Continuing Legal Education Seminar

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Interpreting Taxing Statutes: The Retreat from Duke of Westminster

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INTERPRETING TAXING STATUTES

THE RETREAT FROM DUKE OF WESTMINSTER

1. The Transfer Tax Act of Jamaica imposes a tax on the transfer of certain property, including shares in companies[1]. Paragraph 4 (2) of the First Schedule of the Act provides, however, that "**a reorganization...of a company's share capital shall not be treated as involving any disposal of the original shares**", and paragraph 6 (1) of the First Schedule to the Act adds:

> **"Where a company issues shares or debentures to a person in exchange for shares in or debentures of another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were the same company and the exchange were a reorganization of the share capital".**

The Carreras Case

2. Carreras Group Limited (a subsidiary of British American Tobacco plc) was the largest manufacturer of tobacco products in Jamaica through its subsidiary, Cigarette Company of Jamaica Limited. Carreras was also involved in the manufacture of biscuits through another subsidiary, Jamaica Biscuit Company Limited.

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[1] Section 3. The Transfer Tax Act 1971 is closely modeled on The U.K. Finance Act 1965. The provisions which are referred to in this article were almost identical to the equivalent provisions in the U.K. Finance Act.

3. In 1999, Carreras decided to come out of the biscuit business and concentrate on its core business of manufacturing and selling tobacco products, and it arrived at an agreement with a Trinidadian company. The Trinidadian company acquired the shares in Jamaica Biscuit in the following way:

   a) The Trinidadian company incorporated a subsidiary in Jamaica known as Caribbean Brands Limited;

   b) Carreras transferred its shares in Jamaica Biscuit to Caribbean Brands in exchange for a debenture from Caribbean Brands, promising to pay the agreed consideration (US$37.7Million) within fourteen days.

   c) The debenture was duly redeemed and Carreras received the funds.

4. The Stamp Commissioner took the view that the transaction was a sale and not a reorganization and assessed it for transfer tax. Carreras appealed to the Revenue Court. Mr. Justice Anderson held that the exchange of shares for debenture was not a "sham" and fell "within the four corners" of paragraph 6 (1) of the First Schedule. He held that the Act created a "legal fiction" by which an exchange of shares for a debenture in these circumstances would be deemed to be a reorganization and therefore exempt from transfer tax.

5. Justice Anderson relied on the decision of the House of Lords in **IRC** v **Duke of Westminster**[2] as authority for saying that a taxpayer is only liable to tax on the clear words of a statute and not on the perceived intention of the legislature. He noted[3] that in **Duke of Westminster**, Lord Tomlin dismissed the "supposed doctrine" which would allow the revenue to ignore the strict legal position and consider the "substance of the matter".

6. The Stamp Commissioner's appeal was allowed by the Court of Appeal and Carreras' appeal from that decision was dismissed by the Judicial Committee of the Privy Council. Both appellate bodies held that what has come to be known as the "**Ramsay** principle" would apply to this transaction and that in considering the transaction for the purposes of transfer tax, the exchange of shares for debenture should be disregarded[4].

The Ramsay Principle

7. On the sale of a farm, the taxpayer company realized a substantial chargeable gain. In order to reduce the amount of capital gains tax payable, it entered into a scheme involving a number of share transactions which resulted in an artificial capital loss which the

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[2] [1936] AC 1
[3] at page 1 of the judgment
[4] Both judgments are still unreported. The Privy Council judgment, Privy Council Appeal No. 24 of 2003, was delivered on April 1, 2004.

taxpayer could set off against the capital gain. Although the share transactions were held to be genuine and within the literal language of the statute, the House of Lords held in **W T Ramsay Limited** v **Inland Revenue Commissioners**[5] that the taxpayer was liable to capital gains tax as if they had not taken place.

8. In what has since been described as a seminal speech, Lord Wilberforce said:

> **"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of Inland Revenue Comrs v Duke of Westminster. This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."**[6]

9. Lord Wilberforce added:

> **"The Capital Gains Tax was created to operate in the real world not that of make belief...It is a tax on gains**

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[5] [1982] AC 300
[6] At page 323

(or I might have added gains less losses), it is not a tax on arithmetical differences".[7]

10. The House of Lords considered and developed this principle in a series of cases during the next decade. The House considered a similar scheme a few months later in **Inland Revenue Commissioners** v **Burmah Oil Company Limited**[8]. Lord Diplock noted that **Ramsay** marked a significant change in the approach of the courts to what he called "**a pre-ordained series of transactions...into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable**"[9]. This new approach entitled the court to ignore the intermediate steps and look at the end result.

11. Although the tax avoidance scheme in **Burmah** was similar, there was a significant difference. In **Ramsay**, the taxpayer had purchased a pre-packaged, commercially marketed scheme. The court could more easily find that such a scheme was not within the statutory intent. In **Burmah** the House of Lords rejected a scheme which had not been pre-packaged and purchased.

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[7] At page 326
[8] [1982] STC 30
[9] At page 32 e-f

12. The 1984 decision of the House of Lords in **Furniss (Inspector of Taxes)** v **Dawson**[10] is significant in a number of respects. Unlike those in **Ramsay** and **Burmah**, the tax avoidance scheme in **Furniss** was not "circular" or "self-canceling". It was instead "linear" and had an enduring, perhaps even permanent, legal effect. The scheme did not involve the creation of an artificial loss, but involved an exchange of shares which, on a literal reading of the Finance Act[11] would be deemed to be a tax-exempt reorganization. In a frequently quoted passage[12], Lord Brightman defined the **Ramsay** principle as having two requirements.

a) First, there must be a pre-ordained series of transactions or alternatively, a single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial end;

b) Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax.

13. If these two ingredients exist, said Lord Brightman, the inserted steps are to be disregarded for fiscal purposes and the courts must then look to the end result. Their Lordships also held in this case

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[10] [1984] AC 474

[11] **Furniss** involved provisions in the Finance Act as it stood at the time of the transaction, which are substantially the same as those considered by the courts in **Carreras**.

[12] At page 527

that a series of transactions can be preordained although there is no contractual or other obligation to carry them all out.

14. Even more significantly, the transactions in both **Ramsay** and **Burmah** had involved entitles controlled by the tax payer. **Furniss** involved an independent outside party.

15. The taxpayers in **Furniss** wished to sell their shares in two family companies. Capital gains tax would have been payable immediately on a sale. In order to defer that liability, the taxpayers entered into the following scheme: they incorporated a company called Greenjacket in the Isle of Man and transferred their shares in the family companies to Greenjacket in exchange for shares in Greenjacket. Greenjacket then sold the shares to the eventual purchaser. The Commissioner assessed the taxpayers for capital gains tax on the basis that the exchange of their shares in the operating companies for the shares in Greenjacket was a disposal for purposes of capital gains tax.

16. The House of Lords held that the **Ramsay** principle applied. The exchange of shares with Greenjacket had no commercial purpose other than tax mitigation and should therefore be disregarded for fiscal purposes. The taxpayers were correctly assessed on the

basis that they had transferred their shares directly to the third party. Some critics of this development noted that the decision involved more than disregarding an inserted step; it amounted, in effect, to a restructuring of what had taken place.

17. Before the end of the century, the **Ramsay** principle had been enthusiastically adopted by the Courts of various Commonwealth countries including Australia[13], Fiji[14], New Zealand[15] and Hong Kong[16]. In all these cases[17], the taxpayers implemented a genuine transaction which fell within the literal words of a statutory provision which would allow tax relief, but the courts held that these transactions should be disregarded for fiscal purposes.

18. While not challenging the principle itself, subsequent decisions attempted to impose limitations on its application. An example is the decision of the House of Lords in **Craven (Inspector of Taxes)** v **White**[18]. Two of the three appeals heard in this case involved the same sections of the Finance Act and a similar "reorganization" scheme as in **Furniss**. There were a series of transactions which involved an exchange of shares which fell within the exempting

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[13] Commissioner of Taxation v Cameron Richard Cooling No. G89 of 1990 Fed No. 297
[14] Commissioner of Inland Revenue v Commonwealth Development Corporation [1995] FJCA 8
[15] Hotzip Galvanizers Limited v Brian Perry Limited and Others [1999] NZCA 113
[16] Shiu Wing Limited & Others v Commissioner of Estate Duty [2000] 3HK CFAR 215.
[17] Except Shu Wing, which was not a tax case.
[18] [1989] AC 398

language of the schedule to the Finance Act. The issue in these appeals, however, was whether the series of transactions had been "preordained". The House held in each appeal that it was not.

19. In the third appeal, for example, the taxpayer had entered into negotiations to sell his shares, but those negotiations broke down. He then incorporated an Isle of Man Company and exchanged the shares for shares in that company. Two years later, the Isle of Man Company sold the shares to a third party. The House of Lords held that the evidence did not establish that the exchange of shares and eventual sale were so closely connected as to be part of a "preordained series". In the circumstances, the taxpayers succeeded because in the absence of a preordained scheme, the **Ramsay** principle could not be applied and the intermediate step, the exchange of shares, could not be disregarded.

The McNiven Case

20. A potentially more significant limitation on the **Ramsay** principle was suggested by the House in **McNiven (H. M. Inspector of Taxes)** v **Westmoreland Investments Limited**[19]. In that case, a company owed a substantial amount of interest to its parent, a tax-exempt pension scheme. It would be more advantageous from

[19] [2003] 1 AC 311

a tax point of view if the company owed a principal sum. The pension scheme therefore lent the company the money with which to pay the interest. It used those funds to pay the interest on the same day, thus replacing the liability to the scheme for interest with a liability for an equivalent capital sum. The Revenue took the view that this was not a "payment" of the outstanding interest within the meaning of the Act, and that this transaction should be ignored for tax purposes.

21. The House of Lords disagreed. Lord Hoffman wrote the leading judgment in which he held that in construing a taxing statute, one must first determine whether the concept to which the statute refers is a "commercial" one or a "legal" one. Lord Hoffman explained the **Ramsay** line of cases as being examples of statutes which referred to a "commercial" concept such as sale or disposal, and in relation to which it was therefore appropriate to identify the nature of the commercial transaction as a whole and to ignore steps that had no commercial or business purposes.

22. In those cases where the statute is referring to a "legal" concept, however, Lord Hoffman held that this approach was not permissible. He observed:

> **"If a transaction falls within the legal description, it makes no difference that it has no business purpose.**

Having a business purpose is not part of the relevant concept"[20].

23. Lord Hoffman concluded that the payment of a debt was a legal concept and the Ramsay principle therefore did not apply. He observed that it was easy to understand the commercial sense of a loss which treats as irrelevant, the fact that one part of a composite transaction produced an artificial loss, but he asked rhetorically "what is the commercial concept of payment of a debt which treats as irrelevant the fact that the debt has been discharged?"[21]

24. None of the other Law Lords referred to this distinction between a commercial concept and a legal concept, but they all agreed that the Revenue should fail for the reasons stated by Lord Hoffman. While the actual decision in **McNiven** can be justified on various bases[22], the commercial/legal distinction postulated by Lord Hoffman has created more than a little difficulty. The English Court of Appeal in **Barclay's Mercantile Business Finance Limited** v **Mawson**[23] distinguished **McNiven**. Both Peter Gibson LJ and Carnwath LJ indicated that they could not understand Lord Hoffman's dichotomy and noted that neither counsel in the

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[20] Page 334
[21] Page 337
[22] See for example Lord Millet's analysis at paragraphs 137-143 in Arrowtown
[23] [2003] STC 66

case was able to explain it. Carnwath LJ went so far as to note that he had some difficulty in fitting the early authorities into Lord Hoffman's analysis.

25. Other Law Lords have been even more critical in "off the bench" remarks. Lord Millet has referred to Lord Hoffman's distinction as a "red herring"[24], and in a Law Quarterly Review article[25], Lord Templeman described it as "reflecting ingenuity but not principle". Lord Templeman added[26]:

> **"The future is uncertain because of the attempt by Lord Hoffmann to distinguish that which cannot logically be distinguished".**

26. In the speech referred to below[27], Lord Walker has also made public statements criticising Lord Hoffman's reasoning.

Stamp Duty & Similar Taxes

27. Lord Hoffman's judgment was warmly welcomed, however, by many commentators who had argued that the **Ramsay** principle would not apply to schemes to avoid stamp duty or similar taxes. Lord Hoffman illustrated the difference between "legal" and "commercial" concepts by referring to stamp duty. He observed

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[24] In a speech to an invited audience at Mishcon de Reya, on March 1, 2004
[25] 117 LQR at 584 (October, 2001)
[26] Page 587
[27] See paragraph 41

(obiter) that if the impugned transaction fell within the literal words of a stamp duty statute, whether or not there was a commercial purpose would be irrelevant.

Arrowtown

28. This reasoning was applied by the Court of Appeal of Hong Kong in **Arrowtown Assets Ltd.** v **Collector of Stamp Revenue**[28]. The Court held that a tax avoidance scheme succeeded in avoiding stamp duty because the word "consideration" in the taxing statute referred to a legal concept and not a commercial concept, and therefore the **Ramsay** principle did not apply.

29. The revenue appealed, and in December 2003, the Court of Final Appeal of Hong Kong handed down a judgment which both summarized the status and provided a vision of the future of the **Ramsay** principle. In **The Collector of Stamp Revenue** v **Arrowtown Assets Limited**[29], the court allowed the appeal, applied the **Ramsay** principle and found the taxpayer liable, despite agreeing that the tax avoidance scheme was not a sham and fell within the literal language of the statute. The justices also commented extensively on Lord Hoffman's analysis in **McNiven**.

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[28] [2003] HKEC 335

[29] FACV No. 4 of 2003, not yet reported. The judgment can be found at http://legalref.judiciary.gov.hk

The leading judgment was written by Lord Millet who was sitting as a non-permanent judge in the Hong Kong Final Court of Appeal[30].

30. Lord Millet observed[31] that the true ratio of **McNiven** can be found most clearly in the speeches of Lords Nichols and Hutton. There was nothing in the language or context of the relevant statutory provisions in **McNiven**, he noted, which indicated that the purpose for which a payment of interest was made or the source of the funds to make such a payment was material for the purposes of the statute. He also suggested that it was arguable that the scheme had purposes other than the obtaining of a tax advantage.

31. Lord Millet went on to comment on Lord Hoffman's analysis and his commercial/legal dichotomy against the background of the earlier cases. He held that this dichotomy could not be supported either in logic or on the earlier authorities and concluded that it should not form part of the jurisprudence of Hong Kong. All the other judges agreed. It is the respectful view of this writer that Lord Millet's analysis and reasoning are to be preferred and that the decision in **McNiven** should not be considered as altering or

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[30] As an interesting footnote, two decades earlier, Lord Millet (then Peter Millet, Q.C.) was counsel for the Revenue in both Ramsay and Furniss, and his submissions (described by Lord Oliver in the Court of Appeal in Furniss as "startling") may have been the first articulation of the Ramsay principle.
[31] At paragraph 137

limiting the **Ramsay** principle, but as a decision on its peculiar facts.

32. A few months later (on April 1, 2004), the Privy Council dismissed Carreras' appeal. In that court, Counsel for Carreras raised an additional argument, similar to the one accepted by the Court of Appeal in **Arrowtown**[32]. He argued that the **Ramsay** principle should not be extended to the provision in the Jamaican transfer tax legislation, which is concerned he contended, with the specific transaction involving an exchange of shares for debenture, and not with any wider transaction of which that exchange may form a part.

33. Lord Hoffman (on whose judgment in **McNiven** Carreras had placed much reliance) delivered the opinion of the Board. He noted that since **Ramsay**, the courts have tended to assume that revenue statutes are concerned with transactions as a whole and not with individual steps into which a transaction may be divided. There was therefore no distinction to be made by reason only of the type of tax involved.

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[32] In the Privy Council, Carreras was represented by David Goldberg, Q.C., who had also represented the taxpayer in Arrowtown.

34. In a critical passage[33], Lord Hoffman stated that if the Jamaican Transfer Tax Act was construed in the way contended for by Carreras, the result would not be a rational system of taxation and "their Lordships do not accept that [this] was intended by the legislature".

Duke of Westminster

35. In all the cases referred to above (except for **Carreras**), there was repeated reference to the judgment of the House of Lords in **Duke of Westminster**. None of the decisions overruled that judgment or even expressly disapproved of it; indeed, most of the cases confirmed that it contained a correct statement of the basic principle. At the same time, however, the judges re-stated that principle so narrowly that it is submitted that there is very little left in **Duke of Westminster**. In **Ramsay**, itself, Lord Wilberforce noted that **Duke of Westminster** established the well-known principle that once a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. He went on, however, to make the observations quoted at paragraph 8 above.

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[33] Paragraph 13

36. In **Burmah**, Lord Diplock observed that the much quoted dictum from **Duke of Westminster** that **"every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be"**[34] tells us little or nothing as to what methods of ordering one's affairs would be treated by the courts as effective to reduce the tax that would be payable if business transactions were conducted "in a straightforward way".

37. The law lords in **Furniss** were even more caustic. Lord Roskill thought that the error made in the lower courts is that "they have looked back to 1936 [the year in which **Duke of Westminster** was decided] and not forward from 1982 [the year in which **Ramsay** was decided]", and concluded:

> **"The ghost of the Duke of Westminster and of his transaction...has haunted the administration of this branch of the law for too long. I confess that I had hoped that that ghost might have found quietude with the decisions in Ramsay and in Burmah. Unhappily it has not. Perhaps the decision of this House in these appeals will now suffice as exorcism".**[35]

38. Lord Bridge added that in determining the tax consequences of composite transactions, one should draw a distinction between form and substance and that this distinction will help to free the courts from the "shackles" which have for so long been thought to be imposed upon them by the **Duke of Westminster** case.

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[34] At page 19
[35] At page 515

39. While still not expressly overruling **Duke of Westminster**, their Lordships have come very close in subsequent cases. In **Ensign Tankers Limited** v **Stokes**[36], Lord Templeman expressly agreed with Lord Atkin (who dissented in **Duke of Westminster**) on a critical issue and said that **"if the dictum of Lord Tomlin implied that any tax avoidance scheme which was not a sham and was not unlawful must be allowed to succeed, subsequent authorities have determined otherwise"** [37].

40. In **IRC** v **McGuckian**[38], Lord Steyn noted that the tax avoidance scheme in question in that case would succeed **"on a literal interpretation of the statute in the spirit of Duke of Westminster"**, but held that literalism has given way to purposive interpretation[39]. Lord Tomlin's observations in **Duke of Westminster**, said Lord Steyn, "have ceased to be canonical as to the consequence of a tax avoidance scheme".[40]

41. Perhaps unrestrained by his judicial robes, Lord Walker has publicly expressed the view that **Duke of Westminster** was wrongly decided.[41] In referring to the dissenting judgment in that case, Lord Walker observed:

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[36] [1992] 1 AC 655
[37] Page 670
[38] [1997] 1 WLR 991
[39] Page 1002
[40] At page 1000
[41] In an address to the Chancery Bar Association on March 23, 2004

> **"The calm and compelling irony of Lord Atkin's dissenting speech... has to my mind stood the test of time far better than Lord Tomlin's grandiloquent invocation of the "golden and streight mete wand of the law".**

42. On the present state of the authorities, although **Duke of Westminster** has not been expressly overruled, it is submitted that Lord Tomlin's dicta no longer represent the law.

The Future of Tax Avoidance Schemes

43. In **McGuckian**, Lord Steyn described Lord Wilberforce's speech in **Ramsay** as being "seminal" and as constituting an intellectual breakthrough[42]. In a real sense, however, it is Lord Steyn's own speech in **McGuckian** which identifies the true principle to be extracted from **Ramsay** and the cases which followed it. Lord Steyn noted that during the 30 years before his judgment, there had been a shift away from literalist to purposive methods of construction with an approach designed to identify the purpose of a statute and to give effect to it. He noted, however, that as a result of what he called "the narrow Duke of Westminster doctrine" and other similar decisions, tax law was "by and large left behind as some island of literal interpretation". The **Ramsay** principle, Lord Steyn observed, marked the rejection of pure literalism in the interpretation of tax statutes and permitted the court to take into

[42] Page 999

account the entire composite transaction between the parties when it was shown that a scheme was intended to be implemented as a whole.

44. This analysis of the **Ramsay** principle explains why subsequent cases had no difficulty in extending the principle to different tax avoidance schemes and to different types of tax, and it is submitted that the principle has not seen its full scope. In **McGuckian** itself, Lord Steyn noted that given the reasoning underlying the new approach, the various House of Lords decisions since **Ramsay** should not be regarded as marking the limit of the law on tax avoidance schemes.

45. The year before **Duke of Westminster** was decided, Judge Learned Hand, a member of the US Circuit Court of Appeals, Second Circuit, formulated what has since been called "the no business purpose test". In **Helvering** v **Gregory**[43], the court was faced with a transaction very similar to those which took place in **Furniss**, **Craven** and **Carreras**. The question was whether a transfer of shares by way of exchange was within a statutory exemption from tax as a reorganization. The transaction was held to be genuine and fell squarely within the definition in the statute. The court

[43] (1934) 69 F.2d 809 (affirmed by the US Supreme Court at (1935) 293 US 465)

held that the tax avoidance scheme nonetheless failed. Judge Learned Hand explained that the statute was based on an underlying presupposition that any reorganization would be:

> **"Undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders' taxes is not one of the transactions contemplated as corporate 'reorganizations'".**[44]

46. Twenty years later, Judge Learned Hand returned to the topic in **Gilbert** v **CIR**[45]. In that case he said:

> **"If however the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the Act to provide an escape from the liabilities that it sought to impose"**[46].

47. In **Ramsay**, Lord Wilberforce cited a part of the latter passage with approval, although he noted that the courts in the United States claimed to exercise more "legislative powers" than the courts in England. None of the English cases have yet gone so far as to adopt a "no business purpose test" or to adopt so broad a principle for striking down tax avoidance schemes. In **Arrowtown**, however, Lord Millet said that these US decisions "are echoed in the development of the jurisprudence of the United Kingdom and

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[44] At page 811
[45] (1957) 248 F 2d 399
[46] At page 411

should influence the future development of our own"[47]. In fact, counsel for the Crown in **Arrowtown** advanced a proposition which would have the same effect as Judge Learned Hand's no business purpose test. He argued that it was not possible to create a deduction from tax by entering into a transaction which had no purpose or effect beyond the generation of the deduction itself[48].

48. After a review of Lord Wilberforce's speech in **Ramsay**, Lord Millet concluded that while Lord Wilberforce did not expressly deal with this submission, he implicitly accepted it[49]. Lord Millet concluded his analysis:

> **"It is the likely (though not inevitable) result of a purposive construction of fiscal legislation that it should normally be confined to transactions which have some purpose beyond the mere generation of tax relief. The no business purpose test provides a practical criterion for distinguishing between transactions which operate "in the real world" and transactions which operate in "the world of make belief", and an appropriate criterion for distinguishing between losses of a kind which were within the contemplation of the legislature when granting relief from tax and losses which were not"[50].**

49. In his Law Quarterly Review article, Lord Templeman went even further. He thought that it could be assumed "with certainty" that it was the intention of Parliament that in determining a taxpayer's

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[47] Paragraph 109
[48] Paragraph 108
[49] Paragraph 115
[50] Paragraph 116

liability the court could ignore steps which had been undertaken for no business purpose other than the avoidance of tax.

50. Lord Hoffman's analysis in Carreras was to the same effect. Parliament could not have intended that an exemption from tax could be obtained by carrying out an act which had no business purpose other than the avoidance of tax, and the attempt to avoid therefore failed.

Conclusion

51. In none of the cases referred to above did the House of Lords or the Privy Council find it necessary to expressly adopt (or reject) a no business purpose test along the lines articulated by Judge Learned Hand and Lord Millet. Their Lordships' most recent decisions and public comments suggest, however, that when that situation does arise[51], they will adopt and apply a similar test. The result of such a finding would be to confirm that the practice and parameters of tax avoidance have been completely changed.

B. St. Michael Hylton
June 15, 2004

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[51] The House of Lords is expected to have two opportunities to address this issue before the end of 2004: IRC v Scottish Provident Institution [2003] STC 1035, and Mawson (see note 20, above)