SLAUGHTER AND MAY/

TAX NEWS

PODCAST

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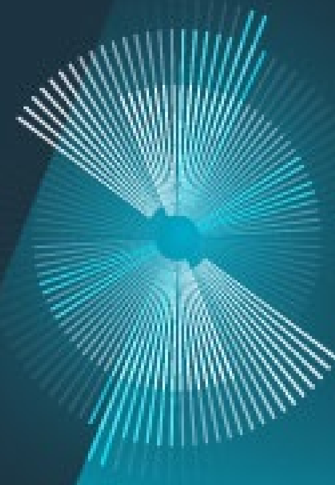

Zoe Andrews	Welcome to the April 2025 edition of Slaughter and May's "Tax News" podcast. I am Zoe Andrews, Head of Tax Knowledge.
Tanja Velling	And I am Tanja Velling, Tax Knowledge Counsel. This time, we have a special guest from our Infrastructure and Energy team to discuss the oil and gas price mechanism consultation and the Court of Appeal's decision in *Gunfleet Sands*. Zoe and I will then also cover the consultation on advance certainty for major projects and a few other points from the Spring Statement before moving on to the First-tier Tribunal's decision in *Hastings Insurance Services* and another Court of Appeal decision in *Innovative Bites*. In terms of case updates, it's also worth noting that HMRC have applied for permission to appeal *ScottishPower* to the Supreme Court - the February 2025 edition of this podcast covered the Court of Appeal's decision that the relevant energy providers could get tax relief for payments made to settle regulatory investigations pursuant to which large fines would have otherwise been imposed. We will also touch on a few international developments. The podcast was recorded on the 1st of April 2025 and reflects the law and guidance on that date.
Zoe Andrews	We are very pleased to be joined today by Alex Dustan, a corporate partner and member of our Infrastructure and Energy team. Welcome, Alex. Please tell us a bit about yourself and your practice.
Alex Dustan	Thank you, Zoe. Well, I have a broad corporate and commercial practice, actually, with a focus on Infrastructure and Energy, and within our Infrastructure and Energy team, we are very fortunate to act for a very diverse range of clients across a range of projects some of which are ground-breaking and innovative. I myself have recently been advising Rolls-Royce on the recent investment by ČEZ into its nuclear small modular reactors JV and also Repsol on its partnership with NEO Energy in the UK North Sea.
Zoe Andrews	Never a dull day then! We'll get to a case that's important in respect of the tax treatment of new projects in a moment, but let's start with the consultation on the oil and gas price mechanism which is open until the 28th of May. Of course, we already have the Energy Profits Levy (or EPL) which is an additional temporary tax that was introduced in May 2022 taking the headline rate of tax on upstream oil and gas activities

	to 78%. The government has already committed to ending the EPL on the 31st of March 2030, or earlier if the Energy Security Investment Mechanism is triggered. This consultation now looks at a mechanism to replace it. Why is there a need for another levy rather than simply extending the EPL?
Alex Dustan	The underlying policy choice is and was that the government intends the oil and gas sector to make an additional contribution to public finances when oil and gas prices are unusually or abnormally high. In 2022, of course, the EPL was brought in quickly without real consultation with industry in reaction to a significant increase in energy prices prompted by Russia's invasion of Ukraine and it was always intended to be temporary. One of the criticisms, though, of the EPL is that it did not recognise the fundamentally different market characteristics of oil and gas, and now that the government seeks a more robust and enduring fiscal regime, it is committed to working with the industry and other stakeholders to design such a mechanism.
Zoe Andrews	There's a balance to be had, isn't there, between allowing the Exchequer to collect additional revenues during periods of unusually high prices and ensuring the industry can have certainty about the future fiscal landscape in order to plan and make investment decisions?
Alex Dustan	Yes, definitely. The consultation does acknowledge the significant role that oil and gas has played in our country's history, and also to tax revenues, of course, and also acknowledges the importance of providing the oil and gas industry with fiscal stability and investor certainty and, through this consultation, invites views on devising what it terms a "predictable and sustainable" mechanism. So, in essence, two models are being considered: one is a revenue-based model and the other profit-based and, in either case, the mechanism will apply to revenue or profit above a particular threshold. The rate of tax and the threshold above which it applies will be set by the government and, as is usual for tax-based government consultations, the rate is not included in the consultation, although the consultation document does list factors the government will consider when defining unusually high prices and setting appropriate thresholds. There will be distinct thresholds for oil and for gas and they will be subject to annual automatic adjustments.
Zoe Andrews	Does the government have a preference between the two proposed mechanisms at this stage?
Alex Dustan	Yes, it seems so, that the government's current preference is the revenue-based model. According to the government's analytical assessments, as it sets out in the consultation, the revenue-based model offers superior targeting of extraordinary price-related gains, reduces impacts on investment decisions and, I guess critically, more readily distinguishes between oil and gas commodities. The profit-based model, on the other hand, would require proxy measures to allocate profits to oil and gas separately, and there is some complexity to this as is drawn out in the consultation. Now, of course, the oil and gas fiscal regime has many other elements besides the EPL and the proposal for its replacement is addressed by this consultation. But this is obviously because it has most recently had the most significant impact on tax certainty for the industry.

Zoe Andrews	It would certainly be good to return to a more predictable tax environment for oil and gas. Predictability is also more generally crucial for your clients, isn't it, when they embark on major projects? Tanja and I are going to speak about a related consultation on advance certainty for major projects that was published as part of the Spring Statement in a moment, but before you drop off, we wanted to hear your views on the Court of Appeal's decision in *Gunfleet Sands* - perhaps after Tanja has taken us through the facts and provided an overview of the outcome.
Tanja Velling	*Gunfleet Sands* is essentially about tax relief for predevelopment costs. The question before the Court of Appeal was whether capital allowances (the tax-equivalent of accounting depreciation) were available for the costs of studies and surveys in respect of offshore windfarms, where the studies and surveys were done, and costs incurred, before the wind farms became operational.
Alex Dustan	And I recall, in part thanks to our excellent Tax Knowledge team internally, that the Upper Tribunal's decision in that case had been that no allowances were available. Now, of course, this had dealt a real blow to the UK's offshore wind sector and to major infrastructure projects more generally - so much so that the Corporate Tax Roadmap published back in October 2024 had promised a consultation on the tax treatment of predevelopment costs in light of that decision.
Tanja Velling	Quite right. Fortunately, the position following the Court of Appeal's decision is now quite different. Provided the project is completed (or in capital allowances-speak, provided that the relevant plant or machinery is acquired), capital allowances should be available for the cost of studies and surveys if the taxpayer can demonstrate that they informed the design of the plant or machinery or how it was to be installed. In demonstrating this, one would look at matters objectively and with the benefit of hindsight. There's one more caveat, though, (in addition to capital allowances being unavailable for the cost of preparatory work for an aborted project): the expenditure must not have arisen from characteristics or circumstances particular to the specific taxpayer. On the facts, in *Gunfleet Sands*, capital allowances were available for all expenditure at issue except for (1) costs that the taxpayer had agreed were ineligible, and (2) the costs of a scoping document for the environmental impact assessment in respect of which the Court of Appeal invited further submissions to enable it to determine whether capital allowances were available. So, Alex, how significant is this decision?
Alex Dustan	Well, to some extent, this depends on what happens next. For now, it's obviously good news in that it signals wider availability of tax relief for predevelopment costs - which should chime with the government's growth mission that includes encouraging investment in renewable energy and major infrastructure projects. But HMRC could still appeal the decision to the Supreme Court with a view to having the Upper Tribunal's original decision restored and continued uncertainty in this area is definitely undesirable, and I'm looking forward to reading about the government's position following the

	Court of Appeal's decision when they finally publish the promised consultation on the tax treatment of predevelopment costs that I mentioned earlier.
Tanja Velling	Thank you, Alex. That makes sense. Zoe, let's talk about the consultation on advance tax certainty for major projects and other Spring Statement measures before we return to a few other cases.
Zoe Andrews	Sure. This consultation (and various other measures mentioned in the Spring Statement) had been foreshadowed in a speech to the CIOT by the Exchequer Secretary to the Treasury on the 12th of March 2025. He noted that the government is "determined to provide certainty and stability for businesses looking to invest" and would consult on how it "can better support businesses seeking to deliver major projects in the UK, through more upfront reassurance on their critical tax assumptions." That's what the consultation is about.
Tanja Velling	Who could apply for clearance under this proposal and what for?
Zoe Andrews	It is envisaged that only entities can apply that are either already subject to corporation tax in the UK or expect to be. This approach would necessarily exclude some more complex structures and the government requests evidence on this. As regards the projects that would be covered, the scope would be limited. The government "anticipates initially setting a threshold that would entail dozens, rather than hundreds, of projects being serviced per year". The consultation envisages a minimum monetary threshold, but this could be supplemented with other factors indicating importance of a project for which examples are requested.
Tanja Velling	Would the clearance provide exhaustive certainty on all tax aspects of a project?
Zoe Andrews	No, it wouldn't. For starters, the consultation envisages that it would be limited to corporation tax, although the government is open to considering an extension to other taxes. Within that framework, the clearance would not be intended to address all points, but to cover only key questions (although, unlike in respect of non-statutory clearances, there would be no need to show that there is genuine uncertainty). The clearance would also be time-limited; it is envisaged to last for a maximum of 5 years, albeit with a possibility to extend. It would be subject to any change in law or the underlying facts and assumptions, and the consultation contemplates the introduction of a procedure for periodically reconfirming those facts and assumptions.
Tanja Velling	Would it cover anti-avoidance provisions?

Zoe Andrews	That is not entirely clear. The consultation states that "Any clearance will need to provide the maximum certainty possible without undermining anti-avoidance rules, and this is likely to be reflected in any final scope with regards to main purpose tests."
Tanja Velling	If purpose tests couldn't ever be covered, that would seem quite a significant limitation. What would be the process for obtaining clearance?
Zoe Andrews	It sounds like the process may be relatively lengthy. The government envisages an early engagement discussion (although this would be optional). Then a clearance application would be submitted. That's followed by a scoping meeting to discuss the priority issues, timelines and what further information would be required. The consultation envisages that, in some cases, the scoping meeting may already provide sufficient reassurance. Otherwise, HMRC would then consider the application – which may take some time. The consultation notes that, the work would be handed over from the clearance to the compliance team if the consideration isn't completed before the deadline for filing the relevant tax return. I should also mention that the grant of a clearance would be subject to an internal governance process.
Tanja Velling	It certainly sounds as if someone spent a long time designing this process; I wonder whether it's slightly overengineered. Is there anything else we should know about the proposal?
Zoe Andrews	Three things. First, the consultation contemplates that the process could be subject to a fee and asks whether taxpayers would be willing to pay. A similar reference can be found in the consultation on pre-clearances for research and development reliefs which I don't propose to cover in more detail here, because it sounds likely that that process may be targeted at smaller companies. But the fact that two consultations have been published alongside the Spring Statement which contemplate payment for tax certainty is interesting and may indicate the direction of travel in this area. The second point is that the consultation contemplates the publication of anonymised summaries of clearances, noting that this could help "clarify HMRC's position" even though other taxpayers could not rely on the summaries. This begs the question – would such a summary be intended to constitute HMRC's "known position" for the purposes of the notification of uncertain tax treatment for large businesses? And finally, hidden within the consultation, is a policy decision in relation to cost contribution agreements. The government intends to offer certainty on their tax treatment through advance pricing agreements and will amend the relevant statement of practice accordingly.
Tanja Velling	We should also note that you have until the 17th of June to send written responses to the consultation, but if you want to participate in a consultative meeting, you need to get in touch by the 15th of April. And, of course, if you'd like to discuss this consultation, the one on the oil and gas price mechanism or anything else in the podcast, please do get in touch with us or your usual Slaughter and May contact. But what else was worth noting in the Spring Statement?

Zoe Andrews	I don't propose to go into detail on the proposals to clamp down on tax avoidance and rogue advisers. But it's worth noting that HMRC now expects tax advisers to register with them to communicate on behalf of clients. There are likely going to be some teething issues with this - especially when it comes to lawyers representing a client in respect of a discreet issue, such as on a clearance application. It would not be appropriate for them to become registered as the client's general tax representative; will there be a different option? Or would all communications then have to go through the client (which would seem unduly burdensome)?
Tanja Velling	Staying with compliance, there is a consultation on changes to behavioural penalties which is worth a look, and the Green Book highlights efforts to reduce the tax gap, including through increasing by 20% the number tax fraud charging notices issued by 2029/30 and through the introduction of a new reward scheme for informants. According to the Green Book, there is also a joint plan between HMRC, Companies House, and the Insolvency Service to tackle phoenixism which includes "increasing the use of upfront payment demands, making more directors personally liable for company taxes, and increasing the number of enforcement sanctions to double the amount of tax protected to £250 million by 2026-27". No further details are provided in respect of this joint plan. But it sounds more like an initiative to increase the use of existing powers (for example by dedicating more resources to investigating directors' behaviour to issue more liability notices) rather than a plan to widen existing powers which are already quite broadly drafted.
Zoe Andrews	In other UK news, the Autumn Finance Bill has been passed as the Finance Act 2025. Amongst other changes, it implements the undertaxed profits rule under Pillar Two. How this fits with the government's reported efforts to negotiate a carve-out from tariffs with the US is unclear, given the US government's hostility towards that particular rule. The National Insurance Contributions Bill to increase employer national insurance contributions as announced during the Autumn Budget, on the other hand, has been ping-ponging between the House of Commons and the House of Lords. The Commons had rejected a first set of amendments proposed by the Lords who have responded with alternative amendments which were also rejected. Just yesterday, however, on the 31st of March, the Lords agreed to the Bill. So, at the time of recording, it has passed all stages and only Royal Assent is outstanding.
Tanja Velling	Let's go back to some cases now, starting with *Hastings Insurance Services*. The First-tier Tribunal allowed the taxpayer's claim to recover £16 million of input tax in respect of a so-called "offshore looping structure" during the period from the 1st of January 2019 to the 31st of December 2022. This is the second time HMRC has unsuccessfully challenged that structure, isn't it?
Zoe Andrews	That's right. The structure first came to the attention of the FTT in 2016. Hastings (a UK company) claimed input tax recovery in relation to supplies of insurance intermediary services it made to Advantage (a Gibraltar company) which enabled Advantage to provide insurance to persons in the UK. The FTT held that Hastings' supplies were made in Gibraltar, that Hastings did not constitute a fixed establishment of Advantage in the UK and that, accordingly, Hastings could recover the input tax. This created an uneven playing field in favour of Hastings/Advantage compared to other

	insurance companies because the relevant input tax would have been irrecoverable for Hastings if it had instead supplied the intermediary services to a UK insurer to insure the same UK persons. What the FTT referred to here as the "Offshore Looping Regulations" were made to address this.
Tanja Velling	That sounds like a sensible response, but the fact that another case was brought to the FTT tells me that perhaps the regulations did not have the intended effect.
Zoe Andrews	That's right. The FTT agreed with Hastings that the Offshore Looping Regulations were incompatible with the EU's Principal VAT Directive and that, for the periods under dispute, the Principal VAT Directive had direct effect and could be relied on by Hastings. This meant the regulations were ineffective in preventing input tax recovery.
Tanja Velling	In what way were the regulations incompatible with the Principal VAT Directive?
Zoe Andrews	It all turned on the meaning of "customer". Article 169(c) of the Principal VAT Directive requires the UK to allow the deduction of input VAT on supplies used by insurance brokers/agents to make supplies of services related to insurance and reinsurance transactions where the customer is established outside the EU. The FTT agreed with Hastings that "customer" here should have its ordinary meaning as the direct recipient of a supply rather than, as HMRC contended, the "final consumer". This meant that the "customer" of the services supplied by Hastings to Advantage for the purposes of Article 169(c) is Advantage and not the person Advantage ultimately insures.
Tanja Velling	As well as being of interest to the insurance industry, this case is also of interest as an example of the application of the UK's VAT rules post-Brexit, isn't it?
Zoe Andrews	Yes. More specifically, it is an example of how the rules apply up to the end of 2023. The way in which Article 169(c) of the Principal VAT Directive could render the Offshore Looping Regulations ineffective was through section 4 of the European Union (Withdrawal) Act 2018. This broadly preserved the direct effect of EU Directives to the extent that it had been recognised before the end of 2020. The FTT in this case was satisfied that the relevant recognition tests had been met and that Hastings could rely on the direct effect of Article 169(c) for the period in question (part of which fell after the end of the Brexit implementation period).
Tanja Velling	And what's different from the start of 2024?
Zoe Andrews	From the start of 2024, the Retained EU Law (Revocation and Reform) Act 2023 has repealed section 4 of the European Union (Withdrawal) Act 2018. So, the EU rights which continued to be available under that section can no longer be relied on.
Tanja Velling	And that's also the case for VAT?

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<tr><td>Zoe Andrews</td><td>Well, for VAT, we continue to be haunted by the ghost of section 4 – which is not intended to be disparaging; I consider it an apt metaphor given how complicated the legislation in this area has become.

Section 4 is fully repealed, but section 28 of the Finance Act 2024 preserves its effect for conforming interpretation of VAT and excise legislation.

What does that mean? It means that EU rights and principles recognised before the end of 2020 continue to impact the interpretation of the UK VAT rules, but they can't be used to quash or disapply those rules.

For Hastings, I would have thought that this may well mean that courts would reach a different conclusion for later periods. The taxpayer had argued that Article 169(c) rendered the Offshore Looping Regulations ineffective - that sounds to me like quashing or disapplication on the basis of pre-existing EU rights which should no longer be possible from the start of 2024.

It'll be interesting to see whether the government will feel the need for additional legislative action to clarify this point or whether they will rely on the legislative context being different from the start of 2024. In terms of the revenue impact, it's worth noting that while the amount at stake in Hastings is £16 million, the impact assessment from the introduction of the Offshore Looping Regulations expected the measure to raise £400m over the 5-year period from 2019/20 to 2023/24 (taking into account businesses changing structure in response to the measure).</td></tr>
<tr><td>Tanja Velling</td><td>And I'm sure this isn't the last we'll hear about the tricky interaction between pre-existing EU rights and UK VAT rules. Moving to a more purely domestic context whilst remaining in the realm of VAT, let's talk about the Court of Appeal's decision in Innovative Bites.

This concerns one of my favourite VAT topics - the classification of foodstuffs. We previously discussed the Upper Tribunal's decision, and you may recall that the central question of the case is whether Mega Marshmallows are zero-rated food or standard-rated confectionary. Quite the sticky tax issue!

As a starting point, “food of a kind used for human consumption” is zero-rated under Group 1 of Scheduled 8 to the Value Added Tax Act 1994. But the standard 20% rate applies to certain “excepted items”, including “confectionary” which HMRC argued the marshmallows fell under.

In contrast, the taxpayer maintained that the marshmallows were marketed and sold specifically for roasting over a campfire to make “s'mores”, the classic American treat, and they should therefore be classed as an ingredient and zero-rated. The First-tier Tribunal agreed with the taxpayer and the Upper Tribunal upheld that decision.

On what basis did HMRC appeal the Upper Tribunal's decision?</td></tr>
<tr><td>Zoe Andrews</td><td>The first thing to note is that the Value Added Tax Act doesn't stop at the term “confectionary”. Note (5) defines “confectionary” as including “chocolates, sweets and biscuits; drained, glacé or crystallised fruits” and, importantly, “any item of sweetened prepared food which is normally eaten with the fingers.”</td></tr>
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	HMRC took issue with the Upper Tribunal's view of Note (5) as "akin to a rebuttable presumption" and their view that "even where a product might fall within a description in Note 5 other factors might lead to a conclusion that the product is not confectionery". The Court of Appeal agreed with HMRC on this. It pointed out that Schedule 8 must be interpreted in line with its accompanying notes and affirmed that Note (5) is conclusive absent of absurdity. If a product falls within its scope, that means it is confectionary unless classing it as such would be unreasonable. Accordingly, the question turns on whether the product is "sweetened prepared food which is normally eaten with the fingers". The Court of Appeal concluded that Mega Marshmallows are indisputably a sweetened product. Therefore, the only issue that remains is whether they are normally eaten with the fingers, and this question was remitted to the First-tier Tribunal.
Tanja Velling	That's going to be a tricky point to prove! The Court of Appeal itself noted that the answer isn't obvious with this product, which may sometimes be consumed with a fork or skewer. The burden of proof here lies with the taxpayer; Innovative Bites will have to persuade the FTT that its Mega Marshmallows are not normally eaten with the fingers for zero-rating to apply.
Zoe Andrews	So, the FTT will get to have another bite of the marshmallow, so to speak…
Tanja Velling	And quite literally, I would expect. If you follow us on LinkedIn, you may have seen that we have also carried out an experiment in this respect. We procured some large marshmallows (although not the exact ones that the case was about) and used our fingers to eat them. That was certainly possible.
Zoe Andrews	I don't think anyone ever claimed they can't be eaten with your fingers! I'm still undecided, though, whether I'd call this the normal way of eating such marshmallows - I've also had them roasted and enjoyed that more. Perhaps we should have gotten Alex to sample one as well!
Tanja Velling	Well, one of us could always pop by his office later and offer him one!
Zoe Andrews	Good idea! But meanwhile, we should move on to some international news. The Council of the European Union has expressed support for the simplification and decluttering of EU tax rules (albeit without jeopardising the current level of protection against avoidance and fraud). In its conclusions on this topic, the Council acknowledges that this will require a detailed analysis of existing rules - ATAD and the DAC (in particular DAC6) are specifically mentioned - to identify duplicative rules for abolition. The European Commission is also invited to keep simplification and decluttering in mind when proposing new initiatives and to address this point in its impact assessment for such initiatives. The Council envisages that the review of existing rules and work on future initiatives should have regard to "four principles: (1) reducing the reporting, administrative and compliance burdens for Member States administrations and taxpayers, (2) eliminating outdated and overlapping tax rules

	and, where relevant, (3) increasing the clarity of tax legislation and 4) streamlining and improving the application of tax rules, procedures and reporting requirements."
Tanja Velling	The Council has also reached political agreement on a compromise text for DAC9 which is a measure that should bring administrative simplification through streamlining the Pillar Two filing process in the EU. It would implement the OECD's GloBE Information Return and permit one central filing per group with exchange of information between tax authorities. The next step will be formal adoption of the Directive by the Council. Member States would then have to implement the Directive by the end of this year. So, the formal adoption of DAC9 is something to look out for. You will also need to remember to get in touch with the Treasury and HMRC by the 15th of April, if you would like to participate in a consultative meeting for the "Advance tax certainty for major projects" consultation.
Zoe Andrews	And that leaves me to thank you for listening. If you have any questions, please contact Alex, 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.

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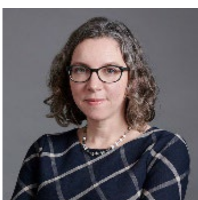

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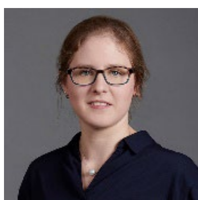

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