Slaughter and May Podcast
Tax News: January 2024

Zoe Andrews	Welcome to the January 2024 edition of the Slaughter and May Tax News podcast. I am Zoe Andrews, PSL Counsel & Head of Tax Knowledge
Tanja Velling	And I am Tanja Velling, Tax PSL Counsel. And yes, you've seen right. We've rebranded the podcast (although only in a small way). After almost three years – we started this podcast in July 2020 – we are changing the title from "Tax News Highlights" to "Tax News" with a new logo. The new logo goes with a new podcast structure; Tax News will now sit as its own show within the Slaughter and May podcast channel, so you should now be able to subscribe either only to our show or to the whole channel (although exactly how this works will depend on where you listen to your podcasts). The Tax News content will remain largely the same: we'll discuss developments in UK, EU and international tax relevant to large UK and multinational businesses. But we are also considering putting together special episodes or series on particular topics as additional content for you. Please do get in touch if there is anything you'd like to hear more on! To celebrate the rebrand of the podcast, we're also publishing a shorter, special episode alongside this January edition where Zoe and I don't talk about tax but share more personal insights – such as the changes Zoe has observed during her twenty years as a tax PSL at Slaughter and May.
Zoe Andrews	This January 2024 edition of the Tax News podcast covers the FTT's decision in *Harber*, the Court of Appeal's decision in *BCM Cayman* and the CJEU's decision in the *Amazon* State aid case. We will also talk about the summary of responses in respect of HM Treasury's consultation on the VAT Treatment of Fund Management Services, changes to HMRC's guidance on foreign entity classification and the latest Pillar Two-related materials published by the OECD and HMRC. It was recorded on the 9th of January 2024 and reflects the law and guidance on that date. Shall we start with the cases as usual?
Tanja Velling	The first case I want to talk about, the First-tier Tribunal's decision in *Harber*, and this is in some ways only peripherally about tax. The taxpayer had appealed against a penalty on the basis that she had a reasonable excuse. She represented herself and cited nine FTT decisions in support of her position. Unfortunately for the taxpayer, it turned out that none of these decisions were genuine. It appeared that the taxpayer had used an AI system to help with her research and that system had made up the cases. The Tribunal accepted that the taxpayer had not known that the cases were fake; it transpired that she was not even aware that there were publicly accessible

	websites where the existence of a decision could be verified and a copy obtained.
Zoe Andrews	The case is reminiscent of an earlier US case, *Mata v Avianca*, where lawyers had cited cases generated by ChatGPT to the court. Indeed, the FTT quoted that case with approval – and I think it's worth reading out the key passage: "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the…judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."
Tanja Velling	That would be a quite dystopian scenario. Legal research and drafting are at the difficult end of generative AI use cases – *Harber* and the US case clearly show that using public generative AI models for legal research (without carefully checking the results) is unwise at least for now, and it is likely that any useful AI system for research or drafting will need to be configured to access only an authoritative body of material. In the near-term, we're more likely to see adoption of tools like Microsoft's Copilot which is designed to help with everyday productivity, like drafting an email or summarising the actions from a meeting. For us, I suppose this means that we won't be getting ChatGPT to write the content for our podcast any time soon…
Zoe Andrews	Which is for the best really, given that I rather enjoy putting it together! Nonetheless, it is likely that artificial intelligence will permeate many aspects of our lives and it is something for businesses to grapple with and harness. How AI can be used responsibly to enhance our work is certainly something that we (and colleagues from across the firm) consider.
Tanja Velling	Our next item is the Court of Appeal's decision in *BCM Cayman*. This was published back in October 2023, so somewhat older "news", but we thought it worth going back to draw out two points. The first relates to tiered partnership structures. In *BCM Cayman*, a Cayman limited partnership sat above, first, an English limited partnership and, at a later point in time, an LLP. Who then is a partner of the English LP or member of the LLP? Is it the Cayman LP, its general partner or everyone who is a partner in the Cayman LP?
Zoe Andrews	A Cayman LP is similar to an English limited partnership; its business is carried on by the general partner and it does not have separate legal personality. So, the Court of Appeal concluded that only the general partner

	of the Cayman LP was a partner in the English LP (and a member of the later LLP). For tiered partnership structures in general, the decision indicates that it will be preferable for upper tier partnerships to have separate legal personality in order to ensure that the structure operates as intended.
Tanja Velling	The second point relates to the *Ramsay* doctrine. Under Cayman law, the Cayman LP's general partner received profits from the English LP (or LLP) on bare trust for the partners in the Cayman LP to be distributed in accordance with the Cayman LP's partnership deed. Some of those profits were consequently distributed to the Cayman LP's corporate limited partner, and the question was who should be taxed on the profits so distributed. Section 6 of the Corporation Tax Act 2009 provides that a "company is not chargeable to corporation tax on profits which accrue to it in a fiduciary or representative capacity" except to the extent that it has a beneficial interest in those profits. Did this mean that the Cayman LP's general partner could not be charged to tax in respect of profits distributed to the corporate limited partner?
Zoe Andrews	No. The Court of Appeal decided that, on a purposive construction of section 6, the general partner was still subject to tax on those profits essentially because, economically, they ended up back with the general partner. The corporate limited partner and the general partner's parent had entered into a total return swap in respect of those profits and the parent had contributed amounts received under the swap to the general partner. The Court of Appeal concluded that, "on a realistic view, [the general partner] was the beneficial owner of those [profits]". I think this is quite a sweeping application of the *Ramsay* doctrine. Could it indicate that we are moving towards a position where concepts such as beneficial ownership, interest or entitlement are going to be harder to pin down? Or perhaps even where they could have different meanings in different statutory contexts?
Tanja Velling	The decision is certainly hard to square with the Upper Tribunal's 2014 decision in *Bupa Insurance* on the meaning of "beneficial entitlement" in the context of the consortium relief rules. The Upper Tribunal (broadly) held that beneficial entitlement meant holding more than a "mere legal shell"; the fact that an amount equivalent to certain dividends had to be on-paid a short time after they were received did not deprive the recipient of its beneficial entitlement to the dividends. Now, in *BCM Cayman*, we are told that you could, in certain circumstances, be regarded as the beneficial owner of an amount received on bare trust – i.e. where you actually hold only a mere legal shell albeit with an expectation to receive an equivalent amount. But in the case, that was following a series of payments made by a number of entities who, at each stage, would have held an entitlement to the relevant amount that amounted to more than a mere legal shell. So, how can these decisions be reconciled? Concluding that different tests may apply in

	different contexts would seem rather undesirable and apt to create uncertainty. But let's move on to another State aid development.
Zoe Andrews	The judgment of the Court of Justice of the European Union in *Amazon* was delivered on the 14th of December 2023. The CJEU upheld the General Court's decision to annul the Commission's State aid finding, but substituted its own grounds. The General Court had erred in law by accepting that the Commission could generally apply the arm's length principle in the context of a State aid investigation. The reference point for determining whether a tax ruling granted State aid was national law, and the General Court had failed to examine whether the Commission had properly established that that principle formed part of national law. Why then did the CJEU uphold the General Court's decision?
Tanja Velling	The CJEU essentially considered that the Commission's decision was vitiated because it had incorrectly identified the reference system by relying on the arm's length principle and OECD transfer pricing guidelines even though they had not been incorporated into national law.
Zoe Andrews	One point I'd like to highlight here is in relation to tax authority practice. The CJEU notes that the relevant provision of Luxembourg law "was interpreted by the Luxembourg tax administration as enshrining the arm's length principle". It seems that such an interpretative practice would be insufficient to conclude that the arm's length principle forms part of the reference system because the CJEU continued by saying that "[h]owever…only the incorporation of that principle as such into national law, which as a minimum requires that that law refer explicitly to that principle, would permit the Commission to apply it in the determination of the existence of a selective advantage". Luxembourg law was amended in 2017 to explicitly adopt the arm's length principle, so the CJEU considered that it could not be applied to assess the rulings at issue. The CJEU further reaffirms that the OECD Transfer Pricing Guidelines cannot be taken into account "unless that national tax system makes explicit reference to them". This appears to be a rather different approach from that suggested by the Advocate General who had said that "[i]n [her] view, consistent administrative practice which serves to flesh out some feature of a legal definition (that of hidden profit distributions in the present case) could be sufficient to expand the reference system to encompass all or part of the OECD Transfer Pricing Guidelines", referencing her opinion and the CJEU decision in *Magnetrol*. That was also a State aid case, but relating to an aid scheme. So, I wonder whether the fact that the CJEU did not follow the Advocate General on this point could be indicative of a more general reluctance towards importing concepts and tests from aid scheme cases, but I'm only speculating here!

Tanja Velling	In December we also had the summary of responses to HM Treasury's consultation on the VAT treatment of fund management. The proposal in the consultation was to codify into UK law current UK policy for the VAT treatment of fund management (based on UK law, retained EU law, general principles, guidance and a body of case law). This was intended to provide certainty and clarity, reduce the scope for differing interpretations of law and case law and ultimately achieve a reduction in the amount of litigation which takes place in this area. However, the government concluded, in response to feedback, that the principles-based approach to defining the criteria for a Special Investment Fund (SIF) outlined in the consultation would be confusing and will not be followed. The government concluded that the list-based approach of items 9 and 10 of Group 5, Schedule 9, VATA 1994 provides sufficient legal certainty and covers "the vast majority of fund types for which management services should be exempt" and can be extended as new types of fund emerge.
Zoe Andrews	So it's pretty much leaving things as they are then?
Tanja Velling	Yes. There were many requests from respondents for a legislative definition of 'management' of a fund but the government concluded that the position established by settled case-law provides sufficient legal certainty, so there will not be a legislative definition. However, in the review of current guidance, consideration will be given to providing additional clarity on the current legal position. There were also requests for zero-rating which, as expected, have not been taken up at this time.
Zoe Andrews	In addition, HMRC's guidance on foreign entity classification in its International Manual (at INTM180010 onwards) was substantially updated in December. The list of classifications of foreign entities remains unchanged but the guidance on the factors used to determine whether a specific entity is opaque or transparent has been redrafted and expanded. It now includes, amongst other things, a very detailed analysis of the law on Delaware LLCs (INTM180050), and how that supports HMRC's conclusion (as set out in R&C Brief 15 (2015) that the position reached in *Anson* was specific to the facts found in the case). Mr Anson was a UK resident member of a Delaware LLC which carried on a trade. He was subject to US tax on his share of the LLC's profits and claimed double tax relief in the UK. The issue before the UK courts was whether Mr Anson was liable to UK tax on the same profits or income which suffered US tax. This turned on whether Mr Anson had an interest in the profits of the LLC as they arose or only if and when distributed to him by the LLC. The Supreme Court held that, based on the FTT's findings of fact on the US law, Mr Anson was entitled to double tax relief as he was liable to UK and US taxes on his share of the LLC's profits.

	HMRC's view is that US LLCs are opaque, notwithstanding the decision in *Anson*. The guidance sets out the relevant provisions of the Delaware LLC Act that support the conclusion that the profits of an LLC will belong to the LLC in the first instance and that members will not be treated as receiving or entitled to the profits of a Delaware LLC. Although the detailed analysis of US law is based on the law of Delaware LLCs, HMRC's understanding is that the LLC law of other states is substantially similar and so members of other US LLCs will generally not be treated as receiving or entitled to profits of the LLC either.
Tanja Velling	That is interesting, but we must move on to our next topic. 31 December 2023 was a very auspicious date for Pillar 2 purposes wasn't it?
Zoe Andrews	Yes, the UK's multinational top-up tax and domestic top-up tax apply to qualifying multinational groups for accounting periods beginning on or after 31 December 2023. Similar rules also commenced in a number of other jurisdictions. HMRC published revised draft guidance on 21 December adding more content (including a 50-page chapter on calculating the effective tax rate) and amending the previous draft chapters (Introduction, Scope and Administration) for the proposed amendments to the legislation in the current Finance Bill and to reflect comments received. There will be more content to follow (including a chapter on particular types of entities and structures and a chapter on calculating the top-up charge) and in due course a complete draft version of the guidance manual will be released for comments. The new chapter on ETR includes cross-references to the relevant parts of the legislation which is very helpful.
Tanja Velling	Yes – the lack of cross-referencing in the original draft guidance made it quite difficult to read the legislation alongside the guidance (or to search the guidance for commentary on a particular section) but HMRC have taken on board feedback on this and intend to cross-refer to the legislation more comprehensively in the next release of the guidance. But the handy map showing the OECD Model Rules and Commentary origins of the UK legislation is missing from the latest version, isn't it?
Zoe Andrews	Yes, that's correct. HMRC are updating it and adding a reverse map showing where in the UK legislation the Model Rules can be found. In the meantime, the original map can still be found in the June 2023 version of the draft guidance. Another welcome improvement which HMRC says may follow due to popular demand is a table showing the differences in the application of the MTT provisions from DTT. This would be very useful as we know that, in general, the same provisions for MTT apply for DTT purposes with modification but there are notable exceptions, and although these are now highlighted in the relevant pages of the draft guidance it would be useful to have them in one handy table too.

	From a first read-through, the amendments to the original draft guidance have provided more clarity and context including improved examples. The new chapter on the ETR takes you through calculating adjusted profits, including how you identify underlying profits and the required adjustments to those profits and then calculating the covered tax balance, starting with what is qualifying tax expense and then going through the various adjustments required. But that's not all the guidance that came out last month. The Inclusive Framework also published further administrative guidance which will at some point likely be fed into the UK legislation and guidance to the extent it is not already. What was in the further guidance and how does it fit in with the Commentary and Model Rules?
Tanja Velling	The GloBE Rules envision that Agreed Administrative Guidance may be issued on both the interpretation and operation of the rules to provide for consistent and common interpretation. The December guidance is the third set of Administrative Guidance. The three sets will be incorporated into a revised version of the Commentary on the Model Rules to be released this year, to replace the original March 2022 version of the Commentary. The latest guidance includes further clarifications on a number of key areas that will help MNE Groups transition into the GloBE Rules, including the application of the Transitional CbCR Safe Harbour and the definition of revenues for the purposes of determining whether an MNE Group is within scope of the GloBE Rules. It also includes guidance for applying the GloBE Rules in situations where there are mismatches between Fiscal Years or financial and tax years of Constituent Entities, guidance on allocating taxes arising in a Blended CFC Tax Regime when some Constituent Entities do not compute their ETR under the GloBE Rules, and the Simplified Calculations Safe Harbour for Non-material Constituent Entities. Some of the Administrative Guidance has already been included in the UK's latest Finance Bill and draft guidance, for example, 2.3.4 enabling MNE groups that are not required to prepare and file CbC reports to qualify for the transitional CbCR safe harbour using figures from a notional CbC report.
Zoe Andrews	An aspect of the guidance getting a lot of press coverage, is the breadth of the anti-abuse rules for the transitional safe harbour rule (2.6 of the Administrative Guidance). This safe harbour allows companies to use their CbCR rules information to calculate tax rates in each jurisdiction if they meet certain criteria. This is much simpler than the full calculations in order to determine if they are subject to the minimum tax rules. The Inclusive Framework is concerned about certain marketed avoidance transactions taking advantage of differences in tax and accounting treatment and so to get within the safe harbour. The guidance identifies three hybrid arbitrage arrangements which have to be excluded from the

	safe harbour calculation if they were entered into after 15 December 2022 (or after 18 December 2023 for jurisdictions which do not permit such a retrospective anti-avoidance measure). So there is a now a concern from business that the new guidance adds more complexity to what was supposed to be a simplified calculation as a deeper analysis of intercompany payments and how transactions are taxed in different jurisdictions will be required to qualify for the safe harbour. And there will likely be more anti-avoidance rules to come. Further guidance will be provided to address hybrid arbitrage arrangements that may otherwise affect the application of the GloBE rules outside the context of the CbCR safe harbour.
Tanja Velling	But going back to the UK: before the Autumn Finance Bill 2023 has even been enacted, we've already had new draft legislation, namely for the new exemption from the Electricity Generator Levy which was announced at the Autumn Statement. It was announced that, where the decision to proceed with the construction of a new generating station or an increase in the generating capacity of an existing station was made on or after the 22nd of November 2023, receipts from the new generation capacity would be exempt from the levy. The legislation implements this concept by requiring that, on the 21st of November, there was still a "significant likelihood of the project not proceeding" which could be more difficult to evidence. The Treasury may, by regulation, provide for cases where this condition must be treated as having been met. The accompanying policy paper still says that the "[l]egislation will be brought forward in an upcoming Finance Bill". When do you think that might be?
Zoe Andrews	My guess would be in a Finance Bill to be published after the Spring Budget which has been announced for the 6th of March and until then, it seems that we will have to contend with being inundated with speculation about its contents. There was also quite a bit of speculation whether the announcement of a Spring Budget would mean an early general election, but the Prime Minister more recently indicated that it is not planned until the second half of this year; it must take place by late January 2025.
Tanja Velling	Then there is the US presidential election. It seems likely that, under a Republican presidency, we can expect pushback against the OECD's international tax reform project and, possibly, the resurgence of trade sanctions. That said, for the time being, international tax reform is likely to continue as a reliable source of content for this podcast. According to an update published on the 18th of December, the OECD is working towards finalising the multilateral convention on Amount A of Pillar One by the end of March 2024 with a view to holding a signing ceremony by the end of June 2024. Meanwhile, at the UN, a new ad hoc intergovernmental committee will prepare draft terms for a United Nations framework convention on international tax cooperation by August 2024.

	In respect of the EU, we will have to keep an eye on developments in relation to the BEFIT proposal and transfer pricing directive published alongside it. So, lots to look forward to in 2024.
Zoe Andrews	That leaves me to thank you for listening. If you have any questions, please contact Tanja or me, or your usual Slaughter and May contact. If you would like to find out more about Slaughter and May's approach to AI, we can put you in touch with someone in our Knowledge and Innovation Team. 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.