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Slaughter and May Podcast
Tax News: March 2024

Zoe Andrews	Welcome to the March 2024 edition of Slaughter and May's "Tax News" podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge.
Tanja Velling	And I am Tanja Velling, Tax PSL Counsel. We will share some thoughts on the Spring Budget and discuss a few recent cases: the Court of Appeal's decision in *Clipperton*, and the First-tier Tribunal's decisions in *Keighley*, *Stolkin* and *Mahmood*. We will also touch on some recent changes to HMRC's guidance, the call for evidence on the tax administration framework, some news on DAC6 and the UN's work on a framework convention on tax cooperation. The podcast was recorded on the 12th of March 2024 and reflects the law and guidance on that date. That means that the podcast was recorded and is coming out around a week after the UK's Spring Budget. What were your main takeaways?
Zoe Andrews	There were fewer measures affecting corporate tax than we have seen in other recent fiscal events. The headline corporation tax rate will stay at 25%. This is unsurprising and matches Labour policy - in February, Shadow Chancellor Rachel Reeves announced that a Labour government would "cap the headline rate of corporation tax at its current rate of 25 per cent for the next parliament."
Tanja Velling	She had also announced that a Labour government would maintain full expensing and the annual investment allowance. Now, of course, as part of last year's Autumn Statement, the Chancellor had announced that full expensing would be made permanent. At the Spring Budget, it was added that draft legislation will be published "shortly" for technical consultation on a potential extension of full expensing to leased assets which are currently excluded, but a final policy decision in favour of this extension has not yet been made.
Zoe Andrews	Other measures to highlight include the introduction of a new Individual Savings Account with a separate additional £5,000 allowance to encourage investment in the UK – what assets one could invest in through this UK ISA is subject to consultation. The introduction of a new fund type, the Reserved Investor Fund (Contractual Scheme) or "RIF", will also go forward. While legislating for a possible early termination of the Energy Profits (Oil and Gas) Levy as previously announced, the government will extend it by another year to the 31st of March 2029.
Tanja Velling	But I think the most eye-catching development was that the government effectively appropriated one of Labour's flagship policies and announced the abolition of what is often referred to as the "non-dom regime" in favour of a residence-based system. I have written about this in a bit more detail

	on the European Tax Blog and our colleagues also cover this and certain other measures impacting employees and employers (such as the further cut in national insurance contributions) in the 2024 HR Budget briefing. So, I shall say no more here.
Zoe Andrews	Your blog post also mentions that the government is introducing legislation to plug a perceived gap in the transfer of assets abroad rules following the Supreme Court's decision in *Fisher* which we discussed in the December 2023 edition of this podcast. The policy paper indicates that the measure is expected to raise £15 million between 2025 and 2027. Thereafter, the impact is predicted to be negligible.
Tanja Velling	As expected, there is now some news coverage speculating what the Spring Budget might mean for the looming general election. But I suspect it's too early to tell at this point. So, let's move on for now and look at some cases. Do you want to start with the Court of Appeal's decision in *Clipperton*?
Zoe Andrews	Sure – although as it concerned a marketed tax avoidance scheme intended to pass funds to shareholders without the tax consequences of paying them dividends, I think you can guess the outcome.
Tanja Velling	I think the taxpayer lost.
Zoe Andrews	Indeed. There were several grounds of appeal, and I want to focus on the first, broadly a *Ramsay* approach to the definition of a "distribution". The term is defined in section 1000 of the Corporation Tax Act 2010 to include "any other distribution out of assets of a company in respect of shares in the company". The legislation then adds some carve-outs, but these are not relevant to the central question here. To get to that question, I will first need to give an overview of the facts. We have a company owned by individuals. The company sets up a subsidiary and uses roughly £200,000 to subscribe for shares. But one of the shares in the subsidiary was held by a trust; the subsidiary then uses the £200,000 to pay a dividend to the trust on that share and the trust uses the vast majority of that money to make a payment to the individuals. So, the company's money ended up in the individual shareholders' hands. But it was not a distribution by the company to its shareholders in respect of their shares in the company, meaning that it did not fall within the definition of "distribution" in section 1000. Or was it? And did it?
Tanja Velling	The Court of Appeal answered yes on both counts. It concluded that the phrase ""distribution … in respect of shares" is, on a purposive construction of the statute, wide enough to include a distribution by a company which is designed to reach, and does reach, the company's shareholders even if it does so as a result of a series of steps."

	It appeared that, in reaching this conclusion, the Court of Appeal took into account the purpose of the charging provisions – to "impose a charge to income tax on distributions by a company to its shareholders" – and that Parliament cannot readily be taken to have intended distributions paid via two or more steps to escape the tax charge. What then is the scope of the decision? Does it speak to the interpretation of the term "distribution" in general? Or only in the context of the relevant charging provisions at issue in this case? And if the latter, does this support the notion of a potential trend towards ascribing subtly different meanings to the same terms or related concepts in different legislative and factual contexts? As regards this latter question, I would stand by what we said back in January in the context of our discussion of *BCM Cayman* – concluding that different tests may apply in different contexts would seem rather undesirable and apt to create uncertainty.
Zoe Andrews	That's quite true. The next case on my list is the First-tier Tribunal's decision in *Keighley*. The compliance review from which this case arose had identified 23 issues on which HMRC sought further information. Thankfully, the number of issues in the case is more manageable and, out of those, I want to mention only one, the loan relationship issue. This concerned debits from a partial write-off of debt between two companies which I will call "the lender" and "the borrower". HMRC argued that the debits were non-deductible on two grounds: first, because the companies were connected and/or secondly, because the partial write-off had an unallowable purpose.
Tanja Velling	Companies are connected for these purposes if they, I quote: "are both controlled by the same person". Does this mean it has to be a single person who controls both?
Zoe Andrews	Not according to the FTT. HMRC had argued that based on a provision in the Interpretation Act 1978 (that "words in the singular include the plural") "person for these purposes can be persons". But what would that look like in practice? HMRC's guidance seems to suggest that something more than mere coincidence of ownership would be required. But the FTT here rejected the taxpayer's suggestion that the persons would "need to act "as one"". This would seem to result in a rather expansive view of connection which, if correct, could have significant practical implications. Could, for example, FTSE 100 companies count as connected if the majority of their shares are ultimately controlled by the same group of fund manager or institutional investors? Technically, that would seem to be a possible conclusion – but hardly something that Parliament would have intended!

Tanja Velling	I'd actually put that in much less lawyerly language – regarding FTSE 100 companies as connected on this basis would seem wild!
Zoe Andrews	That's another good way of putting it. But anyway, let me add a brief thought on the unallowable purpose point. *Keighley* is a good reminder that the unallowable purpose rule in section 441 of the Corporation Tax Act 2009 is not (just) a tax avoidance rule. It bites where a company is party to a loan relationship or enters into a transaction related to it for a purpose that is not among the company's business or other commercial purposes. Here, the lender's purpose was to allow other creditors (namely, the lender's majority shareholders) to be repaid in full – which was a non-commercial and therefore unallowable purpose.
Tanja Velling	That is certainly something to keep in mind in relation to section 441. But let's move on to something else. You went to see Macbeth recently didn't you, Zoe?
Zoe Andrews	Yes, I did. It was an excellent production at the Dock X Theatre with Ralph Fiennes as Macbeth and Indira Varma as Lady Macbeth.
Tanja Velling	Well then you will have appreciated the Macbeth reference in our next case, *Stolkin* on whether a company met the trading company condition for the shareholders to get entrepreneurs' relief (or business asset disposal relief as it has now been renamed) on the disposal of their shares.
Zoe Andrews	Ah yes – in this case the FTT had to decide whether a company, SGL, which had acquired land in West London as an investment in 2011, later appropriated it to trading stock in 2013 and eventually sold the land to a developer in 2015, carried on sufficient trading activities throughout the relevant time. The land in question was the former headquarters site of GSK in Greenford and when acquired by SGL was designated as Strategic Industrial Land for planning purposes although following protracted negotiations over several years the planning designation was relaxed and hybrid permission was granted for a mix of residential and commercial use. This greatly increased the value of the land and SGL intended to keep making planning applications to improve the amount of residential use permitted and further increase the economic value of the land, but they received an offer to buy the land that they could not refuse. In 2016 the Greenford site was sold to Greystar, a major US private rented schemes operator, which went on to improve the planning permission even further and developed the land achieving nearly 2000 flats. SGL went into voluntary liquidation shortly after, with its assets being distributed to the shareholders.

	So the question was whether SGL's activities during a one year period within three years of the voluntary liquidation amounted to trading.
Tanja Velling	The appropriation of the land to trading stock was not sufficient of itself to indicate SGL was carrying on a trade from that point. As with any case on trading, the FTT took a multi-factorial approach to evaluation and then stood back and looked at the whole picture. The FTT worked through the badges of trade and other factors, considering some of them not relevant and others not pointing one way or the other. But it was an uphill struggle for SGL. Although it is possible for a person to acquire an asset as an investment and subsequently become a trader in relation to that asset, the intention at the outset is a weight in the balance against such a conclusion. And here's your Shakespeare reference: "The thinking behind the original acquisition will always be something which has to be considered. Depending what else happens, of course, the weight to be attached to that may change, but, rather like the blood on Lady Macbeth's hands, it will never completely go away and is always something which needs to be considered in the multi-factorial assessment."
Zoe Andrews	So it is harder to show a trade is carried on later if an asset is not originally acquired as trading stock.
Tanja Velling	Yes – the FTT concluded that SGL "need[ed] to do something more decisive to escape the fetters of the past than simply decide to sell the asset and then do no more than take steps to enhance the asset's value prior to sale" which is all the FTT concluded SGL had done here.
Zoe Andrews	The final case that I want to mention briefly is the FTT decision in *Mahmood*. The taxpayer had transferred properties to a company owned by his wife, thinking that a spouse exemption from capital gains tax would be available. But this was incorrect; the correct treatment would have been a capital gains tax charge, with the gain being calculated by reference to the market value of the properties. The taxpayer submitted that this mistake as to the tax consequences of the transaction entitled him and the company to rescind the transfer of the properties (and, indeed, before the case came to the FTT, the company had transferred the properties back to the taxpayer). The taxpayer argued that, consequently, the original transfer should be treated as having never taken place and therefore there could be no capital gains tax charge. What did the FTT make of this?
Tanja Velling	The FTT recognised that, under the doctrine of common mistake, a transaction may be void if the parties entered into it pursuant to a shared mistake. But it concluded that, in this case, the mistake was not sufficiently fundamental for the doctrine to apply. The FTT also noted the possibility that parties may agree to rescind a transaction, but this is only possible to the extent that the transaction has not yet been executed. Here, the

	properties had been transferred, so it was not possible to agree to rescind the transaction. So, there was a disposal of the properties and the taxpayer was liable to capital gains tax. Overall, the case illustrates difficulties faced by taxpayers seeking to unwind transactions undertaken based on a misunderstanding of the associated tax treatment.
Zoe Andrews	And now for the news which those affected are quite rightly furious about - the recent U-turn in HMRC policy on the application of the salaried members rules. These rules are anti-avoidance provisions intended to catch relationships which are more like employment than partnership and they tax the partners of an LLP as employees if all of three conditions are met. In order for the third condition, “Condition C” to be met, the partnership contribution made by the partner must be less than 25% of the “disguised salary” expected to be payable to the partner in respect of their performance during the year. There is a Targeted Anti-avoidance Rule or TAAR which provides that in determining whether an individual is a salaried member, no regard is to be had to any arrangements the main purpose, or one of the main purposes of which, is to secure that the individual is not a salaried member. Now, it has been common practice for LLPs to require capital contributions of 25% or more to ensure Condition C did not apply. And HMRC expressly accepted that condition C did not apply if you made capital contributions which were really at risk in the business, even if this was done to fall within condition C. But a recent change to HMRC’s guidance in the Partnership Manual shows that HMRC has reversed its policy on this and now suggests that the TAAR would apply to an arrangement where members can increase their capital contributions in each period to avoid meeting Condition C. Overall, a rather surprising development, and such unexpected U-turns are not particularly conducive to building effective relationships between HMRC and its customers.
Tanja Velling	While we’re on the subject of guidance, I must mention that HMRC has now updated its Stamp Taxes on Shares Manual to reflect the Finance Act 2024 changes. This includes the removal of domestic legislation on the 1.5% charge on the issue of UK securities into depositary receipt systems and clearance services and on certain transfers into depositary receipt systems and clearance services. It also includes provision to ensure that no 1.5% charge to SDRT will arise on an “exempt capital raising transfer” or an “exempt listing transfer” and that no 1.5% stamp duty will arise on an “exempt capital raising instrument” or an “exempt listing instrument”. As requested in feedback to HMRC on the legislation, the guidance includes examples of transfers and instruments which are included in these terms and confirms a time period of 4 months from the relevant issue (or from when a restriction ceases to have effect) during which a transfer must

	be made to be considered to be "in the course of" a capital raising arrangement or a qualifying listing arrangement.
Zoe Andrews	I'd like to share a few points on the call for evidence on the enquiry and assessment powers, penalties and safeguards as part of the Tax Administration Framework Review. It was published on 15th February and is open until the 9th May. There's a lot in this call for evidence as HMRC explore the possibilities for reform in these areas to make them more efficient, effective and simpler to understand. Some of the suggestions for reform involve significant changes and are inspired by a review of international best practice. On enquiry and assessment powers, for example, it is noted that the current system of different powers spread across different taxes and time limits is very complex for taxpayers, agents and HMRC and could be improved. Options for reform include making powers consistent across all tax regimes (this would be in line with Ireland, Australia and Canada) or preserving distinctions where required but making the powers clearer and more consistent. A more targeted option is aligning powers and addressing gaps or mismatches where powers in one regime are not replicated in otherwise similar regimes. Another opportunity for reform which caught my eye is the conditions for assessments. It is noted that there are areas in current legislation where the element of subjectivity leads to procedural challenges (for example, the discovery powers which relate to HMRC's knowledge of the facts) – so one option would be to replace the discovery powers with a simpler, stricter time limit approach as other countries do.
Tanja Velling	You will recall that, some time ago, the EU's Directive on administrative cooperation in the field of taxation was amended to require that intermediaries (and, in certain circumstances taxpayers) report cross-border arrangements, if they meet certain hallmarks. It's of course DAC6 I'm talking about here. In an interesting turn of events, a number of parties, including the Belgian Association of Tax Lawyers, brought proceedings in Belgium to challenge DAC6 on the basis that it infringes EU law and human rights. The Belgian Constitutional Court referred a number of questions to the CJEU. The Advocate General's opinion was published at the end of February. It advises the CJEU to find no infringement. So, it looks likely that DAC6 will survive this challenge.
Zoe Andrews	But this is not the only challenge to disclosure legislation. The UK High Court recently published a procedural ruling in respect of a challenge to the transfer of data under FATCA from HMRC to the US Internal Revenue Service. The decision indicates that this challenge is "part of 'an international strategic data protection litigation campaign focusing on the

	implementation of various 'transparency' measures for individuals' fundamental rights' and was intended to force a renegotiation of FACTA and the development of a new system". If you add in the fact that the litigation is financed by an unknown party, this could almost be the start of a blockbuster movie. It remains to be seen whether the claimant will continue the case after High Court confirmed that they will have to disclose to HMRC further information on the motivation for the claim and the, as yet unknown, funder.
Tanja Velling	In other international tax news, the first few meetings on the proposed UN framework convention on international tax cooperation have now taken place. Framework conventions are a relatively novel instrument. They are legally binding, but provide only an overarching structure for engagement. Particular issues would have to be addressed separately through more detailed protocols. For anyone interested in ESG topics, this system should be familiar from the UN Climate Convention with its annual COP meetings. At present, this is certainly the most high-profile example of a UN framework convention. Whether the planned tax convention could eventually attract the same amount of public attention is hard to predict, but it should not be discounted as a possibility. The next series of meetings for substantive discussions is planned to start towards the end of April. In the meantime, is there any news in respect of the OECD's international tax reform project?
Zoe Andrews	The Tax Report from the OECD Secretary-General to the G20 Finance Ministers and Central Bank Governors from the end of February indicates that the Inclusive Framework is working towards finalising the text of the Multilateral Convention on Amount A of Pillar One, the new taxing right, by the end of March. They plan to hold a signing ceremony by the end of June. Among more news of misgivings about the convention among US Republicans who regard it as unfavourable to their country, I remain somewhat sceptical as to whether it will come into effect. This would require the MLC to be ratified by 30 States accounting for at least 60% of the ultimate parent entities of MNEs initially expected to be in-scope for Amount A. Further work on the relationship between Amounts A and B will have to be undertaken before the signing and entry into effect of the Multilateral Convention.

Tanja Velling	And finally, as to something a bit further in the future: as part of the Spring Budget, the Chancellor promised that further tax administration and maintenance announcements would be made on the 18th of April. These may include a consultation on the VAT treatment of private hire vehicles following the July 2023 High Court ruling in *Uber Britannia v Sefton MBC.* The Red Book indicated that this consultation would be published "in April". The High Court decision referred to here is not itself about tax; it establishes that the relevant legislation concerning the licencing of private-hire vehicles requires that the operator enters as principal into the contract with the customer, and not as agent for the driver. From a tax perspective, the result is that VAT would apply at the level of the operator (rather than at that of the individual drivers). This would add VAT costs: it is unlikely that individual drivers have to charge VAT (as their turnover is likely below the registration threshold). But the operator's turnover would most likely be above the threshold, so that VAT would have to be charged.
Zoe Andrews	That leaves me to thank you for listening. If you have any questions, please contact Tanja or me, or your usual Slaughter and May contact. Further insights from the Slaughter and May Tax department can be found on the European Tax Blog – www.europeantax.blog. And you can also follow us on Twitter – @SlaughterMayTax.