Slaughter and May Podcast
Tax news highlights: December 2020

Zoe Andrews	Welcome to the December 2020 edition of our tax news highlights podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge.
Tanja Velling	And I am Tanja Velling, Senior Professional Support Lawyer in the Tax department. In this special end of year edition, Zoe and I will look back over exciting developments, including on international tax reform, some key cases and, of course, the impact of COVID-19. This podcast was recorded on the 15th of December and reflects the law and guidance on that date. Zoe, do you want to start with an overview of international tax reform?
Zoe Andrews	Yes, the ambitious deadline for reaching consensus on changes to the international tax rules by the end of 2020 was sadly missed, and the UK joined the growing number of countries imposing its own digital services tax. Although the UK is keen to agree a reform of the international tax rules on a multilateral basis, the Government enacted legislation in Finance Act 2020 for a revenue-based Digital Services Tax or DST from April 2020 as an interim measure. Where threshold requirements are met, the DST is imposed at a rate of 2% on the revenues of search engines, social media platforms and online marketplaces which derive value from UK users. Associated online advertising business is also in scope, if operated on an online platform that facilitates the placing of online advertising and derives significant benefit from its connection with the social media platform, search engine or online marketplace. The US has launched section 301 investigations into a number of planned digital taxes, including the UK's – to see whether they discriminate against US companies, and if they do the US intends to impose additional tariffs. Although considerable progress was made in 2020 on the OECD's two pillars of international tax reform, calling the documents published in October "blueprints" is more optimistic thinking than a true reflection of their content because there are still significant political and technical issues to be resolved. I've watched a lot of webinars on this topic recently and my favourite analogy was from a US panellist, Bob Stack, who said if these documents were blueprints for a house, we still don't know where to put the windows and doors. Undoubtedly COVID and the US have thrown spanners in the works this year but even without these two factors consensus by the end of the year was still unrealistic. The consultation on the blueprints closed on 14 December and there will be a public consultation in January. Agreement by mid-2021 will be hard to achieve and will depend in part on the effect of the change in the US administration and its approach.
Tanja Velling	I am very pleased that I now get to speak about my favourite topic: DAC6, the EU directive which requires that information in respect of certain cross-border arrangements is reported to tax authorities. You might ask if it is an EU rule, is it still relevant in the UK? It is, for several reasons – even if the UK had not implemented DAC6, transactions involving the UK could be reportable in an EU country. But the UK was required to implement it and did so in January 2020. And the Government has indicated that it intends to continue to apply DAC6 even after the end of the transition period.

	So, what happened then during 2020? A short, one-word answer would be COVID-19. The time limits for the provision of information under DAC6 were due to start running on the 1st of July 2020. But, once lockdowns had started, the rumours began that the reporting time limits might be extended or postponed. There followed a period of uncertainty – will they or won't they postpone the reporting? In the end, the EU left the decision up to each Member State, the UK counting as a Member State for these purposes. The directive was amended to afford Member States the option to postpone the start of all reporting deadlines until the 1st of January 2021. Except for Germany, Austria and Finland, the Member States and the UK made use of this option. So, in most cases, DAC6 reporting time limits will now start running on the 1st of January 2021. From the UK perspective, this creates a somewhat awkward situation. The implementing regulations piggy-back off the directive, apparently assuming that the UK would continue to count as a Member State. But now reporting won't start until after the end of the transition period when the UK will no longer count as a Member State. We are expecting some clarification – most likely through amending legislation – from HMRC. Now, the deferral of the DAC6 reporting time limits was only one small aspect of the far-reaching consequences of COVID-19. Zoe, what else has been happening?
Zoe Andrews	Well across the world, unprecedented economic support has been provided to businesses to lessen the fall-out from lockdowns imposed to limit the spread of the pandemic. In the UK, such support included various government-backed loan schemes, the Coronavirus Job Retention Scheme (which our colleagues have covered in previous Slaughter and May podcasts) and – what must have been a national favourite – the Eat-out-to-help-out scheme. I don't think I have ever seen so many pictures of a Chancellor pop up in pubs and restaurants. Even though the scheme did not cover alcoholic beverages, some pubs were quick to advertise by encouraging customers to have a pint on Chancellor Rishi Sunak.
Tanja Velling	HMRC administered a number of the support programmes and it is not surprising that the 10 year strategy published by HMRC in July 2020 capitalises on its central role in the Government's emergency response. If I may quote: "HMRC's ability to deliver payments…rapidly has been crucial to the government's response. An effective modernisation programme for tax administration provides the opportunity significantly to broaden, deepen and reinforce that emergency capability…" In this way, COVID-19 may have a lasting impact on the role and structure of HMRC, and accelerate the move to a fully digital administration. But that isn't the only impact on the UK tax system, is it, Zoe?
Zoe Andrews	Indeed, the support measures have left a hole in the country's public finances and increasing attention is turning to the question of how this hole will be plugged? So far, the Treasury has maintained that the triple lock, the Conservative party manifesto pledge not to raise income tax, national insurance contributions or VAT, still stands. Which means that additional revenues would have to come from another source. Options hotly debated in the press include increasing capital gains tax rates. Rumours in this respect were fuelled by an Office of Tax Simplification report that made recommendations on points to consider, if the Government chooses to increase capital gains tax rates.

	It has also been suggested that the Treasury might look at corporation tax rate increases – you will recall that, instead of decreasing the corporation tax rate to 17% as planned, it was maintained at 19%. And most recently, it has even been suggested, by a Wealth Tax Commission, formed earlier this year, that the Government could introduce a one-off wealth tax. A wealth tax would of course take cash out of people's pockets at a time when we need them to spend – Treasury ministers seem to be emphasising the need to get growth back in the economy to pay off COVID debt. At current low interest rates and with the pound more or less holding its ground, I'd expect them to follow that course in the short term. So, a wealth tax seems particularly unlikely and the other two proposals could hurt inward investment and discourage entrepreneurship at a time when the economy is likely to still be in a somewhat fragile state. For now, it looks like we will have to wait until the March Budget to find out. I wonder whether we would then also find out whether the Government is planning to hold an autumn Budget in 2021 so as to return to the "normal" Budget timetable.
Tanja Velling	And, in some ways, it might make sense to have two fiscal events next year, being the first year when the UK will have fully left the EU. It is not inconceivable that the Government may wish to announce further tax policy changes in November 2021 following an initial period of adjustment after the end of the transition period. The Brexit transition process continued to cause a lot of uncertainty during 2020. Will there be a deal on the future relationship between the UK and the EU? How will the Norther Ireland Protocol be implemented? Will the UK pass legislation that could put it in breach of international law? At the time of recording, the 13th December deadline for a future relationship deal has just been missed. But it was announced that talks would continue. So, for now, uncertainty in respect of the first question persists. Earlier this month, agreement was, however, reached on the implementation of the Northern Ireland Protocol in the EU-UK Joint Committee that was established pursuant to the Withdrawal Agreement. The UK Government also agreed to drop those clauses from its Internal Market Bill that could have put the UK in breach of international law. There is still a flurry of activity; further guidance is being published by the UK and EU and amending legislation enacted, in particular by the UK. At the moment the Taxation (Post-Transition Period) Bill is moving through the UK Parliament. It is likely that all these changes will take a while to bed down – in particular given the speed with which legislation is currently being made, it is likely that further tweaks will be required. The UK Government may also choose to change rules which were previously mandated by EU law. We will have to wait and see what 2021 brings. But for now, we shall move on to look at three 2020 case law highlights: Apple, Newey and Fowler. Zoe, do you want to start with Apple?
Zoe Andrews	Yes, thank you Tanja. It is difficult to think of a tax dispute that has captured the headlines, and the attention of the world's media, more than this case. Not just because the headline numbers are eye-watering - €13bn of tax plus interest but also because it is seen as raising the (very) hot topic of how a multinational group like Apple should be taxed in a modern, digital world.

	The Apple dispute is about the fact that two Apple companies incorporated in Ireland but not Irish tax resident were generating tens of billions of euros in profit each year but paying an effective tax rate of 1% in 2003, declining to 0.005% by 2014. Each company did have an Irish branch, but only profits attributable to the Irish branch were subject to Irish tax. Apple had obtained rulings from the Irish tax authority agreeing how much of their profits should be treated as attributable to the Irish branches, and therefore subject to Irish tax, and how much should be attributable to their "head offices" – i.e. not the branches – and therefore outside the scope of Irish taxation. In its judgement in Apple, the General Court made clear that the mere fact that a ruling may be light on information or methodology does not make it State aid. The Commission has to show that taxable profits went untaxed because of the ruling. This should give some piece of mind to taxpayers who relied on rulings that are less detailed than they could have been. As expected, the Commission has appealed to the Court of Justice against the decision of the General Court.
Tanja Velling	And now, moving on to Newey VAT case. After 10 years, a referral to the CJEU and going all the way up to the Supreme Court and back to the First Tier Tribunal, the First Tier Tribunal has reconfirmed its original decision that the offshore VAT-saving scheme used in Newey is not an abuse of law. The First Tier Tribunal applied the test set out by the CJEU of 'whether the arrangements reflect economic and commercial reality, or instead constitute a wholly artificial arrangement which does not genuinely reflect economic reality. The tribunal looked beyond the contractual provisions and concluded that the business relationships entered into between Mr Newey, Alabaster, the Jersey advertising company and third-party lenders did reflect economic and commercial reality, and they did not constitute a wholly artificial arrangement. But will abuse of law survive the end of the Brexit transition period? Abuse of law (or abuse of rights) is an EU law principle that is expressly preserved in UK law after the end of transition period by virtue of s 42(4) of the Taxation (Cross-border Trade) Act 2018. So cases on this will continue to be relevant. But from next year there would be nothing to stop the UK amending this rule if it so desires.
Zoe Andrews	And the third case we would like to look at is the Supreme Court case of Fowler, in this case, an important case on tax treaty interpretation and the limits of deeming provisions, the Supreme Court determined that the South African resident diver could not rely on a deeming provision under UK legislation to escape UK tax under the UK/South Africa tax treaty on his income from activities carried out in UK waters. The Supreme Court, by unanimous judgment, ruled that the income tax deeming provision (in ITTOIA 2005 s 15) does not extend to the interpretation of a double tax treaty with the result that the diver was taxable in the UK. This case shows it is important to bear in mind that a tax treaty is a bilateral, negotiated text. 'To permit, as the Court of Appeal did, the deeming provision to be applied to the treaty, would result in the UK ceding its taxing rights to the diving income to South Africa, rather than those rights remaining with the UK as negotiated under the treaty. The Supreme Court's decision is a good result for HMRC and a useful addition to the cases on treaty interpretation.

	Looking forward, a few cases have caught my eye as ones to watch out for in 2021: the Belgian excess profits tax case, Target Group Limited and Panayi.
Tanja Velling	Starting with the Belgian excess profits case. What happened? In 2016 the Commission gave a ruling that the Belgian excess profits tax regime is unlawful state aid and ordered Belgium to recover around EUR 700m in unpaid taxes from the multinationals that benefited from the regime. The General Court held that the Commission had erroneously considered that the Belgian excess tax profit system at issue constituted an aid scheme and annulled the Commission's decision. The Commission has appealed to the Court of Justice and in her recent opinion, Advocate General Kokott recommends that the Court of Justice should annul the decision of the General Court. So reinstating the General's opinion. So will the Court of Justice follow the Advocate General? If the Advocate General's opinion is upheld by the Court, it will continue the trend where the General Court is rather more taxpayer-friendly in State aid cases than the CJEU itself.
Zoe Andrews	And now looking at the Target Group Limited case which is about whether loan administration services are debt collection services – the Court of Appeal scheduled to hear the appeal in May 2021 The Upper Tribunal (UT) reached the same conclusion as the First-tier Tribunal that the loan administration services supplied by Target Group Ltd to a bank were standard rated. But whereas the First-tier Tribunal found that the services supplied by Target Group Ltd to the bank were transactions concerning payments or transfers within article 135(1)(d) of the Principal VAT Directive but were excluded from the exemption as debt collection, the UT finds that the services were not within article 135(1)(d) in the first place. This case illustrates the difficulty for a third party providing outsourced functions to a bank to meet the strict requirements for VAT exemption.
Tanja Velling	And finally we have the Panayi case in relation to exit charges. The Upper Tribunal is scheduled to hear the appeal in October 2021. The First-tier Tribunal decided conforming construction of UK legislation to make it compatible with EU law is possible even where the Tribunal has to choose between different potential deferral methods, in contrast with the approach previously taken by a differently constituted tribunal in the Gallaher case.
19:26-19:37	The Upper Tribunal were scheduled to hear in the Gallaher case scheduled for October 2020 so it will be interesting to see whether the approach taken by the Upper Tribunal in both cases is aligned.
Zoe Andrews	And in addition to these cases, we already alluded to some other developments to watch out for. On international tax reform, the OECD is working to a tight deadline of mid-2021, and the stakes are high as countries may increasingly "go it alone". The European Commission, for one, has indicated that they want to be ready with a plan B for the EU, if there is no agreement. On a national level, the question of fiscal consolidation looms large, and we await what the March Budget may bring.

	We may also see further Brexit-related changes – to make existing and amending legislation work (the DAC6 implementing legislation being a prime candidate here), or to make substantive changes to depart from rules previously mandated by EU law.
Tanja Velling	That leaves me to wish you a good start to 2021 and thank you for listening. If you have any questions, please contact Zoe 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. You can also follow us on Twitter - @SlaughterMayTax