SLAUGHTER AND MAY/

TAX NEWS

PODCAST

January 2025

Zoe Andrews	Welcome to the January 2025 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 discuss the First-tier Tribunal's decisions in *Blackfriars Hotel* and *Grint*, the Court of Appeal's decision in *Refinitiv*, and the Supreme Court's decision in *Cobalt Data Centre*, and for the discussion of this last decision, we will be joined by Kasim Mehmood, one of our tax associates. We will also cover a change to HMRC's Capital Gains Manual in relation to the reorganisation rules, discuss PISCES, a proposed new type of regulated trading platform for private shares, and touch on what 2025 might bring in terms of UK, EU and US tax developments. The podcast was recorded on the 7th of January 2025 and reflects the law and guidance on that date. Let's start with the lower-tier decisions and work our way up to the Supreme Court.
Zoe Andrews	The First-tier Tribunal's decision in *Blackfriars Hotel* concerns loss-refreshing. Carried-forward loan relationship deficits were trapped in a holding company. So, the holding company made a loan to its subsidiary, with the intention that the subsidiary would get interest deductions while the holding company would use the carried-forward deficits to shelter the interest income.
Tanja Velling	That sounds familiar - didn't we encounter a similar scenario in *Kwik-Fit*?
Zoe Andrews	Quite right. But in *Kwik-Fit*, the borrowers were denied tax deductions for the interest under the unallowable purpose rule in section 441 of the Corporation Tax Act 2009. That point was not argued in *Blackfriars Hotel*. Instead, HMRC relied on section 730G of the Corporation Tax Act 2010. Section 730G provides that, if certain conditions are met, "relevant carried-forward losses" cannot be used against "relevant profits". The carried-forward deficits were "relevant carried-forward losses" for this purpose. The taxpayer had also conceded that the new loan was an arrangement with a main purpose of securing a relevant tax advantage where the tax benefits exceeded the economic benefits.
Tanja Velling	That's unusual that the tax purpose was conceded. What then was left to decide?
Zoe Andrews	The dispute was broadly about what "relevant profits" were. The taxpayer's arguments included that "relevant profits" meant all of the company's profits for an accounting period. So, if the

	company's profits were to any extent derived from something other than the tax-driven arrangements, section 730G could not apply.
Tanja Velling	And the First-tier Tribunal disagreed?
Zoe Andrews	Yes, which is probably unsurprising. It considered that "relevant profits" were so much of the company's total profits as arose "as a result of" the tax-driven arrangements. In this context, "as a result of" means that the tax-driven arrangements "must be an efficient cause of the profits, but they need not be the sole or even the dominant cause", and the FTT considered that the correct approach to quantifying the profits was not to isolate particular line items but to compare the company's actual profits with what its profits would have been in the absence of the tax-driven arrangements. Here, that simply meant taking out the interest income from the new loan and, given that without that interest income the holding company would have been loss-making, all of its profits were "relevant profits" against which the carried-forward deficits could not be used. Tanja, what did you make of our other First-tier Tribunal decision?
Tanja Velling	I enjoyed the memes associated with the First-tier Tribunal's decision in *Grint* much more than reading the decision itself. As you may be aware, the taxpayer in this case was the actor who played Ron Weasley in the Harry Potter films. So, Tax Journal's annual round-up described the case thus: "The muggle courts held that the magic touch of one of the stars of the Harry Potter films did not extend to the transfiguration of income into gains" - a great line! I also think it's fair to say that Ron's role is often somewhat comical, and case comments on social media have been accompanied by some great pictures, for example, of Ron sadly holding a broken wand…
Zoe Andrews	I do see what you mean, but what was the case actually about?
Tanja Velling	The tax treatment of £4.5m due to Mr Grint as consideration for rights, records and goodwill when he incorporated his acting business in October 2011. The taxpayer argued that the sum was subject to capital gains tax at the entrepreneurs' relief rate of 10% which gave an effective tax rate in the low thirties (if one takes into account that the sum would have to be paid out of profits subject to corporation tax). In contrast, HMRC's position was that the £4.5m was taxable as income under the sale of occupational income rules at a rate of 50%.
Zoe Andrews	These rules have had a bit of a renaissance, haven't they?
Tanja Velling	Yes, we've seen them come up quite a bit over the last few years as alternative arguments in partnership remuneration cases such as *BlueCrest*, *HFFX* and *BCG*. These cases were, however,

	decided on other grounds, so any comments on the sale of occupational income rules were *obiter* whereas, in *Grint*, they form the *ratio* of the decision.
Zoe Andrews	Remind us what the rules are about?
Tanja Velling	The rules are found in Chapter 4 of Part 13 of the Income Tax Act 2007. They bite where an individual receives a capital sum as a result of arrangements that allow another person, like the limited company in *Grint*, to enjoy receipts derived from the individual's earning capacity in an occupation carried out wholly or partly in the UK, here: Mr Grint's acting.
Zoe Andrews	And what were the issues in dispute?
Tanja Velling	There were broadly two issues. The first relates to a tax avoidance condition. The rules apply only if one of the arrangement's main objects is the "avoidance or reduction" of income tax. Taxpayer's counsel argued that the reference to "avoidance" here means that some artificiality is required or, in other words, "a magic wand or a Houdini-like escape from tax". The FTT disagreed: the test is whether the main object is to pay no or less income tax; no additional artificiality requirement can be read into the legislation. The main object then is determined by reference to the decision-maker's intentions. In this case, the decision-makers were Mr Grint and his father who ran Mr Grint's business affairs with little input from his son. Contemporaneous written correspondence between the father and Mr Grint's accountants and tax advisers had focussed on the favourable tax treatment of the £4.5m, without mentioning other commercial objectives which were later put forward. So, the FTT concluded that income tax avoidance was a main object (even though Mr Grint's father may have also had other reasons for thinking that incorporation was a good idea). That was the first issue.
Zoe Andrews	What was the second issue?
Tanja Velling	This relates to the basis for the charge. The amount chargeable under the occupational income rules is given by either section 779, if the capital sum is property or a right which derives substantially the whole of its value from the individual's activities, or section 778, if that is not the case. Under section 778, the tax point is when the capital sum is received; under section 779, when the property or right is sold or otherwise realised. In this context, it's important to note that the £4.5m was not immediately paid to Mr Grint but was left outstanding on a director's loan account. The FTT concluded that this debt claim fell within section 779 and was "otherwise realised" in the same tax year because it was "unreservedly at [Mr Grint's] disposal, in the sense that the payment/receipt of that cash value into his hands is within his control" as the limited company had sufficient money and Mr Grint could have demanded repayment. I found the reasoning on this issue hard to follow and would not be surprised if it is challenged should the decision be appealed.

	But shall we move on to the Court of Appeal's decision on Refinitiv's application for judicial review?
Zoe Andrews	Sure. I'll start with the facts. From 2008 to 2018, three UK-resident companies provided services related to intellectual property to a Swiss company in the same group. For a period from 2008 to 2014, the UK companies had an advance pricing agreement (or **APA**) with HMRC pursuant to which the arm's length reward for those services was calculated on a cost-plus basis. Then, in 2018, the Swiss company sold the IP to a third party, realising a significant gain, and HMRC issued notices charging the three UK companies to diverted profits tax - in the case of one of them to the tune of £167m; for the other two, the amount of tax was in the thousands or tens of thousands. The notices were issued on the basis that the companies' services (including as provided during the period of the APA) had enhanced the value of the IP, and so they should share in the gain.
Tanja Velling	So, what was the judicial review about?
Zoe Andrews	The taxpayers applied for the DPT notices to be quashed or declared unlawful for being incompatible with the APA. They essentially argued that the APA determined the price for the services provided between 2008 and 2014 once and for all. HMRC could not use the DPT notices to effectively come back for more tax in respect of those services on a profit-split basis in a later year. But, like the Upper Tribunal before it, the Court of Appeal disagreed. Taking into account that corporation tax is an annual tax, and the wording of the legislation and the APA, it concluded that the APA applied to determine taxable profits for the periods explicitly covered by it - meaning the period from 2008 to 2014 here. There was "nothing in the language of the APA to support the notion that the agreed treatment should enjoy a potentially indefinite afterlife in future accounting periods [such as the 2018 period here] once the term of the APA had come to an end." So, there was no incompatibility between the APA and the DPT notices. Did you have any further thoughts on this?
Tanja Velling	Yes. This does mean that the value of an APA is potentially more limited than one might have thought, and I agree with Mike Lane's comment on the European Tax Blog that this would seem a good case for consideration by the Supreme Court. There's also an interesting note of caution. The Court of Appeal noted that, even where a DPT notice was incompatible with a prior APA, the DPT notice may not necessarily be unlawful (as had been assumed for the purposes of this litigation). But let's turn to the Supreme Court's decision in *Cobalt Data Centre*, and as I mentioned before, to discuss this, we're joined by Kasim Mehmood, one of our tax associates. Kasim, do you want to take us through the facts?
Kasim Mehmood	Sure. So, the case itself concerns the availability of historic enterprise zone capital allowances which were gradually phased out from 2007 and finally abolished in 2011. In short, that regime allowed for certain areas in the UK to be designated as enterprise zones (a list of which can still be found in HMRC's manuals). Taxpayers could benefit from wider availability and higher rates of

	allowances in respect of expenditure incurred in the construction of buildings in an enterprise zone. The availability of those allowances was subject to time limits. Specifically, for expenditure to qualify under this regime, that expenditure must either have been incurred within 10 years from the relevant area being designated an enterprise zone or be incurred within 20 years of that designation provided the expenditure was incurred under a contract entered into within 10 years from the designation. So, in *Cobalt Data Centre*, two special purpose vehicles (the SPVs) sought to develop land in The Tyne Riverside enterprise zone (which designated as such in 1996). One of those SPVs was the developer (who leased part of that enterprise zone) and the other was the contractor (who was to carry out the relevant building works). They entered into a so-called “Golden Contract” two days before the 10-year anniversary of the Tyne Riverside enterprise zone’s designation. The Golden Contract allowed the Developer to select and alter the specifications of the type of building work to be carried out by the Contractor (which the Developer did over the course of around 5 years). Eventually, just over 15 years from the date of the Tyne Riverside enterprise zone’s designation, the benefit of the Golden Contract and the Developer’s lease was transferred to two LLPs under a separate Sale and Development Agreement. Those two LLPs (the taxpayers in this case) eventually built three data centres, DC1, DC2 and DC3, and made claims under the enterprise zone allowances regime in respect of the expenditure incurred. HMRC challenged the capital allowances claimed by the taxpayers in respect of the expenditure incurred on DC2 and DC3, but not DC1. And - spoiler alert - HMRC won.
Zoe Andrews	What were the points in dispute?
Kasim Mehmood	As I mentioned, the enterprise zone allowances regime operates on strict time limits. HMRC’s argument was the contract under which buildings DC2 and DC3 were constructed (and the relevant expenditure incurred) was not the Golden Contract but instead a separate contract constituted by the Sale and Development Agreement. That contract was entered into over 15 years after the Tyne Riverside enterprise zone’s designation and so fell outside the regime entirely.
Zoe Andrews	If most of the *Cobalt Data Centre* case relates to a regime that was phased out by 2011, why is it relevant today?
Kasim Mehmood	Well, a number of enterprise zone arrangements were stayed behind the *Cobalt Data Centre* case and, assuming those cases can be differentiated from this case, may have unanswered questions around quantification. There may also be some limited read-across to the investment zone and freeport regimes that now operate in the UK where time limitations are relevant (though not in the exact same way as for the enterprise zone regime). The wider relevance today, though, is the Supreme Court’s approach to the interpretation of the legislation in question. It is ordinary course now that courts will construe legislation purposively alongside a realistic view of the facts. In this case, the Supreme Court had to grapple with the purpose of the enterprise zone regime and how the time limitations fit into that wider purposive context. Courts may review explanatory notes, policy papers, law commission reports and any number of external aides to assist in that exercise. In this case however, the Supreme Court

	appeared to focus on a singular press statement from His Majesty's Treasury from 1980 to help determine the purpose of the time limitations in the legislation. *Cobalt Data Centre* is a good reminder for taxpayers that (perhaps oxymoronically) legislation cannot always be taken at face value and as we know from other cases, there is no special category of concept that is immune from the purposive interpretation approach. In the tax context (and arguably more true today than it has ever been), there is often a wealth of supporting documentation, whether that is Budget statements, policy papers, Hansard debates or Explanatory Notes to Finance Bills - all of which may be used to shed light on the purpose of legislation. Staying alive to that is crucial because interpreting legislation in light of that purpose may legitimately move the dial on certain rules applying or not applying at all.
Zoe Andrews	Does *Cobalt Data Centre* signify any change in the approach to interpreting legislation?
Kasim Mehmood	No. Whilst the Supreme Court did focus on a singular piece of external material, it appears to be on the basis that that one press release was sufficient to deduce the purpose of the legislation in question. The Supreme Court did also pressure test their conclusion by questioning whether the taxpayers' position could be maintained bearing in mind what the Supreme Court considered to be, the clear purpose of the rules - which is the other half of the usual purposive interpretation analysis as set out in existing case law. The Supreme Court, it turns out, could not reconcile the two, instead favouring HMRC's reading of the legislation as being more consistent with the purpose of the legislation.
Tanja Velling	Thank you, Kasim. And as we have you with us, do you also want to tell us about a recent change to the Capital Gains Manual in relation to the reorganisation rules?
Kasim Mehmood	Of course. As you know, under section 135 of the Taxation of Chargeable Gains Act 1992, rollover treatment is available on a share-for-share exchange if it falls within one of the three cases set out in subsection (2). This is subject to an anti-avoidance provision, but that's a topic for another podcast. The changes to the Capital Gains Manual that are particularly interesting relate to the second case in subsection (2). This second case applies to a share-for-share exchange made as a result of a general offer made to shareholders of the target conditional on the acquirer gaining control. And I'd like to highlight three clarifications made by the changes: • First, case 2 can also apply where the offer is subsequently made unconditional. • Second, case 2 can be met in the case of an indirect acquisition, that is to say, it can apply, for example, where company B issues shares to the target's shareholders, but the target is not acquired directly by B, but by, for example, B's wholly owned subsidiary. • Third, on the basis that there is no special 'tax' definition of the term "general offer" which is used in the legislation, a court-approved scheme of arrangement could constitute a "general offer" for the purposes of case 2. This clarification is particularly significant as it addresses a

	long-standing point of uncertainty and may make public transactions more straightforward in some circumstances.
Tanja Velling	Thank you, Kasim. Zoe, remind me, what is the PISCES proposal?
Zoe Andrews	PISCES stands for "Private Intermittent Securities and Capital Exchange System" and is a new platform to provide a regulated secondary market for shares in private companies. With many companies deciding to stay private for longer and at scale, PISCES is a response to the increasing demand for investors to be able to trade shares in private companies more easily. Shares of any UK or overseas company can be traded on PISCES so long as, in either case, they are not admitted to trading on a public market in the UK or abroad. The category of investors will be restricted to institutional investors, certain categories of retail investors, employees of the relevant PISCES company and certain high net worth, or sophisticated, individual investors. This is intended to balance the desire for a wide pool of potential investors and providing adequate investor protection given the risk inherent in investing in private companies. Trading will be restricted to trading windows (hence the intermittent part of the acronym) which might be ad hoc, quarterly, yearly etc. depending on the wishes of the PISCES company and the rules of the platform operator. PISCES is for secondary trading only and so will not support capital raising or share buybacks, although, following consultation feedback that share buybacks should be permitted on PISCES, the government has responded that it will continue to consider whether to permit share buybacks at a later stage. The government expects that the availability of a regulated secondary market in private company shares will encourage investors to invest and so private companies may also find it easier to raise funds privately outside of PISCES. In the longer term, it is expected to boost the pipeline of future IPO offerings in the UK.
Tanja Velling	That sounds like a great idea, but how will such a bespoke new trading platform be implemented?
Zoe Andrews	PISCES is being developed using a financial markets infrastructure sandbox which will allow the FCA and the government to test it over a five-year period to make sure it is working properly and adjust as required before making it permanent. Following consultation on the draft regulations, a statutory instrument is expected to be laid by May 2025 to provide the temporary legal framework for the sandbox but it is not known yet when the new platform would launch. The FCA is consulting until the 17th of February on the proposed rules and guidance. Firms wishing to run a PISCES platform will have to apply to the FCA for approval.
Tanja Velling	It was announced at the Autumn Budget 2024 that transactions in PISCES will be exempt from stamp duty and SDRT. Are there any other tax implications?
Zoe Andrews	The November 2024 government response to the March 2024 consultation promised that the government will provide more clarity in due course on how tax-advantaged employee share schemes (such as EMI) would interact with PISCES and whether shares traded on PISCES would be considered readily convertible assets for PAYE and NICs purposes. So, a few points to look out for.

	What else does 2025 have in store for corporate taxpayers in the UK?
Tanja Velling	The latest Finance Bill is making its way through Parliament and is currently at the public committee stage which is scheduled to complete on the 4th of February. Written evidence can be submitted until the committee has concluded its consideration of the Bill. More than 40 pages of the Bill comprise legislation amending the existing Pillar Two rules, including the introduction of the undertaxed profits rule (or UTPR for short) for accounting periods beginning on or after the 31st of December 2024. This is subject to the UTPR safe harbour which delays the operation of the rules by one year where the minimum tax rate in the potentially undertaxed ultimate parent entity jurisdiction is 20% or more. One key jurisdiction for which this is relevant is the US; assuming there is no immediate, drastic reduction in US corporate tax rates, the safe harbour postpones the date from which UK subsidiaries of a US parent would have to collect additional tax in respect of undertaxed US profits - a notion that would likely be met with hostility from the incoming US government and Republican lawmakers. The Finance Bill also delays the date for filing of the first Pillar Two returns until the 30th of June 2026. And shortly before Christmas, government amendments were published showing further tweaks to the Pillar Two legislation to make it work as intended. There is also significant change ahead for transfer pricing with a number of consultations expected, isn't there?
Zoe Andrews	Yes. There will be a second round of consultation with draft legislation in the Spring on reforms to transfer pricing, DPT and permanent establishment rules, building on the previous government's consultation and summary of responses. A second separate consultation will look at bringing medium-sized companies within the transfer pricing regime. And a third consultation will look at a requirement to report cross-border related-party transactions. The corporate tax roadmap stated that the "government will ensure any additional compliance burden is proportionate and not beyond that imposed by peer jurisdictions" but it remains to be seen how much comfort this qualification gives to the new reporting requirement. There is also significant enquiry activity in the area of cost contribution agreements (also known as cost sharing agreements), but I'll refer to them as CCAs here. Different views are being taken by HMRC and other tax authorities as to when a CCA can be an acceptable pricing mechanism under the OECD's Transfer Pricing Guidelines. It seems unlikely that this can be resolved through a change in HMRC's approach and guidance, and a legislative solution may have to be explored. The corporate tax roadmap promised that the government will review the treatment of CCAs. In the meantime, HMRC is expected to pause enquiries into the validity of CCAs.
Tanja Velling	Yes, I also talked about this and other points from the corporate tax roadmap on the European Tax Blog. But continuing with the theme of transfer pricing, taxpayers should be prepared for further challenges by HMRC to the pricing of intra-group debt. Although the taxpayer won on the transfer pricing point in *BlackRock*, about whether third-party covenants could be read into the hypothetical arm's length transaction to put the hypothetical lender into the same position as the

	lender in the intra-group scenario, there were some points HMRC did not explore as HMRC won the case on the unallowable purpose point anyway. HMRC accordingly considers there are a number of unresolved transfer pricing issues following *BlackRock* where points were not argued or not explored fully in the case and which HMRC might come back to in a different case! Is there anything else that we should look out for in 2025?
Zoe Andrews	The consultation on the Tax Administration Framework Review - new ways to tackle non-compliance closes on the 22nd of January 2025. This consultation explores options for reform of existing enquiry and assessment powers and the possibility of a new power to require taxpayers to correct mistakes themselves. The proposal which large business may wish to keep an eye on here is the one to enable HMRC to issue a partial enquiry notice on a specific issue or section of a return. This would apply across the board and would not be restricted to high-volume, low-value compliance risk although the consultation document does suggest that (at least initially) partial enquiry notices could be used as short, targeted interventions where taxpayers have claimed relief or are awaiting payment for relatively small amounts. A partial enquiry notice would not affect the normal enquiry window and would be subject to "appropriate governance" which the consultation document suggests might include an obligation on HMRC not to re-open any risk that had already been dealt with under a partial enquiry.
Tanja Velling	The advantage for both taxpayers and HMRC of a partial enquiry would be to save the time and expense of a full enquiry in order to resolve a discrete issue - which seems sensible. But what I don't understand is this: if there really is a clearly identified, discrete issue, wouldn't a full enquiry under the existing power be quick and simple to run, too?
Zoe Andrews	I agree, and what about the downsides for taxpayers of a partial enquiry power? There would need to be adequate safeguards to protect the taxpayer from facing a series of partial enquiries, or a partial enquiry followed by a full enquiry which would make the enquiry process more complex and more inefficient from a time and cost perspective. In other things to look out for, we have a Spring Statement scheduled for the 26th of March - although some are already saying that the Chancellor may have to make more substantial, Budget-like tax announcements. From April 2025, the current Permanent Secretary for the Scottish Government, John-Paul Marks will replace Sir Jim Harra as Permanent Secretary and Chief Executive at HMRC. It remains to be seen how HMRC policies and priorities might evolve during his tenure.
Tanja Velling	Moving now on to the European Commission. The Commissioners for the period from 2025 to 2029 have been confirmed and, for the first time, the tax portfolio has been joined with green transition responsibilities. It falls within the remit of the new Commissioner for Climate, Net Zero and Clean Growth, Wopke Hoekstra. Energy taxation and encouraging investment into clean technologies will likely be the top priority, and Mr Hoekstra may also look for ways to tweak existing rules to ensure that they support green objectives. It has, for instance, been reported that Mr Hoekstra may look at ways to encourage Member States to provide VAT relief on donations of surplus goods (so as to remove VAT as an incentive to destroy them instead). Other items on the direct tax agenda may be a further push to

	harmonise corporate tax rules across the EU (building on the Pillar Two Directive) and a decluttering of the EU tax rules. But, as they say, "the best-laid plans of mice and men oft' go awry" – the Commission's tax plans are often frustrated by the requirement to obtain the Member States' unanimous approval. For the first half of 2025, Poland holds the Council Presidency, and the only direct tax measure referred to in its work programme is DAC9 – an amendment to the Directive on Administrative Cooperation intended to simplify the filing process for Pillar Two returns in the EU which we talked about briefly in the November 2024 edition of this podcast. So, we'll await further details on the Commission's priorities - the full 2025 work programme is scheduled to be presented to the European Parliament in early February – and then it remains to be seen how much the Member States support any particular measure. Zoe, what else are you keeping eye on?
Zoe Andrews	US tax developments after President-elect Trump's inauguration on the 20th of January 2025; whether additional tariffs will be immediately imposed as he announced on Truth Social, and what else may be forthcoming. We discussed possible policies and what you can look out for with Arvind Ravichandran, tax partner at US law firm Cravath, Swaine & Moore LLP, in a separate special edition of this podcast.
Tanja Velling	And that leaves me to thank you for listening. If you want more insights into what 2025 might hold across different topics and practice areas, our Horizon Scanning publication and podcast episodes will be launching on the 15th of January. If you have any questions, please contact Zoe, Kasim 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.

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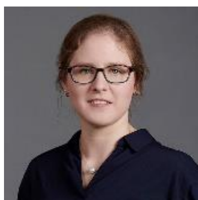

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