Slaughter and May Podcast
Tax News Highlights: February 2023

Zoe Andrews **0.02-0.11**	Welcome to the February 2023 edition of our tax news highlights podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge.
Tanja Velling **00:04-00:22**	And I am Tanja Velling, Senior Professional Support Lawyer in the Tax department. In this podcast, we will cover the Upper Tribunal decisions in *Harrison* and *Morrisons*, HMRC's transfer pricing and DPT statistics for 2021-2022 and HMRC's report on its Financial Institution Notice powers.
Tanja Velling **00:40-01:08**	We will also provide an update on international tax reform and discuss HM Treasury's response to its online sales tax consultation and the OECD's new Manual on handling multilateral MAPs and APAs. This podcast was recorded on the 14th of February 2023 – clearly the best way to spend Valentine's Day – and reflects the law and guidance on that date. We don't have many cases to report this month but *Harrison* is worth a mention for the Monty Python reference alone.
Zoe Andrews **1.17-2.18**	Indeed. But first I will just put this in context. Back in May 2021, in a case called *Tooth*, the Supreme Court brought an end to the doctrine of "staleness" of a discovery. The argument was that HMRC should be prevented from bringing a discovery assessment if it sat on the information discovered for too long before making an assessment so that the "discovery" went "stale". The Supreme Court had set out its comprehensive reasoning why *Charlton*, which was the basis for the decision by the Court of Appeal in *Tooth* that staleness was a doctrine that could prevent a discovery assessment being valid, was wrongly decided on this issue. But as the Supreme Court decided the case on another ground, the comments on staleness were *obiter*. In the case of *Harrison*, the taxpayer argued that the Upper Tribunal should ignore the Supreme Court in *Tooth* because what it said about staleness was *obiter* and instead be bound by the Court of Appeal's decision that staleness did exist as that was the *ratio* of the decision.
Tanja Velling **01:12-01:19**	So the argument was, basically, that *ratio* of a lower court trumps *obiter* of a higher court?

Zoe Andrews **2.25-2.30**	That's right – but the Upper Tribunal was rightly having none of this. And here's the quote:
Zoe Andrews **2.38-2.55**	"We do not accept that, notwithstanding *Tooth* SC, the doctrine of staleness is, like Monty Python's parrot, "not dead, only sleeping". It is deceased. Given our decision, we do not need to, and do not, decide whether on the facts the discovery in this case would have been stale."
Tanja Velling **01:25-02:30**	I also enjoyed the *Morrisons* case on the classification of Nakd and Organix bars for VAT purposes. HMRC had denied Morrisons' application for a VAT refund on the basis that, as the bars were "confectionary", their supply was standard-rated. The First-tier Tribunal had sided with HMRC and Morrisons appealed, arguing that the FTT had wrongly treated the following two factors as irrelevant to the question whether the bars were confectionary: their healthiness and the absence of ingredients, such as cane sugar, butter and flour, associated with traditional confectionary. The VAT-classification of Nakd and Organix bars may be a somewhat niche issue, but the case is of wider interest for its discussion of the threshold for challenging the FTT's conclusion in respect of the application of a multi-factorial test. In addition to VAT classifications, multi-factorial tests are used to determine, for example, the source of interest, whether an activity amounts to a trade or whether a person should be regarded as an employee. So, this case could have a wide impact. What did the UT say about multi-factorial tests?
Zoe Andrews **4.02-4.46**	In order to set aside the FTT's decision, the UT would have to find an error of law. But even where an error of law is found, a decision is not automatically set aside; this is a matter for the UT's discretion, and where multi-factorial tests are concerned, there is a need for appellate caution. Due deference must be accorded to the FTT's role in carrying out the multi-factorial evaluation. But this appellate caution really relates to the weighing of different factors and matters of degree. The situation where the FTT has taken into account an irrelevant factor or failed to take into account a relevant factor is rather different. Taking into account the wrong factors is itself an error of law.
Tanja Velling **02:43-03:19**	The next question is then whether this error is sufficiently material to set aside the decision and the materiality threshold in these circumstances is whether the FTT might have reached a different decision had it taken into account the correct factors – not whether it would have reached a different conclusion, as HMRC had argued. This is clearly good news for taxpayers looking to challenge a first instance decision – although succeeding in such a challenge may not necessarily lead to an immediate resolution of the dispute. In this case, the UT did not

	remake the FTT's decision, but referred it back to a differently constituted FTT.
Zoe Andrews **5.23-6.13**	And now for some statistics on transfer pricing and diverted profits tax (DPT) for 2021-2022. The good news for taxpayers is that transfer pricing enquiries (including real-time interventions) settled within the year have increased by 51 to 175 from the previous year and the average age of settled enquiries has dropped by 2 months to 34 months. This is despite the fall in the number of staff working on international issues involving MNEs. It's not such good news for taxpayers requesting Advance Pricing Agreements (APAs), however, as the number of applications made has increased since the previous year but the number of APAs agreed during the year has gone down and the average time to reach agreement is now 58.3 months – nearly 3 months longer than the previous year.
Tanja Velling **03:28-03:40**	Advance Thin Capitalisation Agreements (ATCAs) tend to still be agreed more quickly than APAs, but their number has dropped more sharply and the time taken to reach agreement has increased significantly.
Tanja Velling **03:45-04:26**	In 2020-21, 23 ATCAs were agreed and the average time taken to reach agreement was 28.1 months. For 2021-2022, the numbers were 7 and 44 months. The number of ATCAs in force also declined from 97 to 44. HMRC note that it is possible that, following the introduction of the corporate interest restriction, fewer groups apply for ATCAs as interest deductions may be restricted to lower amounts than would otherwise be permitted under the arm's length principle. For taxpayers who still wish to agree an ATCA, the long lead-in times are, however, bad news. ATCAs are an area where long delays are unwelcome as interest costs tot up.
Zoe Andrews **7.13-7.46**	A gold star to HMRC for the mutual agreement procedure (MAP) statistics which for these purposes cover transfer pricing and permanent establishment profit attribution issues only and not any other MAP cases. These show the number of MAP cases resolved in the year more than doubled the previous year and the average time to resolve cases has decreased to 21.1 months from 34.4 months. HMRC clearly has its eye on the prestigious OECD MAP awards and being able to resolve international disputes comparatively quickly could enhance the UK's attractiveness for inward investment!
Tanja Velling **05:21-06:14**	The Profit Diversion Compliance Facility (PDCF) was launched in 2019 securing over £516m additional revenue from resolution proposals and changes in taxpayer behaviour. HMRC reports that the PDCF is proving to be very successful – around two-thirds of the large businesses targeted decided to use the facility to bring their tax affairs up to date quickly and

	efficiently. HMRC is reviewing how the PDCF can be expanded and used to help address other areas of tax risk. And finally, DPT. According to the report, over £8 billion in tax has been secured since DPT was introduced in 2015 and a further £2.4 billion of tax is under consideration as at the end of March 2022 in around 100 reviews into multinationals with arrangements to divert profits (including those who have registered under the PDCF).
Zoe Andrews **9.45-10.18**	HMRC's report on the Financial Institution Notice announces that HMRC have moved closer towards meeting the OECD's minimum standard for the timely response to another jurisdiction's request for information. FINs were introduced in the Finance Act 2021. They enable HMRC to request information from a financial institution to check a person's tax position or for the purpose of collecting a tax debt without prior approval from a tribunal (as would be required in order to request information from another third party).
Zoe Andrews **10.34-10.48**	The report notes that, between the start of July 2021 and the end of March 2022, 355 FINs were issued, 39.7% of which were issued for international information requests.
Zoe Andrews **11.12-11.48**	As a result, the average time taken by HMRC to respond to the relevant international requests went down to 197 days – a significantly shorter period than the 365 days it took on average in 2018 when the UK was reviewed by the OECD's Global Forum on Transparency and Exchange. During the report period, no complaints were received from taxpayers or financial institutions in respect of the FINs issued. It appears that the financial institutions' concern that they would be inundated with onerous requests did not materialise.
Tanja Velling **06:48-07:33**	There are two other interesting points in the report. Can FINs be used to obtain taxpayer location data, meaning information on where the taxpayer was when they accessed their online or mobile banking account? The report confirms that, following discussion with a representative body, "HMRC has decided not to use the FIN to obtain this information". The representative body also raised the question whether FINs could or should be used to obtain information on a financial institution's employees or contractors as this would put a financial institution in a position different from other employers. I have a lot of sympathy for this point, but the report confirms that "HMRC's view is that the legislation allows a FIN to be used for this purpose where all relevant statutory conditions and safeguards are satisfied."
Zoe Andrews	International tax reform makes it onto our podcast yet again and is likely to be a frequent visitor this year as the activity of the OECD and Inclusive Framework intensifies in the run up to the commencement of the global

13.18-13.41	minimum tax (or GloBE) rules next year. Since our last podcast, the OECD presented the findings of their impact assessment at a webinar. The impact assessment report itself will follow in the coming months.
Zoe Andrews **14.46-14.59**	We have also had the first tranche of agreed administrative guidance (published on the 2nd of February) on the GloBE rules which will eventually make its way into revised Commentary on the Model Rules. So tell us about the impact assessment.
Tanja Velling **07:54-08:47**	The impact assessment showed significantly higher revenues are expected from international tax reform than shown by the OECD's 2020 assessment. The OECD explained this was the result of more accurate and reliable data sets (drawing from CBCR reports and, in respect of Amount A of Pillar One, from the publicly available financial accounts of the particular MNE groups in scope of Amount A) and taking into account design changes of the rules agreed since the 2020 assessment. Pillar One is now estimated to bring annual global tax revenue gains of between USD 13-36 billion, and more of that will go to developing countries because of design changes. This is a lot more impressive (if it ever happens!) than the USD 5-12 billion which the OECD estimated in their 2020 impact assessment which prompted commentators to question whether the complexity was really worth it.
Tanja Velling **10:18-11:06**	Pillar Two is the really big revenue raiser, though, estimated to result in annual global revenue gains of around USD 220 billion (up from USD 150 billion in the 2020 impact assessment). It may not be as high as this in 2024, however, as the data was taken from 2018 and so does not take into account the impact of Covid-19, the war in Ukraine, the 2022 global increase in inflation and the ongoing implementation of some aspects of the BEPS measures (and resulting behavioural changes) and the US Tax Cuts and Jobs Act. We don't have the time for a deep dive into the administrative guidance but we will mention a few significant points that have been agreed. So one question everyone was waiting to get the answer to is how is US GILTI going to be treated?
Zoe Andrews **19.07-19.21**	Initially, it was hoped that changes would be made to GILTI to align it with the GloBE rules but it was not possible to get those changes passed in the US and so the possibility of GILTI being treated as equivalent to an income inclusion rule has, for now, gone away.
Zoe Andrews **19.27-20.24**	Instead, it has been agreed that GILTI will be treated as a CFC tax regime (and so tax under GILTI will be included in the covered taxes part of the jurisdictional effective tax rate (ETR) calculation). However, as GILTI is calculated on a blend of income/losses and/or creditable taxes of multiple CFCs, it is too difficult to trace the CFC tax to a

	specific constituent entity, as the GloBE rules require. The administrative guidance deals with this by providing for a time-limited simple allocation method for GILTI and other blended CFC tax regimes which will apply to financial years ending on or before the 30th of June 2027. The IF will then assess whether to allow the special method to continue after that period. So we know where we stand with GILTI but what does the guidance say about the US Corporate Alternative Minimum Tax (CAMT)?
Tanja Velling **11:21-11:48**	The guidance does not mention CAMT by name but it is obvious that it cannot be a Qualified Domestic Minimum Top-up Tax (QDMTT) because it is too different from the GloBE minimum tax (it even describes itself as an "alternative"). Hopefully, we will get confirmation in later guidance on whether it is a covered tax and if so, whether there will be a special allocation method for it, too. Do you think that a QDMTT safe harbour will be a game changer?
Zoe Andrews **20.52-21.50**	The QDMTT safe harbour (to follow in later guidance) will provide compliance simplifications for MNE groups operating in a jurisdiction that has adopted a QDMTT that meets certain conditions. One such simplification is exempting the MNE group from the requirement to perform additional GloBE calculations in respect of constituent entities located in a safe harbour jurisdiction. This will be a game changer (assuming enough QDMTTs meet the conditions which are to be developed in future work) as it would let the QDMTTs do all the heavy lifting rather than the GloBE rules themselves in order to achieve the 15% global minimum tax. This advantage is in addition to the benefit of enabling the QDMTT jurisdiction to keep tax revenue that would otherwise be picked up by another jurisdiction. Some discrepancies between domestic tax bases and the GloBE tax base have been addressed in the guidance, haven't they?
Tanja Velling **11:56-12:20**	Yes. The UK consultation on the implementation of the GloBE rules raised a number of scenarios where amounts would be brought into account for the calculation of the jurisdictional ETR because they are shown as income in the accounts even though for tax purposes they are excluded or disregarded and so untaxed. This would have the effect of lowering the jurisdictional ETR and in some cases would result in a top-up tax being due.
Tanja Velling **12:34-12:45**	There are several "tweaks" to the rules which look as if they have resulted from UK representations, but don't single out the UK by name, so equivalent rules in other jurisdictions will similarly benefit.
Tanja Velling **13:49-14:47**	Take for example the UK's corporate rescue debt release rules and the UK's rules on net investment hedges. Under the GloBE Rules, significant top-up tax liabilities could arise where a debtor has a debt released and the resulting accounting income is not taxed under the domestic legislation. In the corporate rescue context, imposing a top-up tax on the release of debt

	in this way would defeat the purpose of the domestic tax rule and impose a tax burden on companies already in financial distress and so the guidance provides that, in certain circumstances (including those which mirror the conditions for the UK's corporate rescue rules), an election can be made to exclude the debt release from the GloBE tax base. There is no provision for the creditor in the first tranche of guidance, but the IF will consider whether further guidance in relation to the creditor is necessary. Debt releases outside of the corporate rescue context will not be excluded from the GloBE tax base so in-scope groups should look to tidy up any intra-group loans before the rules commence.
Zoe Andrews **26.12-26.38**	The UK's Disregard Rules exempt forex gains and losses from transactions that hedge the currency risk associated with certain net investments in foreign operations and it is welcome to see that the guidance provides that an MNE Group may elect to treat gains or losses on a net investment hedge as excluded from the GloBE calculation. This will prevent such hedges from distorting the ETR and will align the treatment of the hedge with the treatment of the equity investment it is hedging.
Zoe Andrews **27.10-27.38**	There are also a number of provisions in the guidance beneficial to insurance companies such as treating Restricted Tier 1 Capital (which insurers are required to issue under regulatory requirements) as debt for GloBE purposes in the same way as Additional Tier One Capital issued by banks for regulatory reason is treated as debt. While we're on the subject of new taxes, what is the latest on the UK's Online Sales Tax (or OST)?
Tanja Velling **15:25-15:59**	It was announced in the Autumn Statement that the government has decided not to proceed with an OST but that there will be a number of reforms to the business rates system responding to key requests from business such as revaluation of the tax base and a £13.6 billion support package over the next 5 years. In the future, more frequent revaluations will make the system fairer and more responsive to changes in the commercial property market. The Treasury has now published the response to the consultation on the OST which explains, in more detail than given at the Autumn Statement, why there will not be an OST.
Tanja Velling **16:03-16:26**	In brief, such a tax was too difficult to design (how do you even define taxable revenue from online sales?) and it would not achieve its intended purpose. The £1 billion a year it was estimated to raise would not be sufficient to replace the business rates system or to fund the scale of cuts to business rates which stakeholders had called for and there was no support for an OST as a standalone policy.

Tanja Velling **17:03-17:29**	One of the reasons for considering an OST in the first place was to create a more level playing field between in-store and online retail as the former typically pays higher business rates than the latter. According to the response document, the business rates revaluation and relief package will address this imbalance with total business rates paid by the retail sector expected to fall by 20% and rates paid by large distribution warehouses expected to rise by 27%.
Zoe Andrews **30.22-31.05**	Going back to the OECD, back in 2019, the Forum on Tax Administration decided that, in order to improve tax certainty, the wider use of multilateral Mutual Agreement Procedures and Advance Pricing Agreements should be explored. The OECD then worked with a focus group of 19 jurisdictions, including the UK, to produce a new Manual on the Handling of Multilateral MAPs and APAs which was published at the start of February. The Manual covers the legal basis and procedure for handling multilateral cases. Multilateral cases generally develop out of bilateral discussions where the two tax authorities agree that the case cannot be fully resolved without the involvement of a third country.
Zoe Andrews **31.10-31.57**	Both multilateral MAPs and APAs would have to derive their legal basis from the relevant treaties, and more specifically their equivalent to Article 25 of the OECD Model Convention. From a taxpayer perspective, there can be one complicating factor here. Some jurisdictions take the view that, where the taxpayer has filed a MAP request, the case has to be considered under the first two limbs of this Article which may mean that the taxpayer would have to file MAP requests under all relevant treaties. Other jurisdictions take a more flexible approach, deriving authority for the involvement of additional jurisdictions under the third limb of Article 25 such that the taxpayer would not have to file additional requests. The Manual encourages jurisdictions to make clear in their MAP guidance which view they subscribe to.
Tanja Velling **17:42-18:27**	On receipt of a multilateral MAP or APA request, the competent authority should notify the other relevant jurisdictions. Once the multilateral stage is initiated, the Manual notes that there are different possible approaches. One option – which is likely to be preferable in most cases – is a multilateral approach of discussions between all jurisdictions concerned with the aim of reaching one multilateral agreement. The alternative would be a bilateral approach where discussions remain between the competent authorities under each relevant treaty with a view to reaching a number of bilateral agreements but in a coordinated fashion. Such coordination might be achieved through an observer competent authority with access to all documents and oversight of all discussions. But what happens if the authorities cannot reach agreement?

Zoe Andrews **32.43-33.24**	In relation to MAP cases, arbitration could be the answer, or at least part of it. In particular following the adoption of the MLI, an increasing number of treaties allows the taxpayer to request arbitration where the case is not resolved within a certain period, commonly two years, with an option for the competent authorities to extend this by agreement. Two years is likely to be a rather short timeframe in the context of multilateral MAP cases, so the Manual suggests that, where possible, the authorities should agree to extend this to 36 months. Alternatively, where treaties don't include the option to extend the period by agreement, the Manual suggests that jurisdictions may "consider revisiting their treaty provisions".
Zoe Andrews **33.31-33.41**	The ideal timeline for a typical multilateral case set out in the Manual also envisages mutual agreement between the competent authorities being reached 36 months after the MAP request.
Tanja Velling **18:34-18:51**	In addition to this timing point, from the taxpayer's perspective, arbitration will only be a complete answer if all relevant treaties contain arbitration provisions in which case it may be possible to arrange a multilateral arbitration. Where only some contain such provisions, arbitration would likely yield only a partial resolution.
Zoe Andrews **34.01-34.44**	Looking ahead to next month, we have the Budget on the 15th of March and the Spring Finance Bill is expected to be introduced shortly thereafter. Based on prior announcements, provisions of interest in this Bill include the introduction of the multi-national top-up tax and QDMTT and of the new transfer pricing documentation requirement, R&D tax relief changes, amendments to the qualifying asset holding companies regime, and changes to double taxation relief claims. There may also be other measures announced at the Budget for inclusion in the Bill. It is rare to have a fiscal event without the announcement of a new (temporary) tax these days so let's see what the government comes up with next. The Chancellor has already stated there will be no tax cuts!
Tanja Velling **18:57-19:16**	And that leaves me to 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. And you can also follow us on Twitter – @SlaughterMayTax.