SLAUGHTER AND MAY/

TAX NEWS

PODCAST

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Zoe Andrews	Welcome to the June 2025 edition of Slaughter and May's "Tax News" podcast. I am Zoe Andrews, Head of Tax Knowledge.
Tanja Velling	And I am Tanja Velling, Tax Knowledge Counsel. We will discuss the Upper Tribunal's decisions in *Walkers Snack Foods* and *Rettig Heating Group*, and the Court of Appeal's decision in *Beard*. We're also going to talk about items published as part of the Tax Update Spring 2025, focussing on stamp taxes modernisation, the reform of the diverted profits tax, transfer pricing and permanent establishment legislation and a consultation on dispute resolution. In this context, we will also highlight the First-tier Tribunal's Practice Statement on alternative dispute resolution before moving on to discuss HMRC's revised unallowable purpose guidance and some international news. The podcast was recorded on the 4th of June 2025 and reflects the law and guidance on that date. Shall we start with an update on the case where the First-tier Tribunal informed us that "Nominative determinism is not a characteristic of snack foods"?
Zoe Andrews	Certainly. The Upper Tribunal's decision in *Walkers Snack Foods* upheld the FTT's assessment that "Sensations Poppadoms" should be standard rated for VAT purposes on the basis that they are products made from potato similar to potato crisps. There's an interesting point in the Upper Tribunal's decision on statutory interpretation linked to the structure of the VAT legislation. In general, items are standard rated, unless they fall, for instance, within an exemption and it is well established that exemptions must be construed restrictively. Here, however, the relevant snack food clearly fell within an exemption, that being "food of a kind used for human consumption". The issue was whether it was then within an exception which would take it out of the exemption and back into standard rating. So, the Upper Tribunal had to consider what principles apply to construing such an excepted item. Does the principle that exemptions must be construed restrictively have indirect effect to require excepted items to be read widely?
Tanja Velling	The parties had not directed the Upper Tribunal to any authorities to support such an approach and, therefore, the Tribunal applied ordinary principles to construe the exception. In doing so, it concluded that it was reasonable for the FTT to conclude that the requirement to be "made from the potato" could include being made from potato granules and therefore the potato content was sufficiently "significant" to fall within the exception.

Zoe Andrews	The case also illustrates how difficult it is to challenge FTT decisions that are highly fact dependent. The Upper Tribunal criticised aspects of the FTT's approach to the multi-factorial assessment whether the snacks were similar to potato crisps. One of these criticisms actually related to the FTT's observations on nominative determinism. The quote that you mentioned earlier continued: "calling a snack food "Hula Hoops" does not mean that one could twirl that product around one's midriff, nor is "Monster Munch" generally reserved as a food for monsters." The Upper Tribunal noted that brand names like "Hula Hoops" and "Monster Munch" are indeed irrelevant for the multi-factorial test, but "Poppadom" seems more of a customary name than a brand name, and this can be relevant. But its relevance here was limited. As the Upper Tribunal noted, "The fact that a product might customarily be called a "poppadom" does not in principle prevent it from also being similar to a potato crisp." Overall, the Upper Tribunal considered the criticisms insufficient to disturb the FTT's conclusion. The test – "whether the FTT reached a conclusion, which is so unreasonable that no reasonable tribunal, properly construing the statute, could reach" – sets a high bar. Let's move on now to a direct tax matter – the Court of Appeal's decision in *Beard* on the meaning of "dividends of a capital nature".
Tanja Velling	Alexander Beard, a UK tax resident shareholder, had received distributions (in cash and in shares) from the share premium of Glencore, a Jersey company. He argued that the distributions were not income in nature and so not caught by the taxing provision (in section 402 of the Income Tax (Trading and Other Income) Act 2005). Now, Jersey law at the relevant time provided two alternative mechanisms for paying distributions out of share premium. Glencore used the mechanism under Part 17 of the relevant Jersey legislation, which was the same mechanism as would be used for paying a dividend out of trading profits. The other mechanism was under Part 12 for capital reductions. This choice of mechanism was critical to the UK tax analysis.
Zoe Andrews	Having lost before the First-tier and Upper Tribunals, the taxpayer appealed to the Court of Appeal where he lost a third time. Although no new ground is broken in this case, the Court of Appeal's review of the case law and application of that case law to the facts of the case is helpful. In particular, the Court of Appeal confirmed the focus of section 402(4) is the character of the dividend and not the funds from which the dividend is paid. The mechanism by which a dividend is paid is an essential element in determining whether the corpus, or capital, of the asset remains intact after the distribution. The mechanism will generally be determinative but in some cases, it might be necessary to look behind the mechanism to identify the "true substance". In this case, however, the Court of Appeal found that, under the Part 17 mechanism, the corpus of the shares remained intact in the hands of the taxpayer after the distributions and so the dividends were income in nature and not capital.
Tanja Velling	Our next case, the Upper Tribunal's decision in *Rettig Heating Group*, takes us back to 2002 when UK law exempted domestic, but not foreign, dividend income from corporation tax. During that year, the taxpayer had received dividends from an Irish subsidiary. It also had a sufficient non-trading loan relationship deficit that it could set against that dividend income to ensure that no corporation tax would be payable. But the taxpayer took a different position - that the corporation

	tax charge on the Irish dividends was incompatible with EU law and that those dividends should be exempt just like domestic dividend income. Many years later, the Franked Investment Income Litigation confirmed that the UK could charge tax on foreign dividend income but had to give a credit at the foreign nominal rate. The taxpayer then reviewed its position and, on the 11th of March 2021, made a claim to offset its non-trading loan relationship deficit for 2002 against the amount of Irish dividend income (less the foreign tax credit) that would otherwise be subject to corporation tax.
Zoe Andrews	That's a somewhat simplified description of the facts, but I agree that it should be sufficient for our discussion of the case. The crux of the matter was the timing of the claim to offset the non-trading loan relationship deficit. Made more than 18 years after the end of the taxpayer's 2002 accounting period, it was way outside the usual two-year time limit. But the relevant legislation also envisages that such claims could be made "within such further period as [HMRC] may allow". So, HMRC does have discretion to allow late claims. Here, they decided not to exercise it in the taxpayer's favour, the taxpayer brought a claim for judicial review and, spoiler alert, the Upper Tribunal dismissed the claim.
Tanja Velling	What can the case tell us about how HMRC should exercise its discretion to allow late claims?
Zoe Andrews	In deciding whether to allow the late claim here, HMRC applied its Statement of Practice 5 of 2001. That's rather interesting, because on its terms, the SP applies only in respect of late claims for the carry back of losses, capital allowances and group relief, not non-trading loan relationship deficits. However, for the purpose of the judicial review, the parties accepted that "the statutory provisions in respect of time limits are similar and that the approach in the SP is instructive and should be applied". Given that HMRC had expressed the decision to have been made on the basis of the SP, the Upper Tribunal could not "see that it would have been open to HMRC now to assert that the Decision did not need to be made in accordance with the SP".
Tanja Velling	Does this then mean that taxpayers can generally rely on this SP as a guide to how HMRC would exercise any discretion to allow late claims? Even where those claims are not within the explicit scope of the SP?
Zoe Andrews	Yes and no - the case does suggest that, in practice, HMRC would apply similar principles to other late claims, but I wouldn't read it as suggesting that they are necessarily bound to do so in all circumstances.
Tanja Velling	That makes sense. The taxpayer claimed here that HMRC misinterpreted the SP; how does the Upper Tribunal say it should be interpreted?
Zoe Andrews	When construing a statement of practice, it must be borne in mind that this is a policy statement, not a statute. The Upper Tribunal considered that the same principles as the Court of Appeal had set out in respect of the interpretation of an extra-statutory concession should apply to a

	statement of practice. Its meaning “falls to be assessed by reference to how it would reasonably have been understood by those to whom it was directed”.
Tanja Velling	The SP indicates that HMRC would generally “admit claims which could not have been made within the statutory time limits for reasons beyond the company’s control.” The first example given for such a situation is that, when the time limit expired, “the company or its agents were unaware of profits against which the company could claim relief.” The Upper Tribunal disagreed with the taxpayer that the case fell within this example - why?
Zoe Andrews	Essentially, the Upper Tribunal’s view was that the taxpayer had been aware of the profits, but it had ultimately decided to file on the basis that the profits were exempt from tax. That decision was something within the taxpayer’s control. According to the Upper Tribunal, a case where the taxpayer is aware of the profits, but unaware that they are taxable, falls outside the scope of this first example.
Tanja Velling	The second example given in the SP for circumstances beyond the taxpayer’s control is that “the amount of a profit or loss depended on discussions with [HMRC] which were not complete when the time limit expired” and the delay was not the taxpayer’s fault. Why did the Upper Tribunal think that this didn’t apply either?
Zoe Andrews	Well, first, the Upper Tribunal considered that this example describes cases where HMRC and the taxpayer disagree on the quantification of a profit or loss; here, the amount of the profit, meaning the amount of the Irish dividends, was never in dispute. That should have been sufficient to dispose of this ground of challenge, but the Upper Tribunal went on to consider that the example also implied that discussions about the profit or loss would have to have started before the expiry of the time limit - which also hadn’t been the case here.
Tanja Velling	The taxpayer advanced three further arguments to challenge HMRC’s decision. Whilst I don’t propose that we go into any detail on these, I do want to note a reminder towards the end of the decision that “the question for the purpose of addressing the JR Claim…is not whether the taxpayer’s conduct was reasonable but whether HMRC were irrational in refusing the late claim.” That’s not an easy hurdle to clear! Shall we move to some other updates?
Zoe Andrews	Yes. We have to make good the promise given in the previous edition of this podcast that we would pick up on some developments from the government’s “Tax Update Spring 2025” which took place on the 28th of April 2025. Amongst others, the government published updates on stamp taxes modernisation and on the reform of the diverted profits tax, transfer pricing and permanent establishment legislation, and a consultation on dispute resolution.

Tanja Velling	The headline on stamp taxes modernisation is that the government plans to go ahead with the project and introduce one new tax to replace stamp duty and stamp duty reserve tax. It would be mandatory and self-assessed through a new online portal. Once a transaction is registered on the online portal, a Unique Transaction Reference Number (or UTRN) would be issued, and based on that UTRN, a company's register could be updated. This should make it significantly faster to reflect a change of ownership following an M&A transaction. Loan capital should continue to be outside the scope of the new tax, but equity-like debt would be caught. Similarly, share buybacks continue to be in scope. The current £1,000 de minimis under which stamp duty does not apply would be removed; but the growth market exemption, and group and reconstruction reliefs would be retained. It is intended that the approach to uncertain and unascertainable consideration would reflect the stamp duty land tax rules. The charging point for the new tax would be the earlier of substantial performance and completion. In respect of M&A transactions, this may raise the question at which point provisions, for instance, in relation to the exercise of voting rights and the conduct of business between signing and completion could cross the line towards substantial performance.
Zoe Andrews	Hopefully, this should become clearer once we see the draft legislation. Any idea when that might be?
Tanja Velling	Given that the new regime is intended to come into force in 2027, I would not expect to see draft legislation before 2026. In contrast, the reform of diverted profits tax (or DPT), and the transfer pricing and permanent establishment rules is significantly more advanced. Draft legislation for the reforms was published on the 28th of April. As previously proposed, the draft legislation would roll DPT into corporation tax with a separate notification regime and new mechanism to charge what's referred to as "unassessed transfer pricing profits" (or UTPP) at (effectively) the current DPT rate. There would be two main gateways into the new UTPP regime - the effective tax mismatch outcome which remains mostly unchanged and the tax design condition which has been completely reworked in a way that seems likely to catch more transactions than it used to. The draft legislation does not include an avoided permanent establishment gateway. It will be interesting to see other countries' reactions to these changes - especially that of the US given certain provisions in the tax bill that has recently passed the House of Representatives. But we'll come onto that in a moment. What changes are being made to the UK's transfer pricing legislation?
Zoe Andrews	Changes to the transfer pricing legislation include the introduction of a new test for the participation condition based on arrangements for common control, and an anti-avoidance provision to address arrangements with a main purpose of not meeting the participation condition. Another new provision would, in certain circumstances, allow HMRC to require a taxpayer to file on the basis that the participation condition has been met.

	The draft legislation further includes an exemption from UK-to-UK transfer pricing where there is no risk of tax loss. This would be subject to certain exclusions and taxpayers could elect out of the exemption. Other changes are to financial transfer pricing and a simplification of the interaction between the intangible fixed asset and transfer pricing rules.
Tanja Velling	In relation to permanent establishments (or PEs), the draft legislation would effectively replace the UK's domestic enactment of the separate enterprise principles with a cross-reference to the OECD's authorised approach to profit attribution. The definition of a dependent agent permanent establishment would be aligned with the definition in the 2017 OECD Model Tax Convention despite concerns having been raised that this could lead to a proliferation of small UK PEs with little or no tax. The government considers those concerns unfounded: "a person who meets this new definition would also fall within the previous wording, which is very broad in scope". The government does, however, acknowledge that the updated definition "will place greater strain on the Investment Manager Exemption" and the draft legislation includes changes intended to clarify its operation. Statement of Practice 1 of 2001 on the Investment Manager Exemption would also be updated and a revised version has been published alongside the draft legislation.
Zoe Andrews	There's clearly a lot to these reforms, and we've only been able to scratch the surface here. However, these are areas where we do have considerable expertise so if you are concerned about the impact of these consultations on your business, please contact Tanja or me or your usual Slaughter and May contact. The final Tax Update item that we wanted to highlight is the consultation on improving HMRC's approach to dispute resolution. Two main headline points are a proposal to align the decision-making and review processes for direct and indirect taxes, and the potential introduction of a requirement to consider alternative dispute resolution before appealing to the tribunal. The alignment proposal envisages a three-stage model. The first stage would involve a pre-decision letter that the taxpayer can query; ADR could also be used at this stage. Then follows the formal decision stage with an offer of a statutory review and/or ADR. Thereafter, the taxpayer could appeal to the Tribunal. The consultation envisages that the potential requirement to consider ADR would not be a requirement to participate in ADR where this is unsuitable, but HMRC and the taxpayer would have to have given ADR "due consideration prior to an appeal". It is not entirely clear what such "due consideration" would look like in practice - and also how HMRC would manage an increased volume of ADR which could entail significant additional costs. How would these be covered? Is this another area - in addition to early certainty for major projects and R&D pre-clearances - where the government might consider requiring taxpayers to contribute to the cost? How appropriate would that be, particularly if ADR continues to be run by HMRC mediators rather than independent third parties?

Tanja Velling	Speaking about ADR, the FTT has recently issued a practice statement on this topic with the aim of furthering its obligation to publicise ADR procedures. The statement clarifies that ADR is not automatic and that the taxpayer needs to apply to HMRC. If ADR is agreed, the Tribunal should be informed as soon as possible and would normally be willing to stay the proceedings for the duration of the ADR process. Costs awards may be impacted by an unreasonable failure to consider or enter into ADR. And what else has been going on?
Zoe Andrews	We are seeing a lot of unallowable purpose enquires at the moment, so it is timely that, in May, HMRC published a significant update to the Corporate Finance Manual pages on the loan relationships unallowable purpose test. This is partly in response to the Court of Appeal's decisions last year in *Kwik-Fit*, *JTI Acquisitions* and *BlackRock* which are now final, but HMRC has also taken the opportunity to re-order and clarify some of the existing guidance to make it read better. The guidance sets out various lists of principles which HMRC has extracted from case-law and from "a plain reading of the statutory language" and lists of factors HMRC says may be relevant, but the guidance emphasises repeatedly that these principles or factors are not determinative and that the questions whether there is an unallowable purpose and how significant such a purpose is, are questions of fact to be determined by the fact-finding tribunal and not simply by asking the decision-maker. In particular, HMRC has expanded its views on whose purpose is relevant including the relevance of the influence on decision-makers of "group purpose" and on how to assess the significance of a purpose to see whether securing a tax advantage is a main purpose. There is also further consideration, in light of the cases, of attribution on a just and reasonable apportionment including by way of clear causal link between the purpose and debits and asking the "but for" question.
Tanja Velling	It sounds like the revised guidance is a must-read for anyone involved in an unallowable purpose enquiry, but it is important to remember that the views set out in the guidance are based on HMRC's interpretation of the law and cases which may not necessarily be the same as how a taxpayer or a court would interpret them! In that respect, it's also important to remember that the Manual does, of course, form part of HMRC's known position for the purposes of the notification of uncertain tax treatment rules that apply to large businesses.
Zoe Andrews	Bridging the gap between UK developments and overseas ones, I'd like to mention the US/UK trade deal. On the 8th of May, the US and UK agreed a trade deal (although the document states it is not legally binding and there are requirements to bring it into effect). The US agreed to cut tariffs, including on British car and steel exports to the US. The whole tariff situation is all a bit confusing, but it is important to note that the car and steel tariffs that the trade deal is supposed to cut are separate from the so-called "reciprocal" import taxes announced by President Trump on the 2nd of April (labelled "Liberation Day") which have been ruled by a US court to be illegal, although the decision has already been appealed. There is concern, however, that, with the Trump Administration being distracted by the legal challenge to the validity of the Liberation Day tariffs, there may be a delay to the US actually implementing the tariff cuts promised in the US/UK trade deal.

Tanja Velling	I was wondering if the trade deal would require a rollback of the UK's digital services tax or other tax concessions from the UK, but these did not form part of the deal. Probably because the Trump Administration has other plans to tackle digital service taxes and other foreign taxes it deems unfair?
Zoe Andrews	Ah yes. We have been keeping an eye on the international tax provisions in The One Big Beautiful Bill Act, currently working its way through the legislative process in the US. Section 899 is causing particular concern to non-US persons with US investments. We intend to explore this in more detail in a follow-up podcast with Arvind Ravichandran of Cravath, but in brief, what is the issue here?
Tanja Velling	This is a provision to increase US tax rates (including withholding tax rates) on residents of foreign countries imposing unfair foreign taxes on US persons.
Zoe Andrews	Which taxes are "unfair"?
Tanja Velling	The legislation is very broadly drafted and would pick up the Pillar 2 undertaxed profits rule (UTPR), digital services taxes and diverted profits taxes. But it also picks up other taxes "with a public or stated purpose indicating the tax will be economically borne, directly or indirectly, disproportionately by United States persons". Section 899 would increase the statutory rate of tax (or, where applicable, the treaty rate) on certain US-source income by 5% for each calendar year, up to a maximum of 20% above the statutory rate.
Zoe Andrews	Alarm bells will be ringing for residents of the UK receiving certain payments from the US as the UK would likely be classed as a discriminatory foreign country as we have the full set of so called "unfair taxes": a digital services tax, the UTPR and a diverted profits tax. In respect of the latter, would the change to roll it into corporation tax make a difference? I think that's open to debate. Looking at the practical impact of section 899, it is common practice for loan agreements, derivative contracts and certain note offerings to include a provision requiring a gross-up for certain withholding taxes. For existing agreements with a US borrower or counterparty, it should be considered whether the application of section 899 could trigger such gross-up obligations or termination provisions. Where an agreement or offering is currently being negotiated, parties should consider the allocation of the risk of withholding taxes that would become payable under section 899, if enacted. Section 899 would also modify the application of the Base Erosion and Anti-Abuse Tax (BEAT) to corporations owned directly or indirectly by certain non-US persons with sufficient nexus to a discriminatory foreign country, but we will not go into the details of that here.
Tanja Velling	If section 899 gets enacted, when will it commence?
Zoe Andrews	The section 899 withholding tax increase will begin in the calendar year 2026 at the earliest - and that assumes the provision is enacted by the 30th of September 2025, or in 2027 if enactment is after the 30th of September 2025. So, there is a period of time for deals to be done to remove such unfair taxes.

Tanja Velling	And finally, in other international news, the OECD Inclusive Framework has published a consolidated commentary to the GloBE Rules which incorporates the Agreed Administrative Guidance approved by the Inclusive Framework up until March 2025. The commentary is intended to provide tax administrations and taxpayers with guidance on the interpretation and application of the GloBE Rules to promote a consistent and common interpretation and application of the rules. And what is there to look out for?
Zoe Andrews	Well, based on what we just said, developments on the proposed changes to US domestic tax legislation and the US court case in relation to tariffs, for one thing. In relation to the Tax Update measures that we mentioned, it's worth noting that comments on the draft legislation for the reform of DPT, and the transfer pricing and permanent establishment rules can be submitted until the 7th of July 2025. That's also the closing date for comments for the dispute resolution consultation. Finally, HMRC have updated their International Manual in respect of a Brexit-related change in policy that will take effect from the 1st of July 2025. From then, they will no longer apply a conforming interpretation to the provisions on repayment interest in respect of claims for the repayment of income tax or payment of a tax credit under a double tax treaty. The conforming interpretation had meant that EU and EEA companies were also entitled to such interest; but from the 1st of July, that entitlement will be limited to companies within the charge to UK corporation tax.
Tanja Velling	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.

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