Slaughter and May Podcast
Tax News Highlights: April 2021

Zoe Andrews	Welcome to the April 2021 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 podcast, we will discuss some of the consultations published on Tax Day, two CJEU cases on VAT and DAC7. This podcast was recorded on the 6th of April 2021 and reflects the law and guidance on that date.
Zoe Andrews	Following the Budget on the 3rd of March and the publication of the Finance Bill on the 11th of March, on Tax Day, the 23rd of March, the UK Government published a command paper, including over 30 high-level tax policy announcements. They confirm which measures will be shelved and which will be taken forward. And there were some conspicuous absences.
Tanja Velling	Indeed. Following much press speculation in the run-up to the Budget, nothing was announced on capital gains tax reform. At least for now, entrepreneurs may therefore sleep more easily. And we can focus on what was announced, starting with an overview of some measures not to be taken forward. Namely, trusts reform, VAT grouping and the carbon emissions tax.
Zoe Andrews	The responses to the consultation on trusts reform showed a lack of appetite for comprehensive reform of trusts at this stage. But the Government will keep the issues raised under review to ensure its long-term approach to the taxation of trusts meets its objectives. In the shorter term, there is likely to be some tinkering around the edges in specific areas of trusts taxation and the consultation responses in these areas will be taken into consideration.
Tanja Velling	On VAT grouping, the summary of responses to the call for evidence is expected to be published before the summer, but it has already been announced that the Government has decided not to take this forward.
Zoe Andrews	The carbon emissions tax legislated for in the 2019 and 2020 Finance Acts will not now come into force because Finance Act 2021 will repeal the provisions. As confirmed in December 2020, the Government is instead implementing a standalone UK Emissions Trading System to replace its participation in the EU Emissions Trading System. So what measures are being taken forward?

Tanja Velling	Well, first, we have a few measures on which we are awaiting further details. A consultation on the proposed residential property developer tax, a new tax intended to raise at least £2 billion over a decade from the largest residential property developers to help pay for cladding remediation costs, is to be "published in the coming months" – which probably means we will have to wait until the summer.
Zoe Andrews	Before then, we can expect a call for evidence which will explore how to make the rules on the VAT exemption for land and property simpler and clearer. The command paper gives "shortly" as the timeframe for publication of this call for evidence.
Tanja Velling	Later this year – so probably after the summer – the Government will provide an update on next steps in respect of the consultation on the value shifting rules for VAT which closed on the 30th of March.
Zoe Andrews	Having thus looked at what will not happen and at what we don't yet know, let's move on to the details of what was published on Tax Day, starting with the call for evidence on the tax administration framework.
Tanja Velling	It starts with high-level policy questions around the reforms which should be prioritised and whether the Government has correctly identified what should be the overarching aims of the tax administration framework. The closing date for responses is the 13th of July. When looking at different areas in more detail, a push towards smarter use of data stands out. Somewhat ominously, the call for evidence states that "roles and responsibilities of the taxpayer, HMRC and third parties may need to evolve as well".
Zoe Andrews	I wonder to what extent this might be a hint at the potential introduction of further information gathering and sharing requirements, and potential liability for under-charged tax in the case of incorrect data, for example, for banks.
Tanja Velling	Well, the call for evidence itself seems to suggest that the Government might look at requiring third parties to automatically provide information which HMRC would otherwise have to specifically request, and that it must be ensured that taxpayers can have confidence in the accuracy of data obtained from third parties. In this respect, it is worth noting that, in the chapter on verification, sanctions and safeguards to promote compliance, one of the topics to be considered is "where accountability lies for the completeness and accuracy of data (for example where third-party information is provided or pre-populated)".

Zoe Andrews	Well, this does indeed sound as if, sooner or later, questions may be asked around third parties' liability for a loss of tax caused by inaccuracies in the data they provide. Another point that I have been pondering is how this review fits in with the review of large businesses' experience with the UK tax administration announced on Budget Day (at paragraph 2.92 of the Red Book, to be precise). There are legitimate fears that HMRC governance concerns are both causing the enquiry process to take too long and result in over-use of discovery to the dismay of many big inward investors into the UK. The tax administration call for evidence does acknowledge both that there is room to improve the process for resolving tax disputes, with potential lessons to be learned from international examples, and that the 'enquiry' process in the UK is relatively unique and does not promote the early resolution of issues. So, large businesses could consider responding to the call for evidence – in which case they should expect their names and responses to be published in the usual way for a public consultation. As businesses may consequently be reluctant to share more sensitive information, we would expect that, in order to meet the promise in the Red Book, the HMRC would engage with businesses in a more informal manner as well, but we don't yet know the timing or form.
Tanja Velling	A second consultation on the proposed requirement to notify uncertain tax treatment for large businesses was published on Tax Day. The objective is to identify and reduce £4.9bn of tax losses caused by delays in identifying and resolving disagreements on how the law should be interpreted. It is intended to enable HMRC to draw out legal uncertainties earlier, identify businesses that are pushing the legal boundaries and to begin to challenge taxpayers sooner. The notification requirement will apply only to large businesses, meaning partnerships, LLPs or corporates with a turnover above £200m or a balance sheet total over £2bn. Collective investment schemes are, however, excluded from this.
Zoe Andrews	It was originally intended to be brought in from April 2021, but in response to concerns raised during the first consultation, it was announced in November 2020 that implementation would be deferred by 12 months. It will now be legislated in Finance Bill 2022, but it needs to be considered for transactions which are happening now, if they will be included in returns due to be filed after April 2022. The scope of the taxes covered by this measure has been narrowed since the original consultation hasn't it?

Tanja Velling	Yes. The taxes covered are now limited to corporation tax, income tax (including PAYE) and VAT in order to reduce the administrative burden and focus the measure on the taxes that make up the majority of large businesses' share of the legal interpretation tax gap. And there are now some exceptions to notification.
Zoe Andrews	Yes. There is no need for duplication of notification. So, banks that have signed up to the banking code of conduct are not required to notify uncertain tax treatment that they discuss with HMRC under the code. Large businesses which have already had discussions with HMRC about the uncertainty will not be required to bring it to HMRC's attention again through the notification process, unless the business treats the transaction contrary to HMRC's recommendation. The definition of "large" will pull in some businesses which do not have a CCM and so as to not disadvantage these, HMRC will provide a method for discussions to occur for businesses without a CCM. The original definition of uncertain tax treatment was one that HMRC may challenge or is likely to challenge, but this was criticised as being too subjective. That criticism has been taken on board in the second consultation, hasn't it?
Tanja Velling	Yes. A series of seven objective tests, or triggers, is now proposed where, if any one trigger is met at the due time for notification, the large business will be required to notify. There is no duty to notify subsequently if, after the due time for notification, there is a change (for example a case-law development) that means a tax treatment becomes uncertain. The Government is considering whether a specific list of common uncertain tax treatments, along with HMRC's view, could be published alongside HMRC guidance. And there are some other important differences in the second consultation.
Zoe Andrews	Yes. There is an increase to £5m (from £1m) in the de minimis for notification – and it has become a two-stage test. The total tax impact of the tax treatment must be £5m or above and the biggest tax difference between the customer's treatment and HMRC's expected treatment must be more than £5m – but, if the second part of the test has not been calculated, the taxpayer can rely on the first part not being met. Similar products or transactions are amalgamated for the purposes of the £5m threshold. The notification is required at the same time as the relevant return is required, and there must be a separate notification for each tax regime. The £5000 penalty for failure to notify will be imposed on the large business entity, not on an individual as proposed in the initial consultation,

	unless the entity is a partnership and the failure to notify is in respect of the partnership return required by TMA 1970, section 12AA.
Tanja Velling	The consultation closes the 1st of June. Draft legislation and a tax information and impact note will be published for further comment ahead of inclusion in the Finance Bill 2022. HMRC will develop and publish additional guidance for large businesses on the new regime, including a list of the information to be provided alongside an uncertain tax treatment notification.
Zoe Andrews	Moving on to the consultation on transfer pricing documentation which closes on 1st of June. The UK does not currently impose any specific transfer pricing documentation requirements. Companies are, however, required to preserve records to show that their tax returns are complete and accurate. Having contemporaneous records of the reasons why intra-group transactions were priced in a particular way are invaluable in this regard and may help to reduce penalties by showing that the taxpayer did not act carelessly. Introducing specific documentation requirements should make it more straightforward for the taxpayer to know and fulfil their compliance obligations. So, let's look at the proposed documentation requirements. Multinational enterprises within the scope of country-by-country reporting will be required to provide HMRC with a copy of their transfer pricing master file on request. They will also be required to maintain, and produce on request, a local UK transfer pricing file. The requirements for the master and local files would track the OECD's standardised approach under Action 13 and, if the proposals were limited to the production of these files, they would probably be a welcome clarification and be unlikely to lead to significant additional administrative costs.

Tanja Velling	The consultation does, however, envisage two additional measures which do, unfortunately, look rather onerous. First, it is suggested that an evidence log could be required to supplement the local file. The evidence log required to be submitted in the context of the Profit Diversion Facility is suggested as an example of what this could look like. Using what is, at heart, an evidence-gathering mechanism in a dispute resolution process for routine compliance may not be a proportionate policy choice – and the consultation itself refers to proportionality as a key policy consideration. The second additional measure, the introduction of an international dealings schedule which would set out certain details on cross-border intra-group transactions above a yet-to-be-determined de minimis threshold, would apply to all UK businesses within the scope of the transfer pricing rules, and not only to those that are also within the scope of country-by-country reporting.
Zoe Andrews	The whole proposal is still phrased as hypothetical. If it is implemented, it could lead to significant additional compliance costs, depending on how it is implemented. So, businesses may wish to consider commenting in detail on the "how" as well as the "if" despite the early stage of the proposal.
Tanja Velling	The consultation on the reform of the taxation of securitisation companies suggests some welcome improvements to the regime, recognising that securitisations are an important part of the UK's capital markets and a key source of finance for UK businesses. The Government is keen to ensure the UK's tax code keeps pace with the evolving nature of capital markets and contributes to the UK's position as a leading financial services centre. Accordingly, the consultation explores, at a high-level, changes to clarify and/or reform certain aspects of the Taxation of Securitisation Companies Regulations and the stamp duty loan capital exemption as it applies to securitisations and to insurance-linked securities, or ILS for short.
Zoe Andrews	Four areas are being explored. Views are sought on the commercial importance (and the impact on the UK's competitiveness as a financial services centre) of being able to carry out retained securitisations. A retained securitisation is one where an originator acquires more than 50% of the securities from the note-issuing company. A condition of the current regime is that notes must be issued "wholly or mainly" to independent persons and HMRC interpret this as meaning more than 50%. HMRC welcomes views on whether the legislation should be amended on the application of this test in relation to retained securitisations.

	The second area is the scope of assets which can be securitised - should the scope be expanded beyond the current definition of financial assets, and, if so, what should be included and what would be the implications of this for interaction with other parts of the tax code.
Tanja Velling	The third area is the operation of the note issuance threshold for the note-issuing company. There are concerns that having a threshold as high as £10m and the requirement that each single issuance be in excess of that amount restricts access to that regime. But if this threshold is lowered, there is a risk that arrangements are then inadvertently caught by the securitisation rules, a risk that could be minimised by requiring an election into the rules. The final area is the uncertainty of the application of the loan capital exemption from stamp duty to securitisation arrangements, to transfers of large pools of assets, to ILS arrangements and to notes issued by insurance special purpose vehicles. It is acknowledged that this uncertainty can be regarded as a barrier to establishing securitisations in the UK. Workarounds implemented to remove the possibility of stamp duty complicate the securitisation process and increase its costs. The consultation asks how best these various uncertainties can be addressed and whether updated HMRC guidance is the answer. The consultation closes on the 3rd of June and a summary of responses is expected to be published in the summer
Zoe Andrews	The last consultation which we wanted to briefly draw your attention to concerns the raising of standards in the tax advice market and closes on 15th of June. The Government proposes to require tax advisers to hold professional indemnity insurance. And this could affect a much wider category of persons than one might have thought. The stated policy intention is to cast the net widely through a broad definition of what constitutes “tax advice”. Tax software may be included in the definition and it is suggested that, without a specific exclusion, the incidental provision of tax advice when performing a statutory duty, such as an employer submitting PAYE information using a Real Time Information return, could be caught – which would seem a rather odd result.
Tanja Velling	In terms of enforcement, the consultation muses whether the sanctions should include suspending an adviser’s access to HMRC’s online services. This is quite a troubling possibility, in particular for those, like the employer who, as per the example in the consultation, is accidentally caught by an overbroad definition of tax advice, as it could presumably lead to late filing penalties in respect of the tax adviser’s own compliance.

	But let's now leave the UK and look at what's been happening in the EU, starting with two recent VAT decisions of the European Court of Justice in the *Wellcome Trust* and *Danske Bank* cases.
Zoe Andrews	The Wellcome Trust is a charitable organisation. It had engaged investment managers outside the EU to assist with the management of its large endowment portfolio and the point at issue was whether the Wellcome Trust had to account for VAT on the receipt of the supply of those investment management services under the reverse charge procedure. The question turned on the interpretation of the phrase "acting as such" in Article 44 of the Principal VAT Directive which reads: "The place of supply of services to a taxable person acting as such shall be the place where that person has established his business."
Tanja Velling	The UK's First-tier Tribunal was persuaded by the Wellcome Trust's argument that the phrase must mean that, where a taxable person receives supplies that are wholly used for the purpose of its non-taxable activities (including the non-economic business activity at issue in this case), they are not received by it "acting as" a taxable person and are, therefore, outside the scope of Article 44. HMRC appealed the FTT's decision to the Upper Tribunal and the UT referred the question of the interpretation of "acting as such" to the CJEU.
Zoe Andrews	Following the Advocate-General, the CJEU has now confirmed that, in applying Article 44, a distinction must be drawn between non-economic activities of a business and private use. If a taxable person carrying on a non-economic activity receives services for the purposes of that activity, those services are received by the taxable person acting as such, within the meaning of Article 44, unless the services are intended for the private use of the taxable person or their staff.
Tanja Velling	The *Danske Bank* case concerns VAT grouping and you may have seen it referred to as "reverse Skandia".
Zoe Andrews	*Skandia* concerned services provided by a non-VAT grouped head outside the EU to its VAT-grouped EU branch. It was decided that this was a taxable supply to the VAT group because for VAT purposes, the branch, as part of the VAT group, and the head office had to be regarded as two separate persons.
Tanja Velling	The *Danske Bank* case involved the provision of services by a VAT grouped head office established in one EU Member State to its non-VAT grouped branch in a different Member State. The CJEU confirmed that, despite the slight differences in the fact pattern between the *Danske Bank* and the *Skandia* cases, the *Skandia* principle applied equally in *Danske Bank*. The head office, as part of the VAT group, and the branch had to be

	treated as two separate persons for VAT purposes and the supplies between them were taxable in accordance with the normal rules.
Zoe Andrews	The UK's VAT grouping rules are different from the ones at issue in *Skandia* and *Danske Bank*, insofar as they provide that the whole legal entity (rather than only its UK establishments) would form part of the UK VAT group. Post-*Skandia*, commentators asked whether the decision meant that the type of grouping rules implemented in the UK may not be compatible with EU law. But, in Revenue and Customs Brief number 2 of 2015, HMRC confirmed that UK rules were compatible with EU law. The *Danske Bank* case casts doubt on this conclusion. The CJEU's description of the territorial limitation on VAT grouping as meaning that "a Member State may not provide for a VAT group to include persons established in another Member State" leaves room to argue that the UK rules are compliant given that they would merely allow foreign branches – which are not separate legal persons – to be part of a UK VAT group. But the judgment does suggest rather heavily that the CJEU would regard a branch as a person for these purposes, given that the CJEU appears to conclude, on the basis of the thus-described territorial limitation, that the Swedish branch of a Danish entity cannot form part of a Danish VAT group. In any event, in post-Brexit Britain, this is likely to be mostly of historic interest.
Tanja Velling	The other EU development that we wanted to mention is DAC7, another amendment of the Directive on administrative cooperation in the field of taxation, which was adopted by the Council of the EU on the 22nd of March. DAC7 requires Member States to impose an obligation on digital platform operators (whether located inside or outside the EU) to report the income earned by sellers on their platforms. The measures shall take effect from the 1st of January 2023. DAC7 also amends certain other cross-border administrative procedures and provides a framework for competent authorities of two or more Member States to conduct joint audits. And now, what can we look forward to?
Zoe Andrews	With the start of the new tax year on the 6th of April 2020, the extension of the off-payroll working rules to the private sector will come into force. The 9th of April is the deadline for comments on the Office of Tax Simplification's consultation that asks how tax can be made easier through the smarter use of third party data.

	The Upper Tribunal is scheduled to hear HMRC's appeal in *Tower Resources v HMRC* (VAT recovery by holding companies) between the 19th and 21st of April. And the 20th of April is the closing date for comments on the Treasury's review of the UK funds regime. Stakeholders are invited to provide views on which regulatory and tax reforms should be taken forward and which of the changes should be prioritised.
Tanja Velling	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