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TAX NEWS

PODCAST

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Zoe Andrews	Welcome to the November 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 cover the Budget, a UK expert report on a possible re-domiciliation regime and a few other news items in relation to the UK and international tax. In terms of cases, we will discuss the First-tier Tribunal's decision in *Syngenta*, the Upper Tribunal's decisions in *Gould* and *Panayi*, and mention a US challenge to the Belgian UTPR implementation. This podcast was recorded on the 12th of November 2024 and reflects the law and guidance on that date. Zoe, are you glad you postponed your holiday so you could follow the Budget live?
Zoe Andrews	Well, it was a historic event - the first Labour Budget in 14 years and it was delivered by the first female Chancellor - and it would have been sad not be in the office for it. But you know, in the past, I complained when fiscal events were followed by a "Tax Administration and Maintenance Day". I even said that I wished everything would be published on the day of the fiscal event. Well, as they say, be careful what you wish for! This time, no separate Tax Administration and Maintenance Day, and the government certainly didn't hold back on publishing policy papers and consultations. There was a lot to digest.
Tanja Velling	There certainly was! And you will be glad to hear that I don't propose to go through all the measures. Instead, we'll focus on just one area: pensions. And I'm delighted that, for this, we're joined by Catrin Young, Senior Professional Support Lawyer in our pensions team. There was certainly a lot of press speculation before the Budget. Would the Chancellor impose employer's National Insurance on pension contributions? Reduce the amount of tax-free cash members could take at retirement? Reduce the annual allowance? Or even reduce tax relief on pension contributions? Catrin, tell us - what did the Chancellor actually announce?
Catrin Young	Well, first things first, Tanja: None of the items you just mentioned featured in the Budget. But we did see the changes that had been widely predicted in relation to bringing unused defined contribution (or DC) pension pots within the scope of inheritance tax from the 6th of April 2027. To be fair, this was a pretty obvious target. Since pensions freedoms were introduced in 2015, many

	financial advisers had been promoting DC pensions as an estate planning tool, even more so since the abolition of the lifetime allowance in March 2023. However, whilst this change was widely expected, a consultation issued by HMRC on the day of the Budget suggests the proposal goes further than expected and potentially brings almost all lump sum death benefits as well as unused DC assets and dependants' annuities within the ambit of inheritance tax.
Zoe Andrews	So, let's talk first about what is clear - bringing unused DC assets into a member's estate for inheritance tax. What is the position now and how will it change from April 2027?
Catrin Young	OK, so currently, if a member dies before age 75, DC benefits can generally be passed on to dependants entirely tax-free. Even if death is after age 75, DC benefits don't form part of the member's estate for inheritance tax purposes. Income tax, though, is payable at the recipient's marginal rate on lump sums where the member was over 75 at the date of death or if the lump sum is distributed more than 2 years after the member dies. However, from the 6th of April 2027, unused DC benefits will be included in the value of a person's estate for inheritance tax purposes. Therefore, unless they are passed to a member's spouse or civil partner, inheritance tax at the rate of 40% will be applied to such amount of the member's estate as exceeds the nil-rate band. So, if you're an unmarried or single person dies with assets exceeding this threshold (generally £325,000), inheritance tax will now be payable. Furthermore, the consultation paper suggests there will be no change to the income tax position, meaning that, if the member dies aged over 75, income tax will also be payable on the balance at the recipient's marginal rate. And the obligation to pay the new inheritance tax liability will fall on pension scheme administrators which will require them to work closely with a deceased member's personal representatives so they can determine whether IHT will be payable on the member's estate and, if so, how much of the nil-rate band should be applied to the unused pension benefits and how much to the other assets in the member's estate. And the consultation launched by HMRC runs until the 22nd of January next year, and it is very much about the proposed process for collecting inheritance tax and not the substance of whether inheritance tax should be payable at all.
Tanja Velling	And what are some of the outstanding questions arising from the ongoing consultation and why has it caused some consternation in the industry?
Catrin Young	Yeah, absolutely. The consultation document says that, when a pension scheme member dies with unused funds or without having accessed all of their pension entitlements, those unused funds <u>and death benefits</u> will be treated as being part of the member's estate and may be liable to inheritance tax. It then goes on to say that the current distinction in treatment between discretionary and non-discretionary schemes will be removed, which is where the confusion has arisen. Does it cover all arrangements where the scheme trustees decide who should receive a lump sum on death? If so, potentially death in service lump sums sheltered under life assurance only trusts as well as those provided as part of an occupational DB or DC scheme could be in scope. There is also a note at the end of Annex B to the consultation paper which says, and I quote, "All life policy products purchased with pension funds or alongside them as part of a pension package

	offered by an employer are not in scope of the changes in this consultation document" – so, on one reading, this would suggest that where a scheme has insured lump sum benefits (which they often do where members die in service) those benefits will not be chargeable to tax, but self-insured benefits will be. The note also suggests that, if an individual takes out their own personal life cover (which again is usually sheltered under a discretionary trust), this could also be subject to inheritance tax, if it isn't purchased alongside a pension. I am not convinced that the Government intended to draw such a distinction, not least because the consultation confirms in more than one place that it will only apply to registered pension schemes, meaning that death benefits payable by excepted life schemes which are not registered but are often used by employers to shelter lump sums on death will not form part of the member's estate for inheritance tax purposes. I wonder if the intention is that a tax will be imposed on a death benefit that derives from the member's benefits (so a 5-year guaranteed lump sum on the death of a pensioner, for example, or a lump sum representing a refund of contributions will be subject to inheritance tax, but not where it is basically a life cover amount that the member could never have had an entitlement to). This seems to be more consistent with the stated aim of the change in the Budget to "restore the principle that pensions should not be a vehicle for the accumulation of capital sums for the purposes of inheritance, as was the case prior to the 2015 pensions reforms." It also makes more sense of excluding benefits covered by a life policy and the various statements about not using pensions for inheritance tax planning. There was no further clarification in the Finance Bill published on the 7th of November.
Zoe Andrews	But hopefully, HMRC will confirm what is intended here very soon. Catrin, whilst we have you with us, could I also ask you to cover the recent announcement HMRC has made in relation to authorised surplus payment charges?
Catrin Young	Sure. So the authorised surplus payment charge is the income tax charge payable by the trustees of a defined benefits (or DB) scheme when returning a surplus to an employer. You may recall it was reduced from 35% to 25% from the 6th of April this year. With the recent significant improvements in the funding of DB schemes, surpluses have become far more common and a question had arisen in the industry as to whether the 25% charge should be applied to the gross amount of the surplus or the amount received by the employer on the refund of surplus. So, if I give an example: if there is £100,000 of surplus left in the scheme, should the trustees pay £25,000 to HMRC and £75,000 to the employer or should the trustees pay £80,000 to the employer and £20,000 to HMRC (applying the authorised surplus payments charge only to the amount that is in fact paid to the employer)? The debate had arisen due to a lack of clarity in the drafting of the relevant section of the Finance Act 2004 which is not drafted as a withholding tax provision like those seen in other sections of the Act. Perhaps, unsurprisingly, HMRC confirmed in its 24th October newsletter that the charge should be applied to the larger gross amount. With more DB schemes considering whether to run-on and generate surplus, it is useful to have this clarified.
Zoe Andrews	Thank you, Catrin. That will give us a lot to think about. Tanja, what else has been going on in the UK?

Tanja Velling	Let's first mention one more point on the Budget. From April 2025, late payment interest will increase by 1.5 percentage points, taking the rate difference between late payment and repayment interest from 3.5 to 5 percentage points. At current base rate levels, this would mean a late payment interest rate of 8.75% from April 2025. Beyond tax disputes, late payment interest is of practical relevance, for example, in completion accounts deals where stamp duty has been paid on a wait-and-see basis (with late payment interest due, if the actual consideration and associated stamp duty charge exceed the estimate made at completion).
Zoe Andrews	Staying then with another topic that interests commercial colleagues, you may recall that, back in October 2021, the Johnson government published a consultation on the potential introduction of a corporate re-domiciliation regime which would allow a non-UK incorporated company to become UK-incorporated (and potentially vice versa). The consultation had set out high-level tax points, and these were discussed in more detail in the summary of responses published in April 2022. In December 2023, an expert panel was then appointed to further consider re-domiciliation, and this panel published its report in October. It sets out how both inward and outward re-domiciliations could work, and the current government has stated its intention to consult "in due course on a proposed regime design". Section 6 of the report covers tax. Care to highlight three points that caught your eye, Tanja?
Tanja Velling	In the April 2022 summary of responses, the Johnson government had noted tax residence as a point for further consideration. Should a company automatically become UK tax resident following an inward re-domiciliation (unless it must be treated as resident elsewhere under a double tax treaty)? Or should it become tax resident in the UK only if its central management and control is also in the UK? It is sensible that the report supports the former approach. The latter would, for tax residence purposes, have treated companies re-domiciled to the UK in the same way as companies incorporated abroad even though, for corporate law purposes, they would (post-re-domiciliation) be regarded as incorporated in the UK. The result would be two different tax residence regimes for UK-incorporated companies which would seem unnecessarily complicated. For similar reasons (namely, to avoid creating a 'two tier tax system' for UK incorporated companies), the report also states that, following an inward re-domiciliation, stamp duty and SDRT should apply in respect of the re-domiciled company's shares. Conversely, a company's shares should fall outside the scope following an outward re-domiciliation, but the report notes that this may need to be subject to a targeted anti-avoidance rule to prevent stamp duty saving schemes involving an outward re-domiciliation before a third-party share sale, followed by a movement back to the UK shortly after completion. I can see that this might be a theoretical concern, but I would have thought that, in most cases, the potential stamp duty saving is unlikely to justify the costs and risks associated with two back-to-back re-domiciliations. My third point in relation to tax in the report relates to withholding tax and UK source. The panel thought it would be helpful to clarify in guidance that a payor's inward re-domiciliation should not, in and of itself, mean that interest and other payments acquire a UK source. This should be relatively uncontroversial given that the source is determined according to a multi-factorial test with the payor's residence being only one of the factors to be taken into account.
Zoe Andrews	In other UK news, it's also worth mentioning that, following representations from the CIOT, HMRC updated the Company Taxation Manual on the meaning of "ordinary" share capital. The update

	changes the categorisation of shares with fixed rate dividend the payment of which is subject to regulatory consent. Such shares do not count as ordinary share capital. This follows an earlier update following the Upper Tribunal's decision in *Warshaw* that fixed rate preference shares (whether cumulative or not) do not count as ordinary share capital. HMRC also updated the Employment Related Securities Manual for the Supreme Court's decision in *Vermilion*. You will recall that an individual had been granted a share option by their employer. The Supreme Court decided that the option was consequently deemed to have been granted by reason of the individual's employment even though, on the facts, the reason for the grant of the option was not the individual's employment, but that the individual had agreed to the cancellation of a different share option. Now, following this excursion into older cases, should we talk about more recent ones?
Tanja Velling	Sure – although my first point is an update on cases decided back in the first half of this year! The Court of Appeal's decisions in the trio of unallowable purpose cases, *BlackRock*, *Kwik-Fit* and *JTI* are now final (although *BlackRock*, of course, also concerned transfer pricing). The Supreme Court denied permission to appeal the Court of Appeal's decisions "on the ground that the appeal does not raise an arguable point of law."
Zoe Andrews	Does this then mark the end of our run of unallowable purpose cases?
Tanja Velling	Well, you might have thought so, but no! The story continues with *Syngenta*, a new decision from the First-tier Tribunal. It all started - at least in terms of how the FTT laid out the documentary evidence – it all started with an email in early 2010, sent within the UK tax team of a Swiss-headed group. The email included a list of "UK tax projects 2010". One of these was a "debt push down" which was approved, and the UK tax team went on to manage its implementation.
Zoe Andrews	So, we have a debt push down project originated and managed by the UK tax team. What did it actually involve?
Tanja Velling	An intra-group reorganisation. Before that re-organisation, a Dutch intermediate holding company (Syngenta Alpha) held two UK sister companies, Syngenta Holdings and Syngenta Limited, and each of these had UK (and in Limited's case also non-UK) subsidiaries. The project was the "Insertion of debt into the UK to fund purchase of Syngenta Limited" by Holdings. The final transaction structure was a cash and share deal. To fund the cash element, Holdings borrowed $950 million from a Dutch group treasury company. The interest on that loan was taxed at a lower rate in the Netherlands than the rate at which it would be relieved in the UK. The resulting tax saving was calculated as around $7 million per year.
Zoe Andrews	And HMRC sought to challenge the interest deductions on that loan on the basis that its main purpose was to achieve that tax saving?

Tanja Velling	Indeed. The FTT acknowledged that the reorganisation had other benefits for the Syngenta Group (in addition to the tax saving), but these did not amount to a "purpose". For instance, the reorganisation had the benefit of unifying the UK sub-group under Holdings. But this benefit was small compared to the tax saving and was mentioned only some way down the line. In fact, the FTT thought that the evidence suggested that legal entity simplification was "being used as a "cover", to minimise any perception that the Transaction was entered into for tax purposes". This led the FTT to approach documents with caution that had been reviewed by tax advisers "with an eye to reducing the likelihood of a challenge by HMRC". Not an ideal position from the taxpayer's perspective. I discuss the FTT's reasoning around the Syngenta Group's purpose in more detail in an article to be published in the 22nd November edition of Tax Journal. For now, let's move on to the FTT's conclusion: that, from the group's perspective, the purpose of the reorganisation (and the loan) was to obtain the tax saving.
Zoe Andrews	But that's not the test. The unallowable purpose rule looks at the purpose for which a company is party to a loan through the eyes of its directors (unless the directors' decision-making was usurped which didn't' happen here). So the crucial question is: what was the purpose of Holdings' directors?
Tanja Velling	You're quite right. The group's purpose can inform the directors' purposes, though. And that's what happened here. The evidence suggested that the directors were aware that the group had a tax avoidance purpose, and they were happy to go along with the reorganisation on that basis - provided that the transaction did not risk breaching their fiduciary duties. The taxpayer had sought to argue that the directors had a separate, good purpose of acquiring Syngenta Limited as an investment, but this was not borne out by the evidence. The FTT noted that documents provided to Holdings' board emphasised risks and group tax benefit; they did "not suggest that [Holdings] may wish to acquire [Syngenta Limited] due to capital growth or the dividend income exceeding loan repayments." The directors' focus was not on Holdings making a desirable investment, but that it should play its part in the group's (tax-motivated) plans provided the acquisition of Syngenta Limited was not a bad investment. That was why the FTT ultimately concluded that the main and only purpose for Holdings entering into the loan was to obtain the tax saving. All interest deductions had to be attributed to that unallowable purpose and denied.
Zoe Andrews	I see. Was there anything positive in the decision then?
Tanja Velling	Yes. The FTT rejected HMRC's argument that a circular funds flow could indicate a tax purpose, given that groups often have treasury companies that effectively act as the group's bank so that it is unsurprising if cash flows for internal transactions begin and end with that treasury company.

	Another point worth mentioning is around evidence. During the appeal process, HMRC had applied for further disclosures. That application was not precluded by the preceding enquiry (during which HMRC could have requested the evidence). But this was relevant to assessing whether the requested disclosures are proportional. It's worth quoting the passage from the 2021 case management decision: "When considering proportionality I shall take into account the fact that there has been a six-year enquiry during which [Holdings] has co-operated fully and provided extensive information and documentation which was not seriously challenged by HMRC during the course of that enquiry; nor (save for the odd exception) during that enquiry, did HMRC ask [Holdings] for the additional documents and information which are the subject of this application." And the disclosures which the FTT directed were significantly narrower than what HMRC had requested (although this was partly due to a lack of jurisdiction which I also touch on my article).
Zoe Andrews	I wonder whether this – the hurdles to be surmounted to obtaining further evidence once the case is at the appeal stage – is part of what drives the broad requests in Schedule 36 notices that we have seen.
Tanja Velling	That's possible. But should we move on to talk about the Upper Tribunal's decision in *Gould*?
Zoe Andrews	Yes, it concerns the tax point for an interim dividend paid by a UK company. For dividends generally the tax point is when the dividend is "due and payable" and, in this respect, there is a difference between a shareholder-approved final dividend and an interim dividend approved by the board. The former is due and payable immediately (or from the date given in the shareholders' resolution). In contrast, the latter is due and payable only when paid (and could be reconsidered at any point before then). But what happens when you have an interim dividend and the shareholders aren't paid at the same time? In *Gould*, there were two shareholders whose portions of an interim dividend were paid about eight months apart. In that case, is the whole dividend due and payable when the first shareholder is paid (as contended for by HMRC)? Or is each shareholder's portion due and payable when it is paid to them (so the shareholders' payment dates and tax points would be different)? This was the position of the taxpayer. What did the Upper Tribunal make of it?
Tanja Velling	The Upper Tribunal considered that, in general, the shareholders had to be treated equally. So, from the date when the first shareholder was paid his share of the interim dividend, the other should have an enforceable debt claim against the company (and the dividend is due and payable from that date). This is, however, subject to contrary agreement and the Upper Tribunal considered that, either the company's articles had been varied informally to permit the payment of different shareholders' portions of an interim dividend at different times, or the second shareholder had waived his right to enforce the debt in a legally binding manner. Consequently, here, the second shareholder's portion of the interim dividend had not, in fact, become due and payable when the first shareholder had been paid, but eight months later when

	the second shareholder was paid. This meant that the two shareholders' personal tax planning had succeeded. Let's now move on to *Panayi* or, more accurately, *Panayi* and *Redevco* as the Upper Tribunal joined two different taxpayers' appeals, given the similarity of the issues.
Zoe Andrews	In *Panayi*, the trustees of certain settlements were replaced so that, instead of being UK tax resident, the majority of the trustees was resident in Cyprus. Why this change? The settlor who had come to the UK as a child had decided to return to Cyprus. Interestingly (in the context of recent tax policy announcements, although not strictly relevant to the decision), the settlor was actually a non-dom while he lived in the UK - the decision states that he "had never acquired a UK domicile". Anyway, that's *Panayi* - the majority of trustees of four settlements changed from UK to Cyprus tax resident. *Redevco* also concerned a change in tax residence. A company moved from the UK to the Netherlands (by virtue of relocating the effective management to the Netherlands). In both cases, HMRC issued exit tax assessments (on the basis of different provisions in the Taxation of Chargeable Gains Act 1992 that deem all assets to have been disposed of and immediately reacquired on the change of tax residence) and the taxpayers argued that these charges were contrary to EU law in the absence of an option to pay in instalments. They further argued that a conforming interpretation of the UK legislation through reading in an instalment payment regime was impermissible, and consequently, the exit tax charges had to be disapplied.
Tanja Velling	And, if, at this point, you have a sense of déjà vu, you're quite justified. A similar question had come up in *Gallaher* in the context of intra-group asset transfers from a UK company to its sisters in Switzerland and the Netherlands. The FTT declined to read an instalment payment option into the legislation and disapplied the relevant tax charge. This prompted the government to take legislative action. The Finance Act 2019 provided for an instalment payment regime in a new Schedule 3ZAA to the Taxes Management Act 1970. With hindsight (as we will come on to), that wasn't strictly necessary, but better safe than sorry, I suppose. *Gallaher* went to the Upper Tribunal which referred the case to the CJEU. In an interesting twist, the CJEU concluded that there was no infringement of EU law to start with. So, the conforming interpretation point around instalment payments became moot and was left unresolved - which takes us back to *Panayi* and *Redevco*.
Zoe Andrews	In both, *Panayi* and *Redevco*, the FTT had ended up concluding that *Gallaher* had been wrongly decided on the conforming interpretation point. The Upper Tribunal agreed that an option to pay in five equal instalments could be read into the relevant sections of the Taxes Management Act. But it also decided that, in each case, the FTT made an error of law by providing that no interest (other than in case of late payment) would be due. EU law did not require that the instalment payment option would be interest-free, so this part of the conforming interpretation went beyond what was permissible.

Tanja Velling	There's another (non-UK) case I heard about that could prove rather interesting – especially in light of the results of the US election last week. US trade organisations are challenging the Belgian legislation implementing the UTPR before the Belgian constitutional court. As I understand it, the challenge is based on the Belgian constitution as well as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union and may well result in a reference to the CJEU. So, one to watch, and I suspect it isn't the last challenge of national legislation implementing Pillar Two, and in particular the UTPR. In mid-September, Republican members of Congress wrote to the OECD Secretary-General to express their objections to the UTPR and support for the Belgian lawsuit. These objections are likely to grow louder, but what this could mean in practice will be pure speculation at this point. The US could seek to argue that the UTPR is inconsistent with double tax treaties. It is also not beyond the realms of possibility that the US could seek to target countries that implement the UTPR with retaliatory measures. Previously, Republicans had proposed legislation to increase US taxes on individuals and companies resident in countries which had implemented the UTPR. There will also be the question of Pillar One and the expired moratorium on US trade sanctions in retaliation for digital services taxes…
Zoe Andrews	So, there's lots of uncertainty ahead for international tax. Returning, however, to something more concrete, the European Commission published a proposal for DAC9. This amendment to the Directive on Administrative Cooperation would establish a way for multinationals to file one Pillar Two return for their EU entities, rather than having to file separate returns for each entity in its jurisdiction which is the current default under the Pillar Two Directive. And what's there to look out for?
Tanja Velling	As Catrin discussed, HMRC have confirmed in their 24th October newsletter that the authorised surplus payment charge should be applied to the larger gross amount. We are still waiting for the change to the Pensions Tax Manual to reflect this. Another Supreme Court decision in a tax case is pending. *Royal Bank of Canada* on the taxation of oil royalties received by an overseas bank was heard by the Supreme Court on the 4th and 5th of November.
Zoe Andrews	And that leaves me to thank you for listening. If you have any questions, please contact Catrin, 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

CONTACTS

Zoe Andrews
PSL Counsel & HEAD OF TAX KNOWLEDGE
T: +44 (0)20 7090 5017
E: zoe.andrews@slaughterandmay.com

Tanja Velling
PSL Counsel
T: +44 (0)20 7090 3254
E: tanja.velling@slaughterandmay.com

Catrin Young
Senior Professional Support Lawyer
T: +44 (0)20 7090 3750
E: catrin.young@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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