevant location is of real risk (i.e. uncertain event) that results in payment being made under policy
  - Risk ‘relates to a building’ if there is a sufficient physical connection to a building
  - Confirms existing case law that ‘establishment’ is where activities are conducted in relation to which risk relates, which generally requires identifying a concrete or physical location where those activities are carried out
  - ‘Establishment’ must have some degree of permanence (generally a set up lasting 12 months or more should suffice) but does not have to be in one fixed geographical location

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*Centrica Overseas Holdings Ltd v HMRC [2021] UKUT 200 (TCC)*

- **Background:** relief for expenses of management of intermediate holding company (C) in connection with disposal of group (O) it held as an investment
- **Decision:**
  - Management: sufficient if it can be shown that directors of C were participating in strategic decision-making – no minimum degree of formality required (although records are desirable)
  - Expenses of management: question of fact whether expenses are incurred in deciding whether to acquire or dispose of an asset (which are expenses of management) or on the “mechanics of implementation” once that decision has been taken (which are not expenses of management) – and the purpose of the expenditure is key
  - Success fee: even if contingent on completion, was expense of management if payable for services that enabled C to decide whether and how to dispose of O
  - Capital expenditure: in this context does not include expenditure which informs decision-making and exercise of managerial discretion

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*Murphy, and Clamp*

***Murphy v HMRC [2021] EWHC 1914 (Admin)***

- ESC B18: UK beneficiary of a non-UK trust has credit for UK tax on trust income
- Was this restricted to income from six prior tax years – or not?
- Interpretation of an ESC is a “hard-edged question” for the court: para [33]
- All public documents available when issued are aids to interpretation: [53]
- Anecdotal or unpublished evidence of HMRC practice is not: [62]
- The court preferred a less “obvious” interpretation, applying restriction: [75]
- Critically – on any view ESC B18 was not clear, and so no right to rely on it: [76]

***Clamp v HMRC [2021] EWHC 2360 (Admin)***

- Mr Clamp asked HMRC to agree to disregard his repayment of EBT loans [21]
- They refused. He sought judicial review of the decision. He lost.
- Discussion focused on whether HMRC would have had power to do so.
- This would not have been a prohibited forward tax agreement [34].
- But HMRC had no such power if (as here) had formed a proper rational view [47] that tax was due on repayment, unless [41] on grounds of pragmatism.

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## Approach to CJEU case law post-Brexit: *Balhousie* and *Target*

- ***Balhousie Holdings Ltd v HMRC [2021] UKSC 11***

- Supreme Court allows taxpayer's appeal, holding that sale and leaseback was not a disposal of the taxpayer's 'entire interest' in a care home.
- As a result HMRC was not entitled to claw back the benefit of the VAT zero-rating that had applied when the taxpayer acquired the home from a developer.
- Lord Briggs delivering the leading judgment declined to engage with CJEU case law on multi-part transactions: [23].
  - He held that normal rules of UK statutory interpretation applied, and the issue did not turn on what supply the taxpayer had made.
  - Further, he stated that EU law is relevant only to certain questions when construing zero-rating provisions, and is not relevant here: [24].
- Lady Arden agreed with the outcome but for different reasons, taking a robust line that EU law was relevant, and focusing on the CJEU decision in *Mydibel* to conclude that a sale and lease back (for funding purposes) is treated as a single supply for VAT.
- Lord Briggs is probably correct, but his approach was very robust.

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## Approach to CJEU case law post-Brexit: *Balhousie* and *Target*

- ***Target Group Ltd v HMRC [2021] EWCA Civ 1043***

- Concerned whether certain loan administration services supplied by Target to a bank which originated and provided mortgages and loans to borrowers were exempt from VAT.
- Court carried out detailed consideration of the domestic and CJEU authorities.
- Having done so, it considered itself bound to give precedence to decisions of the CJEU in the face of conflict between these and domestic case law.
- On this basis, the Court found that the exemption did not apply.
- Further hearing expected on whether the Court should exercise powers now available in the European Union (Withdrawal) Act 2018 and associated regulations to depart from retained EU law.

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Questions?

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- WJ0521 The latest tax cases (2021) - **Q3 2021**
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