SLAUGHTER AND MAY

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Tax News

Podcast

ZOE ANDREWS	Welcome to the May 2026 edition of Slaughter and May's "Tax News" podcast. I am Zoe Andrews, Head of Tax Knowledge. I am delighted to welcome Gabrielle Pereira as my co-host today. Hi Gabrielle, it's great to have you on the podcast.
GABRIELLE PEREIRA	Hi Zoe – thank you; great to be here. For those listening who don't know me - I'm a senior associate in the Slaughter and May Tax department and I advise on a range of tax matters, from M&A and financings to real estate transactions and general advisory work. Today we have a special guest to discuss the Supreme Court's decision in *Gunfleet Sands* and the changes to the Electricity Generator Levy. We will then cover: • Two Court of Appeal decisions: Burlington (on treaty purpose tests which is a case of global interest) and *MR Currell Limited* (on the tax treatment of a payment to an employee benefit trust subsequently loaned to a director) • The latest sticky finger instalment of the Innovative Bites case on the VAT classification of mega marshmallows • UK developments including The Department for Business and Trade's consultation on an inbound redomiciliation regime and the latest annual tax and National insurance receipts statistics • The recent OECD Taxing Wages 2026 report, which shows that the OECD average tax on wages reached its highest level since 2016 with the UK seeing the largest increase. This podcast was recorded on the 20th of May 2026 and reflects the law and guidance on that date.
ZOE ANDREWS	I am pleased to welcome back to the podcast Alex Dustan, a corporate partner and member of our Infrastructure and Energy team. It was just over a year ago that you were talking to me about the Court of Appeal's decision in *Gunfleet Sands*, a case about tax relief for predevelopment costs.
ALEX DUSTAN	Hello and thank you for having me back on. The progress of this case through the courts has been quite a rollercoaster. When we spoke last year of course, the Court of Appeal had signalled a wider availability of tax relief for predevelopment costs. This which chimed with the government's growth mission that includes encouraging investment in renewable energy and major infrastructure projects. The Supreme Court, however, took a much more restrictive interpretation of the legislation which is

	obviously disappointing for taxpayers involved in major infrastructure and renewable projects. And for anyone unfamiliar with the case perhaps it's worth a quick reminder of what it was all about?
ZOE ANDREWS	Of course. The taxpayers own and operate windfarms. Before construction of the windfarms, considerable sums were spent on environmental studies and surveys which the taxpayers argued qualify for capital allowances (which is the tax equivalent of accounting depreciation). The disputed studies comprised those needed for the Environmental Impact Assessment as well as additional geophysical and geotechnical studies not required by law. The question for the Supreme Court was: were the survey and studies costs capital expenditure "on the provision of plant" for the purposes of section 11 of the Capital Allowances Act 2001? The Supreme Court unanimously agreed with HMRC that section 11 has to be construed narrowly with the result that the costs were not expenditure "on" the provision of windfarms. The Supreme Court did not accept the argument that, as the purpose of capital allowances is an incentive to invest in plant and machinery, the provision should be construed broadly. Instead, it concluded that "One cannot rely on the broad purpose of a provision to define where the precise boundary lies between what is caught and what is not caught".
ALEX DUSTAN	And importantly the Supreme Court did not have to identify precisely where the boundary might lie. It was enough to conclude that the studies and surveys were not close to the boundary at all but were firmly on the "too remote" side, wherever that line is eventually drawn.
ZOE ANDREWS	What has been the industry response to this case?
ALEX DUSTAN	Well, large infrastructure projects require costly and extensive preparatory work and this decision will be very disappointing to taxpayers hoping for a more generous interpretation of section 11 and greater certainty of recoverability of costs. But there are some rays of hope in the Supreme Court's judgment for certain types of predevelopment expenditure in other cases, aren't there?
ZOE ANDREWS	Yes, there are. The first is that the Supreme Court did not express a view as to whether the cost of producing final technical drawings and specifications, which are then "made real" by the manufacturer, could be recoverable. This is a fact-sensitive question and, as this kind of expenditure was not in dispute in this case, and HMRC reserved its position on this, it was not necessary for the Supreme Court to consider it. There is the possibility, then, that such expenditure may qualify for capital allowances in some circumstances. The second glimmer of hope for taxpayers is that HMRC accepted that further surveys and studies carried out in the final stages of fabrication or during the course of installation of a windfarm may qualify as being "on the provision of plant" either as part and parcel of the production process or as part of the installation of the windfarm.
ALEX DUSTAN	So now we are waiting keenly to see what the government's proposed consultation on the tax treatment of predevelopment costs will include. After the Upper Tribunal decision that none of the survey or studies expenditure qualified for capital allowances, the government promised in the

	October 2024 Corporate Tax Roadmap there would be a consultation, focused on the tax treatment of predevelopment expenditure – particularly in the context of green energy and major infra. It was expected in early 2025, then delayed after the Court of Appeal decision, and now we have the Supreme Court outcome which illustrates the need for the government to provide relief for expenditure on predevelopment costs that do not currently fall within the statutory wording for capital allowances in order to incentivise such investments. It is hoped that the government launches the promised consultation on the tax treatment of predevelopment costs without further delay.
ZOE ANDREWS	Let's touch briefly on the recently announced changes to the Electricity Generator Levy in light of the conflict in the Middle East.
ALEX DUSTAN	Yes, the government wants to break the link between electricity prices and gas. Under the current system, gas-fired generation is often the marginal generator and therefore sets the wholesale electricity price, particularly at times of high demand. This means electricity costs still track volatile gas markets to a large extent, even as cheaper renewables and nuclear have expanded. The government has proposed two measures: first, voluntary fixed-price contracts for existing low-carbon generators, with an allocation round planned for 2027. Second, a hike in the Electricity Generator Levy from 45% to 55% from July 2026, and an extension beyond its scheduled conclusion in 2028, to encourage generators towards the fixed price contracts and to claw back a greater share of windfall revenues to fund household and business support.
ZOE ANDREWS	That does sound like a major intervention in the wholesale electricity market, very clearly framed around customer protection and showing a more interventionist approach to electricity pricing. Do you think there will be much take up for the voluntary fixed-price contracts?
ALEX DUSTAN	As you say, they are voluntary, and the key question is which projects will be eligible for these and whether the fixed-price contracts are genuinely attractive — and we'll only know that once the detail is published in a consultation later this year.
ZOE ANDREWS	Thanks Alex. Now let's take a look at *Burlington* .....
GABRIELLE PEREIRA	Yes, thanks Zoe - we've now had the Court of Appeal's judgment handed down in Burlington. As a reminder, this case concerns the tax treatment of interest in respect of a debt claim (in particular, the availability of treaty benefits). The key issue here was whether exemption from UK withholding tax under the terms of the UK-Ireland double tax treaty was available to the taxpayer in light of the purpose test in the "Interest" article of that treaty (as it was at the time). That purpose test entailed that the provisions of the "Interest" article did not apply "if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment."

ZOE ANDREWS	As a reminder of where the FTT and UT got to on this issue: the FTT found that the taxpayer did not have the taking advantage of the "Interest" article as a main purpose when it entered into the assignment of the debt claim. The FTT said the UK withholding tax exemption was "merely part of the scenery" or the "setting" in which the taxpayer made an offer for the debt claim and the taxpayer's sole purpose in entering into the assignment of the debt claim was to realise a profit. The ability to benefit from the "Interest" article was a component in the calculations made by the taxpayer when deciding whether to make an offer for the debt claim, but even though that was the case, that didn't make that ability a part of the taxpayer's subjective purpose in acquiring the debt claim. The UT upheld the FTT's decision.
GABRIELLE PEREIRA	The Court of Appeal agreed with HMRC (and the FTT and the UT) that artificiality does not need to be found for that purpose test to apply – and the fact that parties have genuine commercial reasons for entering into an assignment of the debt-claim doesn't necessarily mean that the purpose test cannot apply. As to the key issue of whether "taking advantage of" (in the context of applying the purpose test) just means having a main purpose of "obtaining the benefit of" the "Interest" article or something different – considering the recent *Vietjet* case, the Court of Appeal said that "to take advantage of" in this context "must mean obtaining the benefit of the article in a way that is contrary to the object and purpose of the treaty". Applying that to the instant case, the taxpayer (as a resident of Ireland and beneficiary of the UK-Ireland double tax treaty) bidding a higher price to acquire the relevant debt claim on the assumption that it would only be taxed on the interest in Ireland (and not in the UK) was in line with the objects and purposes of the UK-Ireland double tax treaty – so the relevant purpose test should not deprive the taxpayer of the treaty benefits. Which is good news for the secondary debt market!
ZOE ANDREWS	It is also worth noting that, although the particular test in the UK/Ireland double tax treaty has since been replaced with the principal purpose test (following the adoption of Article 7 of the OECD's multilateral instrument), the reasoning of the case would equally apply to the principal purpose test. As the principal purpose test has been widely imported in treaties worldwide it is understandable that there is so much interest in the case from beyond the UK and Ireland. There were also a couple of key takeaways and re-affirmations on legislative interpretation in Lady Justice Falk's judgment, weren't there?
GABRIELLE PEREIRA	There were – firstly, she said that "where the tax advantage in question is specifically conferred by legislation then it cannot have been intended that it should inevitably be denied by a "main purpose" rule if it forms part of the economics of a transaction". So the fact that one can avail of a particular tax provision, by virtue of which one can get tax relief, cannot by itself cause a "main purpose" test to be failed – taxpayers cannot be penalised for merely falling within certain tax provisions. Secondly, Lady Justice Falk agreed with Lord Justice Snowden in being "unconvinced that the expression "main purpose or one of the main purposes" [in the relevant purpose test] should be interpreted simply by reference to domestic cases which consider that phrase in different contexts". That makes sense, doesn't it – that when considering the interpretation of international treaties, we should look at both domestic and international cases.
ZOE ANDREWS	The other recent Court of Appeal case that I found interesting is *MR Currell Limited*. Although the facts are now largely of historical interest – because loans via employee benefit trusts would today fall

	squarely within the disguised remuneration rules in Part 7A of ITEPA – the case is still worth attention for the points of principle it makes. And the distinction between why a payment is made and how that payment is characterised for tax purposes is an important one. The facts were relatively straightforward. In November 2010, M R Currell Ltd – a family-owned painting and decorating business – paid £800,000 to an employee benefit trust. That sum was immediately on-lent to Mr Mark Currell, a director and shareholder, under a five-year, interest-free loan secured over shares. HMRC assessed the £800,000 as employment earnings, giving rise to PAYE and NICs. The First-tier Tribunal agreed, but the Upper Tribunal did not – and HMRC appealed again to the Court of Appeal. HMRC argued that the loan was made because of Mr Currell's work, and that the function of the payment to the trust was simply to fund that loan. From that, HMRC said, the payment itself must be a reward for services. The Court of Appeal rejected that reasoning as a non sequitur. The key point was that the purpose of a payment does not determine its legal character. As Lady Justice Falk put it, "the need to fund the Loan explains why the Payment was made but not what it was. It does not determine its nature."
GABRIELLE PEREIRA	HMRC also argued that the loan itself should be treated as earnings, on the basis that Mr Currell had practical control over whether repayment would ever be required. That argument failed on the facts – he did not have sole control – but the Court of Appeal went further and dealt with the point as a matter of law. It held that the mere fact that a borrower controls the lender does not, without more, change the legal character of a loan. Otherwise, as the Court noted, the legal status of an entirely commonplace transaction – like a loan to a parent company – would be thrown into doubt.
ZOE ANDREWS	It's obvious why HMRC were uncomfortable with the outcome. Mr Currell had accessed a large amount of cash from his company without an immediate tax charge. Although Parliament dealt with that concern by changing the law – first through the disguised remuneration rules, and later by strengthening the loans to participators regime in 2013 - the Court of Appeal was clear that HMRC could not stretch the pre-existing legislation beyond its limits to fill what they saw as a gap. That leads us to one of the most memorable lines in the judgment. In cautioning against over-reach by HMRC, Lady Justice Falk said: "A close inspection of the trees can risk a failure to distinguish the overall wood." It's a neat reminder that tax analysis requires stepping back and looking at the transaction as a whole – and not allowing dissatisfaction with the outcome to drive the legal characterisation!
GABRIELLE PEREIRA	Let's turn now to the latest instalment of the Mega Marshmallows litigation, the FTT judgment in Innovative Bites. The case has been winding its way through the tribunals for years, and finally landed back in the FTT in March 2026. And the big question was deceptively simple: are Mega Marshmallows confectionery?

ZOE ANDREWS	And as ever with VAT, "simple" doesn't mean straightforward. By way of recap, food is generally zero-rated. But this excludes confectionery, which includes any "sweetened prepared food which is normally eaten with the fingers". Back in 2022, the FTT decided the Mega Marshmallows weren't confectionery, having looked at things like size, packaging, marketing, and how people actually use them. That decision was upheld by the Upper Tribunal. But in 2025, the Court of Appeal stepped in and said—hold on—you haven't answered the statutory question. It's not enough to ask whether something looks like confectionery. You also have to decide, as a matter of fact, whether it's normally eaten with the fingers. So the case was sent back to a freshly constituted FTT to answer that question. And that's what this latest decision does.
GABRIELLE PEREIRA	The first question that the FTT asked concerned the meaning of "normally". The parties agreed on, and the tribunal adopted, a quantitative construction: holding that "normally" means "more often than not", for example, "over 50% of the time".
ZOE ANDREWS	But that's not necessarily obvious… "Normally" could also have a qualitative meaning, similar to "by design" or "suitably".
GABRIELLE PEREIRA	I agree, but having decided what "normally" means, the judges identified four main ways people eat Mega Marshmallows: roasted and eaten off a skewer, roasted and eaten with fingers, used to make "s'mores" (which are, for the uninitiated, basically a sandwich of roasted marshmallow with melted chocolate between two biscuits), or eaten straight from the packet. They then asked: were finger methods or non-finger methods used more than 50% of the time? Interestingly, despite proposing a "more often than not" evidential test, which seems to be a test of frequency, the tribunal undertook a detailed analysis of marshmallows' characteristics. Roasted marshmallows were likely to be too hot and structurally unstable to be handled directly. Furthermore, the size of the marshmallows, the large packaging, and retail positioning, all strongly indicated that the product was not aimed at on-the-go consumption with the fingers.
ZOE ANDREWS	I can see this was quite a pragmatic approach, as obtaining numerical evidence would have been difficult, and open to methodological criticisms. Taking all the evidence together — how the marshmallows were marketed, how consumers typically prepared them, and the dominance of roasting and using them to make s'mores — the tribunal found that Mega Marshmallows are more often eaten without using fingers than with them. And that means they are not "normally eaten with the fingers". So the result? Zero rated food, not standard rated confectionery. HMRC's assessments for the 2015 to 2019 periods were overturned. The case is a neat reminder that VAT classification can turn on surprisingly granular questions of consumer behaviour—and that courts are perfectly willing to roll up their sleeves, get their fingers sticky and decide those questions as findings of fact.

GABRIELLE PEREIRA	Is this the final word on the matter?
ZOE ANDREWS	That, of course, remains to be seen. But I wouldn't rule out another appeal. Not all of the reasoning of the FTT is convincing. In particular, HMRC might not accept that the method of eating a s'more, where the fingers touch the biscuits but not the marshmallow, is in fact not eating with the fingers. The FTT reasoned that when a marshmallow is placed into the chocolate and biscuit sandwich to form a s'more, it is being used as an ingredient in the s'more, and thereafter it is not the marshmallow that is being eaten, but the s'more. The FTT compared this to ketchup eaten inside a burger, where the ketchup becomes an ingredient in the burger. But are s'mores and burgers really sufficiently similar? It's an odd analogy because you're not really going to get, by way of comparison, people eating ketchup directly with their fingers – now that really would be messy!
GABRIELLE PEREIRA	Perhaps one day we will get to the bottom of this but it's time to move away from cases now, to other UK developments. What are your thoughts on the Department of Business and Trade's redomiciliation consultation?
ZOE ANDREWS	The consultation proposes an inbound redomiciliation regime, allowing foreign companies to move their place of incorporation to the UK without losing legal identity. There is no outbound route—this is all about attracting companies to the UK.
GABRIELLE PEREIRA	Do we know which companies the government hopes to attract with this?
ZOE ANDREWS	The consultation document suggests it would appeal mainly to intermediate holding companies within multinational groups and that this should boost demand for UK professional and financial services, with particular interest from asset holding and captive insurance structures.
GABRIELLE PEREIRA	But a foreign company can already become UK tax resident, and generally benefit from the same tax rules as UK incorporated companies, by moving central management and control here, so can you see why anyone would redomicile in the UK from a tax perspective?
ZOE ANDREWS	From a tax perspective, the consultation largely defers detail. The elephant in the room though is SDRT. A company incorporated in the UK would bring its shares within charge. Given that companies can already achieve UK tax residence via central management and control—and that redomiciliation would be a one-way move into SDRT, tax alone is unlikely to drive demand. SDRT aside, the main tax question is whether the government adopts the expert panel's recommendation for a market value step-up on entry. That would remove a potential tax friction, ensuring tax is not an obstacle where there are otherwise good commercial or regulatory reasons to redomicile.

GABRIELLE PEREIRA	Time now for a quick look at the latest annual tax and national insurance receipts. HMRC had a good year - collecting nearly £939 billion in taxes in 2025 to 2026, an increase of 9% from the previous year. Business tax receipts in 2025 to 2026 were around £101 billion mainly due to growth in onshore Corporation Tax receipts.
ZOE ANDREWS	That's right and one tax in particular has caused some ripples across the pond. I wanted to highlight in particular that the £944m receipts from the digital services tax are 17% higher than the previous year which has increased the tension with the US. The digital services tax was introduced in 2020 and imposes a 2% levy on the revenues of several major US tech companies. The Trump administration has been pushing back against it and in December 2025, the US paused its investment into British tech in protest that trade barriers had not been lowered. The US president recently threatened to "put a big tariff on the UK" if it did not drop its tax, which is viewed as unfairly targeting US-headquartered tech companies. The UK continues to defend the digital services tax as fair and proportionate and a necessary tax in the absence of a global solution.
GABRIELLE PEREIRA	Let's also cover the OECD's Taxing Wages 2026 report briefly, which makes for some uncomfortable reading for the UK from a growth perspective. The report uses the concept of the "labour tax wedge" to compare countries. That's the total tax on labour paid by both employees and employers, net of cash benefits, expressed as a percentage of total labour costs. The OECD looks at this across different household types and jurisdictions. For the UK, one of the standout findings is the position of a single earner on the average wage. The report shows that the UK experienced the largest increase in the labour tax wedge among OECD countries in 2025 – an increase of 2.45 percentage points. That reflects two main factors: higher employer National Insurance contributions, and fiscal drag, as frozen income tax thresholds pushed up effective tax rates.
ZOE ANDREWS	And that matters directly for growth. Higher labour taxes weaken incentives to work and to hire, particularly at the margin. So even though the UK isn't yet an outlier on the numbers, the combination of higher employer NICs and sustained fiscal drag cuts across the government's stated ambition to boost productivity and economic growth. So what have we got coming up, Gabrielle?
GABRIELLE PEREIRA	We will be looking out for an update on the consultation on taxation of predevelopment costs following the Gunfleet Sands decision. We are expecting a consultation on reforming tax rules that can result in double taxation for UK resident members of US LLCs.

	Closing dates are coming up in June for various consultations: such as the extension of the Uncertain Tax Treatment regime, ACT regime changes and redomiciliations. HMRC is revising the Litigation Settlement Strategy to strengthen and simplify the framework and is expected to consult with stakeholders over the summer and report on next steps in the Autumn. The Supreme Court heard the ScottishPower on 18 and 19 May. This is an important case on the deductibility for corporation tax purposes of customer redress payments, namely whether payments in lieu of penalties are deductible. We will be covering the judgment, once it comes out, in a future podcast.
ZOE ANDREWS	And that leaves me to thank you for listening. If you have any questions, please contact Gabrielle, Alex 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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