Slaughter and May Podcast
Tax News Highlights: November 2023

Tanja Velling	Welcome to the November 2023 edition of our tax news highlights podcast. I am Tanja Velling, Tax PSL Counsel. For this episode, we will unfortunately have to make do without my usual co-host, Zoe Andrews. But excitingly, I have been joined by Emma Game, one of our Tax Senior Counsel.
Emma Game	Thanks, Tanja. I am very excited for this episode. It's my first tax podcast recording, and we have a number of cases and other developments to report on. So, in this podcast, we will discuss the Supreme Court's decision in *Vermilion*, the Court of Appeal's decision in *Euromoney* and the Upper Tribunal's decision in *Refinitiv*, covering topics from employment-related securities options to DPT and APAs. We will also discuss some more draft legislation for the next Finance Bill, new HMRC guidance for insolvency practitioners, changes to the Double Taxation Treaty Passport Scheme and certain EU developments. This podcast was recorded on the 14th of November 2023 and reflects the law and guidance on that date.
Tanja Velling	So let's start with the decision of the highest court, the Supreme Court's decision in *Vermilion*, and work our way down. *Vermilion* is a short, to the point judgment – and a case that will be familiar to our regular listeners. It's a case I've been following through the courts with particular interest as it provides not only guidance on the specific question under consideration (whether an option granted to Vermilion's director, Mr Noble, is an employment-related securities option), but also an indication as to how courts approach those difficult tax cases if they suspect that a literal interpretation of the relevant legislation requiring the taxpayer to pay tax in their particular circumstances might not have been what Parliament intended.
Emma Game	As to the facts of the case, Mr Noble owned and was a director of Quest, a consulting company. In 2006, Quest provided corporate advisory services to Vermilion in return for the grant of a share option. When Vermilion subsequently came into financial difficulty, it was crucial to the success of a rescue funding exercise that Mr Noble became a director of Vermilion and that the terms of the 2006 option in favour of Quest were revised. But, instead of simply amending the existing option, the 2006 option was replaced with a new option, the 2007 option, on amended terms and in favour of Mr Noble.

Tanja Velling	The central issue in this case is the interaction between subsections (1) and (3) of section 471 of the employment-related securities legislation in Part 7 of the Income Tax (Earnings and Pensions) Act 2003. Section 471 defines when the Chapter in relation to securities options applies. Subsection (1) states that it applies "where a right or opportunity to acquire the securities option is available by reason of an employment". Subsection (3) provides that, where such a right or opportunity is made available by a person's employer, it "is to be regarded for the purposes of subsection (1) as available by reason of an employment".
Emma Game	HMRC argued that the 2007 option was an employment-related securities option. The FTT decided that it was not. The Upper Tribunal thought it was. Then the taxpayer won in the Court of Session which restored the FTT's decision, but it was a split decision with a dissenting judgment from the Lord President. As Tanja pointed out in the September 2021 edition of this podcast, that meant that this was a prime candidate for appeal to the Supreme Court. So what did the Supreme Court tell us about how to interpret the two subsections?
Tanja Velling	The Supreme Court clarified that these two provisions essentially operate independently – and that the appeal could be determined by the application of the deeming provision in subsection (3) alone. Subsection (3) will deem an option to be made available by reason of employment where it is made available by a person's employer. If the deeming provision in subsection (3) applies, then there is no need to go on to consider whether subsection (1) applies. The Court described the deeming provision as creating "a bright line rule". So, if a person's employer provides the employee with the right or opportunity to acquire an option, then that right or opportunity is conclusively treated as having been made available by reason of employment (unless, of course, one of the narrow exceptions applies). You don't even need to think about why the employer made that right or opportunity available.
Emma Game	So it's only if you are outside the deeming provision that you would then need to consider whether you are within subsection 471(1)?
Tanja Velling	Exactly. And then you would need to consider the difficult causation questions that arise when trying to ascertain whether something is "available by reason of employment".
Emma Game	Well I'm glad the Supreme Court has clarified how these two important provisions should be interpreted. Let's move onto another case now that will be familiar to regular listeners; and this is the Court of Appeal's decision in *Euromoney*.

Tanja Velling	Yes, the judgment in the *Euromoney* case was handed down on the 3rd of November – remarkably quickly given the hearing only took place on the 18th of October. The Appellant, Euromoney, has changed its name and so the case has been renamed *Delinian* – but I'll continue to refer to *Euromoney* as that's what the Court of Appeal did.
Tanja Velling	This was a case about whether capital gains reorganisation treatment applied to a share for share exchange under section 135 TCGA 1992, and, in particular, the correct interpretation of the purpose test in section 137. Where shares are sold in exchange for the issue of shares by the buyer, then, if section 135 applies, the exchange is not treated as involving a disposal of the old shares and acquisition of the new shares for chargeable gains purposes; instead, the new shares are treated as the same asset, acquired for the same cost, as the original shares were acquired. This treatment is, however, switched off if the purpose test in section 137 is failed. The purpose test will be failed if the exchange forms part of a scheme or arrangements, a main purpose of which is the avoidance of tax on chargeable gains.
Emma Game	So in this case, Euromoney agreed in principle to sell its shareholding in a company called CDL for a mixture of cash and share consideration. Given the nature of the rights attaching to the shares in CDL, the substantial shareholding exemption (or SSE) would not have applied to the disposal of shares for cash. At what the FTT described as "a very late stage" in the negotiations, Euromoney's parent company's tax director suggested that instead of receiving the cash part of the consideration, it would be better for the buyer to issue redeemable preference shares to Euromoney, which could then be redeemed after 12 months and qualify for SSE. The buyer agreed to this and the transaction went ahead. Euromoney filed its tax return on the basis that reorganisation treatment applied to the exchange of CDL shares for ordinary shares and redeemable preference shares. HMRC said that reorganisation treatment was not available because the taxpayer failed the purpose test in section 137. Our regular listeners will know that HMRC lost in the FTT and the Upper Tribunal. The FTT found that saving tax was not a main purpose of the scheme or arrangement as a whole. Tanja, did HMRC's losing streak continue in the Court of Appeal?
Tanja Velling	Yes, it did. The Court of Appeal dismissed HMRC's appeal. The focus of the Court of Appeal's decision was on the proper construction of the purpose test. They make it clear that when applying section 137 and considering whether the share exchange forms part of a scheme or arrangements of which a main purpose is tax avoidance, the scheme or arrangements that must be considered are the whole of the scheme or arrangements

	undertaken by the taxpayer in question, not a selected part or selected parts of them.
Tanja Velling	HMRC had tried to cherry pick the steps constituting the scheme or arrangements, zooming in on the tax-influenced step of swapping some ordinary shares for redeemable preference shares. The Court of Appeal said that HMRC's approach was not correct; it is not necessary to undertake a free-standing exercise to identify an appropriate scheme or arrangements from amongst many candidates. And, to emphasise that you need to consider the whole of the scheme or arrangements when applying the purpose test, the Court of Appeal have put "the whole" in bold. This, they say, is the natural reading of section 137 and correct from a purposive point of view. Section 137 envisages that there may be tax avoidance so long as it is not a main purpose of the entire scheme or arrangements – Parliament's purpose is clear from the language used.
Emma Game	And now, let's move on to the case of Refinitiv. This concerns a judicial review claim that sought to have a DPT notice issued by HMRC in respect of 2018 quashed or declared unlawful on the basis that it was incompatible with an advance pricing agreement entered into for a period from 2008 to 2014. Starting with the factual background, from 2008 to 2018, certain UK entities provided services to a Swiss member of their group. For 2008 to 2014, an APA was in place pursuant to which the services were to be priced on a cost-plus basis. HMRC considered that the services provided from 2008 to 2018 had enhanced the value of IP held by the Swiss entity. When the IP was sold in 2018, the Swiss entity realised a significant gain. The DPT notice sought to tax the UK entities on a share of that gain, effectively as arm's length remuneration (on a profit-split basis) for their services provided over the entire period from 2008 to 2018. But the APA had envisaged remuneration on a cost-plus basis for the services provided from 2008 to 2014. Consequently, the taxpayer argued, the DPT notice was inconsistent with the APA.
Tanja Velling	According to the Upper Tribunal, the case turned on a question of statutory construction – whether the APA related to the 2018 period. "Relating to" is capable of signifying different degrees of connection. The Upper Tribunal considered that it was used here to mean periods to which the APA applied on its term and that, in this case, the APA had been expressed to apply only from 2008 to 2014. So, the APA did not relate to the 2018 period and consequently, the DPT notice for 2018 could not be inconsistent with the APA. Extrapolating from this, the case indicates that an APA cannot necessarily be regarded as an exhaustive regulation of the pricing of a particular provision during the period to which it applies; the drafting will have to be considered carefully in each case.

	What draft legislation for the next Finance Bill did you want to talk about?
Emma Game	Nothing on Pillar Two for a change. Instead, it relates to another recurring theme, namely Brexit. When the Retained EU Law (Revocation and Reform) Bill (which received Royal Assent in June of this year) was introduced back in September 2022, the government announced that it would "introduce a bespoke legislative approach for retained EU law concerning VAT, excise, and customs duty in a future Finance Bill [which would] revoke any remaining retained direct EU law that the government did not repeal in the Taxation (Cross-border) Trade Act 2018, and make clear that UK Acts of Parliament and subordinate legislation are supreme." The new draft legislation provides for this "bespoke legislative approach", although I would say it doesn't go quite as far as this quote. Would you agree?
Tanja Velling	Yes, I'd say that's a fair statement because rather than making clear that UK Acts of Parliament and subordinate legislation are supreme – full stop – it preserves a partial supremacy of EU law. Certain rights derived from EU law were preserved under section 4 of the European Union (Withdrawal) Act 2018. The Revocation and Reform Act will repeal section 4. But, pursuant to the draft legislation section 4 would continue to apply for the purposes of interpreting VAT and excise law (subject to an exception in relation to two provision in the Treaty on the Functioning of the European Union). The Revocation and Reform Act also provides for the abolition of general principles of EU law. The draft legislation provides that such principles shall nonetheless continue to apply for the purpose of interpreting VAT and excise law (albeit subject to other provisions of the Revocation and Reform Act). Relevant general principles would include the *Halifax* abuse principle; this is explicitly confirmed in the Taxation (Cross-border Trade) Act 2018.
Emma Game	But what does the draft legislation say specifically on the question as to which law is supreme?
Tanja Velling	Well, section 5 of the Withdrawal Act preserved the principle of the supremacy of EU law in respect of unamended pre-Brexit enactments. For provisions amended since then, the extent to which the principle applies depends on whether its application is consistent with the intent of the amendment. The Revocation and Reform Act will reverse section 5; the amended version will state that the principle of the supremacy of EU law is not part of UK domestic law. The draft legislation would limit the effect of this amendment in respect of VAT and excise law: EU law continues to be

	supreme for the purposes of interpreting VAT and excise law, but it can no longer result in the quashing or disapplication of any domestic law in this area. So, the principle of consistent interpretation should continue to apply. The Financial Secretary to the Treasury stated that, in this way, VAT and excise law "continues to be interpreted as Parliament intended, drawing on rights and principles that currently apply in interpreting UK law". It is intended to avoid re-litigation of settled interpretative points. From a legal certainty perspective that would seem welcome.
Emma Game	But it does not seem the most straightforward way of getting there… Anyway, onto HMRC's new guidance for insolvency practitioners. I suspect that its publication may have been triggered by recent case law on court-sanctioned restructuring plans under Part 26A of the Companies Act 2006. Part 26A is heavily based on the scheme of arrangement procedure in Part 26 and was introduced relatively recently – in 2020. Under Part 26A, the court may sanction a restructuring plan if a sufficient proportion of creditors and / or members in each class agree; but unlike a Part 26 scheme, a Part 26A restructuring plan also provides for a "cross-class cram-down": it allows a plan to be sanctioned against the wishes of a dissenting class if certain additional conditions are met, and as long as the court is satisfied that it should exercise its discretion to do so (which very broadly boils down to whether the court considers this to be a fair plan). In the cases of *Re Houst*, *Re Nasmyth*, *Re GAS (Great Annual Savings)* and *Re Prezzo*, the court was asked to cram down HMRC and sanction the company's proposed restructuring plan regardless of HMRC's dissent.
Tanja Velling	In the first case, the case of *Re Houst*, HMRC had voted against the plan, but not sent a representative to formally oppose it at the hearings. The court sanctioned the plan and noted that HMRC could have appeared to present arguments and evidence, and could have sought to negotiate a different deal – but did not do so (and in fact had acknowledged that, under the plan, recoveries would be better than in the likely alternative). So, in the following cases, HMRC has been represented at the hearings and the same can be expected going forwards where HMRC opposes a plan.
Emma Game	In the cases of *Re Nasmyth* and *Re GAS*, the plans were not sanctioned. In the case of *Re Nasmyth*, a highly fact sensitive case, the court declined to exercise its discretion to sanction the plan. The court found that the plan was unfair to HMRC given the size and age of the preferential debt owed to HMRC, the proposed allocation of recoveries to HMRC under the plan relative to some other creditors, and the position proposed in the plan in relation to time to pay arrangements. There had been previous broken time to pay arrangements and, in order for the plan to succeed, HMRC would have had to agree to further time to pay arrangements with operating subsidiaries – which it was unwilling to do. That meant that HMRC was a

	'critical creditor' and should have been paid in full, as other critical creditors were. In the case of *Re GAS*, HMRC successfully argued (among other things) that the debtor had not demonstrated that HMRC would be no worse off under the plan than in the likely alternative (this is one of the key conditions that must be met for a plan to be sanctioned). In any event, the court would not have exercised its discretion to sanction the plan because it was not fair in its treatment of HMRC (including when considering that shareholders would be kept whole, but had contributed nothing new). Importantly, the court stressed that HMRC's views deserve considerable weight.
Tanja Velling	In the case of *Re Prezzo*, on the other hand, the court decided to sanction the plan, notwithstanding HMRC's strong opposition – having considered principles raised in the earlier cases, including the need to attach weight to HMRC's views. The company's liabilities had accrued relatively recently, there were no broken time to pay arrangements, there had been meaningful engagement with HMRC resulting in an enhanced deal – HMRC's proposed recoveries were high relative to many other stakeholders and in comparison with what it would receive in the likely alternative – and, although certain other creditors were paid in full, they were truly critical (there had been questions raised about whether this was the case in both *GAS* and *Nasmyth*). Overall, these cases show that it is possible to cram down HMRC, including in relation to its preferential creditor status, but only if HMRC is (at least) no worse off than in the likely alternative to the plan and if the court considers the plan to be otherwise fair. There is a growing body of case law to guide the court in that regard, including when HMRC opposes a plan, and it is clear that the court will consider HMRC's views carefully. Engagement with HMRC is important. So, what does HMRC's new guidance say?
Emma Game	It certainly covers the engagement point, stating that HMRC's Debt Management team should be contacted "as soon as you decide to restructure your finances", detailing what information will have to be provided. It also states that all tax returns must be filed before HMRC will consider a plan. The factors that HMRC will take into account in reaching its decision on whether to support the plan capture some of the case law you referred to, but some of the points could be read as going further. For instance, HMRC states that they would be more likely to support a plan if it "explains how the restructuring will benefit all your creditors", but there is no requirement in the legislation for a plan to benefit all creditors; indeed, a core feature of the plan is that it allows the debtor to select which creditors to compromise or leave out (but the debtor will need to be able to justify this). HMRC is less likely to agree to a plan which would seek to restrict the recovery of future debts, or where HMRC has concerns regarding whether

	future tax debts will be paid in full and on time. The latter point is expressed rather subjectively, but should still be something that the company is able to predict. In any event, whilst the guidance is helpful in showing HMRC's thinking, to the extent that it does actually go beyond the principles established in case law, its practical impact will be questionable, given that it is ultimately for the court to decide whether to sanction a plan, whether or not HMRC supports it, as long as the conditions for cram down are satisfied (if the cram down power is relied upon).
Tanja Velling	Onto the next issue, relief under a double tax treaty from the UK's 20% interest withholding tax does not apply automatically. The borrower may pay interest gross (or subject to withholding at a reduced rate), only after it has obtained a direction to that effect from HMRC. The application process for such a direction is generally lengthy because it requires evidence that the lender is entitled to treaty benefits. So, to simplify and expedite the process, HMRC introduced the Double Taxation Treaty Passport Scheme or DTTPS. Lenders can obtain a "treaty passport" if HMRC is satisfied that they are eligible for treaty benefits, and the borrower can apply for a direction to pay gross (or to withhold at a reduced rate) on the basis of the lender's passport number. On the 20th of October, HMRC published changes to the DTTPS terms and conditions and the associated guidance.
Emma Game	It's helpful that the terms now explicitly acknowledge certain market and HMRC practices. If a borrower has submitted an application under the DTTPS before the first interest payment date, the terms now state that it may provisionally pay gross (or subject to withholding at a reduced rate) pending approval of the application and, if the application is successful, the direction will be backdated to the date when the application was submitted. In the case of a facility with multiple lenders and frequent changes, the borrower may be permitted to send a consolidated application on a monthly basis, but HMRC must be contacted to agree this. The appendix discussing whether a change in name, ownership or constitution of the payor or payee would constitute a material change so as to require a fresh application for a new direction has been deleted. Instead, the guidance states that, if a borrower is in doubt as to what constitutes a material change, they should contact HMRC. In the guidance, HMRC's has removed a commitment to notify lenders when their treaty passport is due to expire – lenders will now need to have a system in place to monitor this themselves. In addition, HMRC no longer commits to considering a passport application within 30 days, and the guidance states that borrowers must notify a passported loan "as soon as

	possible once the loan agreement is entered into" compared to the previous timing of "at least 30 working days before the first interest payment".
Tanja Velling	Now, moving on to the EU, the Council adopted DAC8, yet another amendment to the Directive on Administrative Cooperation. I want to highlight two points. DAC8 extends the scope of the automatic exchange of information and introduces a new reporting requirement for crypto-asset service providers in respect of transactions of crypto-assets and e-money, reflecting the OECD's Crypto-Asset Reporting Framework and changes to the CRS. Article 16 of the DAC specifies the use to which information exchanged under the Directive may be put. DAC8 extends the categories of permissible use to encompass anti-money laundering and countering terrorist financing.
Emma Game	Of course, we cannot record this podcast without some mention of Pillar Two. Article 32 of the EU's Pillar Two Directive requires, broadly speaking, that EU Member States implement agreed safe harbours. But, in order to count as agreed, all EU Member States must have agreed to them. The fact that safe harbours have been included in Administrative Guidance published by the OECD would seem insufficient for these purposes because not all Member States are part of the Inclusive Framework (Cyprus is not a member of the IF). But, on the 30th of October, the Cyprus Ministry of Finance announced that Cyprus consents to the QDMTT safe harbour and the transitional UTPR safe harbour in the Administrative Guidance released in July, so as to allow Article 32 to take effect in respect of them. A similar statement was previously issued in respect of the transitional country-by-country reporting safe harbour. And what can we look forward to during the next month, Tanja?
Tanja Velling	The main thing – at least on most tax practitioners' minds in the UK – will be the Autumn Statement on the 22nd of November. There have been some hints as to what it might contain. In their response to the Treasury Committee's Venture Capital report, the Financial Secretary and Economic Secretary reconfirmed that "HM Treasury agreed…that the sunset clauses for the Enterprise Investment Scheme (EIS) and Venture Capital Trusts (VCT) should be extended" with further details to be provided at a future fiscal event. That could be the Autumn Statement. There has also been speculation around changes to the ISA rules and further changes in respect of pensions. We will have to wait and see to what extent such speculation turns out to have been correct.
Emma Game	Another thing to look forward to will be our December podcast when we will cover last week's Supreme Court decision on the question of whether Dicey Rule 3 renders inadmissible claims by the Danish tax authorities for

	amounts allegedly obtained as a result of fraudulent tax refund applications, and the Advocate General's opinion in the *Apple* State aid case. If you would like to discuss these before then or have any other questions or comments, please contact Tanja 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.