Slaughter and May Podcast
Tax News Highlights: March 2023

Zoe Andrews **0.03-0.11**	Welcome to the March 2023 edition of our tax news highlights podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge.
Tanja Velling **00:01-01:12**	And I am Tanja Velling, Senior Professional Support Lawyer in the Tax department. The Spring Budget, followed by the publication of the Spring Finance Bill, was clearly the biggest development in UK tax during the last month or so. It has also been the most covered – whether that's on our European Tax Blog, by other professional services firms or the media. So, we won't bore you with a run-through of all the measures, but will mention a few that we consider most interesting, or which may have so far received less media attention. Aside from that, we have four cases to talk about – one from each level of the judicial system: • the First-tier Tribunal's decision in *Muller* on the application of the intangible fixed assets regime to partnerships; • the Upper Tribunal's decision in *Prudential* on the interaction of the VAT grouping rules and the time of supply rules; • the Court of Appeal's decision in *Mitchell* on HMRC's powers to disclose documents without taxpayer consent; and • the Supreme Court's decision in *News Corp* applying the "always speaking" principle to the VAT legislation to consider whether "newspapers" could include digital as well as print newspapers. This podcast was recorded on the 28th of March 2023 and reflects the law and guidance on that date.
Zoe Andrews **1.50-2.13**	The Chancellor's pensions tax changes must be one of the measures – if not the measure – which attracted most media coverage. The most eye-catching of these changes is generally talked about in terms of an abolition of the lifetime allowance. But, under clause 18 of the Spring Finance Bill, only the associated charge is removed. We will have to wait for a future Finance Bill for the full abolition of the lifetime allowance.
Zoe Andrews **2.19-2.41**	Other limits on tax reliefs for pension contributions will also remain in place. There will still be an annual limit on tax-free contributions, set at £60,000 (up from £40,000). Given that the annual allowance taper will also be maintained (albeit at a slightly more generous level), the highest earners

	will derive only a limited benefit (if any) from the removal of the lifetime allowance.
Tanja Velling **01:20-01:55**	Another eye-catching change was the introduction of full expensing, for corporation tax purposes, of capital expenditure which would have otherwise qualified for capital allowances at the main rate of 18%. This is provided for in clause 7 of the Spring Finance Bill. The Chancellor's stated intention is that the measure would become permanent, but it was introduced with a time limit of three years. So, it will function to accelerate tax deductions to mitigate the impact of the increase in the main corporation tax rate to 25% from April. It is then predicted to become tax positive by 2027/ 2028 as the timing benefit starts to unwind.
Tanja Velling **02:09-**02:39	The news on tax reliefs for research and development was that the Government is still considering a merger of the regimes for small and medium sized enterprises and larger companies. In the meantime, the Budget announced additional tax reliefs for R&D intensive SMEs – this is effectively a partial reversal of the reduction of tax reliefs for SMEs announced as part of the Autumn Statement. Our colleague, Kasim Mehmood, has written about the changes to tax relief for R&D expenditure in more detail on the European Tax Blog.
Tanja Velling **02:44-02:46**	Zoe, what other changes did you want to mention?
Zoe Andrews **4.17-5.39**	Let's first go back to 2004 when the House of Lords decided *Jerome v Kelly*. Certain land was held on trust and the trustees signed a contract for the sale of that land. The transaction completed several years later, but during the period between signing and completion, the beneficial interest was assigned to another person. So, simplifying slightly, the beneficial owner of the land was person A, but at completion, it was person B. Like section 28 TCGA, the applicable predecessor legislation provided that, for tax purposes, the disposal of the land should be treated to have taken place at the time of signing – i.e. when A was the beneficial owner. So, should A be taken to have made the disposal even though at the time when the contract was completed, A was no longer the beneficial owner? The House of Lords decided that the legislation did not go that far and noted that it posed a problem in the circumstances of the case. Lord Walker of Gestingthorpe considered that there was "no indication that Parliament contemplated that the interval between contract and completion might be measured in years rather than weeks, or might be punctuated by a change in beneficial ownership" and Lord Hoffmann saw "no elegant solution to the problem posed by" the relevant section. Almost 20 years later, the Chancellor has announced a fix to section 28 TCGA which addresses a related problem.

Zoe Andrews **5.53-6.37**	In the case of a long gap between signing and completion, the effect of section 28 may well have been to place the disposal into a past tax year for which the relevant notification periods and assessment time limits had already expired, thus denying HMRC the opportunity to assess and collect the tax due. So, in respect of unconditional contracts entered into from April 2023, clause 40 of the Spring Finance Bill would change the tax administration provisions so that the relevant time limits operate by reference to the period during which completion takes place. The measure is not expected to raise additional revenues for some time; the expected exchequer impact is nil until 2027/ 2028 when it jumps to £5 million.
Tanja Velling **02:57-03:13**	In a bid to encourage growth and investment, the Spring Finance Bill also includes a number of taxpayer-friendly improvements to various investment regimes and to the Corporate Interest Restriction rules. Let's move on to look at some cases, though. Do you want to start with the First-tier Tribunal's decision in *Muller*?
Zoe Andrews **6.54-7.40**	Yes. The narrower point decided by this case may be of mostly historic interest. But its overarching theme remains relevant: the intangible fixed assets regime in Part 8 of the Corporation Tax Act 2009 does not work very well in relation to partnerships. Three UK tax resident companies formed an LLP and transferred their trades to it. The transfer included assets that fell within the definition of "intangible fixed assets" for the purposes of the IFA regime or goodwill that was to be treated as such, and the case concerned the question whether the assets (referred to in the case as the "Material Assets") fell within the scope of that regime, thus entitling the taxpayers to writing-down allowances which would not otherwise have been available to them.
Zoe Andrews **7.50-8.18**	One gateway into the IFA regime is for an asset acquired on or after the 1st of April 2002 from a person who was not a "related party". This is set out in section 882 of the CTA 2009. So, the crucial question was whether the LLP acquired the assets from a "related party". In other words, were the corporate members "related parties" of the LLP for these purposes?
Tanja Velling **03:27-03:44**	The profit share on which a corporate member is taxable is determined on corporation tax principles. So, as a first step, one has to "determine what would be the amount of the profits of the trade [carried on by the LLP] chargeable to corporation tax…if a UK resident company had carried on the trade".
Tanja Velling **04:22-05:19**	The taxpayers argued that the relevant section is merely a computational provision and refers to a notional company without any specific characteristics and which was not capable of being a "related party" for the purposes of section 882. In the alternative, they contended that the

	definition of "related party" had to be applied to the LLP because the company did not actually exist and, because the LLP was not a company, it could not have any "related party" pursuant to that definition. The FTT dismissed both arguments. The underlying computational provision requires the application of the IFA regime, including section 882. And in applying the regime and that section, "the statutory fiction requires the notional company to be assumed to be owned in the same way as the partnership in relation to which the computation is being carried out, in the same way that the transactions carried out by that partnership form the basis for the notional company calculation".
Zoe Andrews **12.11-12.25**	The FTT also considered the consequences of certain changes made to section 882 by section 52 of the Finance Act 2016. These changes are the reason why the decision should be of mostly historic interest.
Zoe Andrews **12.49-13.31**	According to the related explanatory notes, they were intended to confirm "that arrangements involving bodies such as partnerships or Limited Liability Partnerships (LLPs) cannot be used to move assets into the Part 8 rules in ways that were not intended by the legislation", and according to the FTT, they have the effect of denying debits accruing in respect of the Material Assets in accounting periods commencing on or after the 25th of November 2015, even if the FTT's conclusion in relation to the "related party" issue had been incorrect. Let's move on to the Upper Tribunal's decision in *Prudential*. I like to think of it as a tale of chicken and eggs.
Tanja Velling **05:29-06:13**	But not in the sense of it concerning an agricultural business! Silverfleet Capital Ltd had supplied investment management services to The Prudential Assurance Company Ltd while the two companies were members of the same VAT group of which Prudential was the representative member. Prudential had agreed to pay a management fee and a performance fee if certain benchmarks had been met. Then Silverfleet left the VAT group following a management buy-out and the parties agreed that only the performance fee would remain payable if the relevant conditions were met. This happened around 7 years later and Silverfleet invoiced Prudential a total of around £9 million plus VAT at the standard rate of 20%. The question before the Upper Tribunal was whether VAT was actually due on the performance fee.
Zoe Andrews **14.16-15.17**	Broadly, Prudential argued that, because, in the real world, the management services were supplied while Silverfleet was a member of Prudential's VAT group, they should be disregarded under section 43 of the Value Added Tax Act 1994. In contrast, HMRC's view was that, in the VAT world, the supplies must be treated as made after Silverfleet left the VAT group pursuant to the time of supply rules in Regulation 90 of the Value

	Added Tax Regulations 1995 (which looks to the date of invoice of, or payment for, the services), so they can't be disregarded under section 43 and VAT is due. And this is where chicken and eggs come in… as per the Upper Tribunal: "*The question of whether the VAT liability on the performance fees is determined by Regulation 90 or by section 43 might at times resemble a choice between the chicken and the egg. Certainly the FTT's highly discursive analysis indicates some difficulty in coming to a conclusion as to "which came first"*."
Zoe Andrews **15.26-16.01**	The FTT had effectively decided that section 43 came first; the time of supply rules could not make taxable a supply which fell to be disregarded. The Upper Tribunal came to the opposite conclusion. The time of supply rules apply first to determine whether a supply has been made at a time when the supplier and the recipient were members of the same group. In this case Silverfleet had left the group at the time of supply as determined by Regulation 90 and so section 43 did not apply to disregard the supply for VAT purposes.
Tanja Velling **06:22-06:34**	The Court of Appeal's decision in *Mitchell* considers the relationship between the First-tier Tribunal's case management powers and HMRC's statutory powers under section 18 of the Commissioners for Revenue and Customs Act 2005 (the CRCA).
Zoe Andrews **21.48-22.24**	HMRC had undertaken an investigation into the personal and business tax affairs of Mr Mitchell under Code of Practice (or COP) 9, applicable to investigations where HMRC suspect fraud. The questioning covered two companies on which HMRC imposed penalties for deliberate errors in their VAT returns. The companies went into liquidation and HMRC issued personal liability notices in respect of the penalties to Mr Mitchell and Mr Bell who HMRC allege were shadow directors of the companies at the material time. They appealed and the FTT directed that the appeals should be heard together.
Zoe Andrews **22.27-23.00**	HMRC asked for Mr Mitchell's consent to disclose to Mr Bell certain documents which had come into HMRC's possession as part of the COP 9 investigation. Mr Mitchell did not consent, HMRC included the documents in its List of Documents, Mr Mitchell objected and HMRC applied to the FTT for permission to disclose the documents. The FTT concluded that documents should be disclosed only if and to the extent relevant and granted the permission only in part. The Upper Tribunal upheld the FTT's decision.
Zoe Andrews **23.04-23.10**	Before the Court of Appeal, the case took a different turn which made the earlier decisions essentially irrelevant.

Tanja Velling **07:11-08:32**	The Court of Appeal concluded that HMRC needed neither the taxpayer's consent nor the FTT's permission to disclose the relevant documents. Whilst ordinarily covered by taxpayer confidentiality, two exceptions in section 18 of the CRCA were engaged, the exception for disclosure made for the purposes of an HMRC function and the exception for disclosure made for the purpose of civil proceedings relating to a matter in respect of which HMRC have functions. On either exception, HMRC could have disclosed the documents to Mr Bell, and HMRC's exercise of its powers under section 18 were outside the jurisdiction of the Tribunals. It could be challenged only by way of judicial review. The majority of the Court of Appeal considered that the FTT nonetheless had jurisdiction to decide HMRC's application for a direction to disclose (even if such a direction was unnecessary). But, in this case, the FTT had misdirected itself and therefore, its decision could not stand. The Court of Appeal allowed the appeal and substituted "no order" - given that HMRC did not actually need any court or tribunal's permission to disclose the documents, there was no point to remit the case to the FTT. I think that, as a result of this decision, HMRC may more readily disclose documents pursuant to its powers under section 18 of the CRCA without first seeking taxpayer consent or the FTT's permission.
Zoe Andrews **25.13-25.31**	The Supreme Court's decision in *News Corp* concerns the question whether "newspapers" in the VAT legislation could be interpreted to include digital editions as well as print newspapers. The taxpayer argued for such an interpretation because it would have extended the zero-rate applicable to print newspapers to digital editions.
Zoe Andrews **25.52-26.18**	The Supreme Court's conclusion that digital editions did not constitute newspapers for these purposes is only of historic interest. This is because the legislation was amended so that since May 2020, zero-rating has been extended to newspapers "when supplied electronically". The way in which the Supreme Court reached its decision is of more general interest, though, because of its discussion and application of the "always speaking" principle.
Tanja Velling **08:40-09:00**	The majority took the view that the "always speaking" principle means that, generally, statutes should be interpreted, taking into account changes, such as technological advances and changes in scientific understanding, social attitudes or the law, which have occurred since the statute was enacted – whether or not such changes were foreseen at the time of enactment.
Tanja Velling	Exceptionally, the "always speaking" principle can be disapplied where such a disapplication is indicated by the context and purpose of the legislation.

09:06-09:59	The majority opinion states that “The great merit of the always speaking principle is that it operates to prevent statutes becoming outdated. It would be unrealistic for Parliament to try to keep most statutes up to date by continually passing amendments to cope with subsequent change.” Lord Leggatt, on the other hand, considered that this description of the “always speaking” principle states it “at too high a level of generality to be meaningful. Rather, there are different types of change that may occur after a statute is enacted to which different considerations apply.” Lord Leggatt went on to distinguish four different factors. In relation to technological changes (such as the invention of digital newspapers), Lord Leggat considered that the “always speaking” principle did not have any role to play;
Tanja Velling **10:04-10:18**	he considered that “the proper approach is simply to ask in accordance with ordinary principles of interpretation whether the newly invented object falls within the meaning of the statutory language, interpreted in the light of the legislative purpose”.
Zoe Andrews **27.58-29.10**	Despite these differences in the interpretation of the “always speaking” principle, the majority in Supreme Court and Lord Leggatt reached the same conclusion, that digital editions should not be regarded as “newspapers” for the purpose of the zero-rating provision. This was based on there being a fundamental difference between print and digital editions and the requirement -derived from EU law – that zero-rating provisions must be interpreted strictly. Before we finish, I wanted to share one more quote from Lord Leggatt’s judgment. After noting that Counsel for HMRC “gave a number of examples of differences in tax treatment between items for which there is no clear rhyme or reason”, Lord Leggatt went on to say that “With a statute of this kind the scope for purposive interpretation of the words used to ascertain their intended effect is extremely limited. There is not - and does not need to be - an overall logic or coherence in the items specified by Parliament which would permit reasoning by analogy.” I would say that he is not wrong, but also that this is unfortunate and the reason for a lot of litigation around VAT classification. So, what is there coming up?
Tanja Velling **10:23-10:44**	On the 31st of March, the Economic and Social Council of the United Nations will have a Special Meeting on the General Assembly’s resolution on the “Promotion of inclusive and effective international tax cooperation at the United Nations”. Organisations have already submitted comments on the resolution, including to call for the creation of a new forum on international tax cooperation.
Tanja Velling	There are a number of changes to UK tax taking place on 1st of April, including rate changes: the main corporation tax rate will go up to 25%, the

11:14-11:40	diverted profits tax rate will go up to 31%, the corporation tax bank surcharge will go down to 3% and the surcharge allowance increases to £100 million. We also have the recently announced Tax Administration and Maintenance Day to look forward to later in the Spring.
Zoe Andrews **30.29-30.49**	And 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.