

CRITIQUE AND COMMENT

**TAX AVOIDANCE — A VIEW  
FROM THE DARK SIDE**

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*In discussion of tax avoidance in Australia and the United Kingdom, attempts are generally made to define tax avoidance by distinguishing it from other tax activities — often with positive or negative connotations. However, an examination of the nature of taxation and the anti-avoidance provisions now present in both jurisdictions suggests that the way the law views tax avoidance may not match some political rhetoric. This article argues that courts should be trusted to give effect to parliamentary intention, and that, in the words of Lord Hoffmann, ‘tax avoidance in the sense of transactions successfully structured to avoid a tax which Parliament intended to impose should be a contradiction in terms’. Tax avoidance, where specific and general anti-avoidance provisions are present, is always unsuccessful.*

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## I INTRODUCTION

I know of only one authority which might justify the suggested method of construction:

‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master — that’s all.’

After all this long discussion the question is whether the words ‘If a man has’ can mean ‘If a man thinks he has.’ I am of opinion that they cannot, and that the case should be decided accordingly.<sup>1</sup>

Much has been written on the topic of ‘tax avoidance’ in Australia and in the United Kingdom. I have restricted myself to these two jurisdictions because both now have a general anti-avoidance rule (‘GAAR’) — Australia, federally, since 1915 and the United Kingdom only recently, the addition having been made by the *Finance Act 2013* (UK) c 29 (‘*Finance Act*’).<sup>2</sup>

In his *Adventures in Tax Avoidance* the late Peter Clyne said: ‘The first thing to do when we are writing or thinking about tax avoidance is to stop mincing words.’<sup>3</sup> I propose to follow his counsel. Lord Denning MR said in *Re Weston’s Settlements; Weston v Weston*: ‘The avoidance of tax may be lawful, but it is not yet a virtue.’<sup>4</sup> And Murphy J, in *O’Brien v Komesaroff*, described the respondent’s ‘tax-avoidance’ schemes as ‘anti-social activities’.<sup>5</sup>

Attempts are generally made to define tax avoidance by distinguishing it from other tax activities such as ‘tax minimisation’, ‘tax planning’ and ‘tax evasion’. In his foreword to Justice Pagone’s book *Tax Avoidance in Australia*,<sup>6</sup> the Hon Murray Gleeson, former Chief Justice of Australia, distinguishes

<sup>1</sup> *Liversidge v Anderson* [1942] AC 206, 245 (Lord Atkin) (citations omitted).

<sup>2</sup> See *Income Tax Assessment Act 1915* (Cth) s 53, repealed by *Income Tax Assessment Act 1922* (Cth) s 2. The acronym ‘GAAR’ is used for both the Australian ‘general anti-avoidance rule’ and United Kingdom ‘general anti-abuse rule’.

<sup>3</sup> Peter Clyne, *Adventures in Tax Avoidance (With 120 Practical Tax Hints)* (Rydge Publications, 1969) 1.

<sup>4</sup> [1969] 1 Ch 223, 245.

<sup>5</sup> (1982) 150 CLR 310, 329. In that case the respondent, a solicitor, devised and marketed tax minimisation schemes in respect of which he claimed copyright.

<sup>6</sup> G T Pagone, *Tax Avoidance in Australia* (Federation Press, 2010) v–vi.

between 'legitimate tax planning' on the one hand and 'illegitimate tax avoidance' on the other. (In this, as in many things, he is, as will be seen, and in the writer's view, correct.)

He adds: "Tax evasion was a different issue, and one normally dealt with by the penal law".<sup>7</sup> With one Australian exception, he is again correct. In Victoria, tax avoidance was, by the *Income Tax Act 1895* (Vic) made an offence. Thus s 44 provided:

- (1) Every contract covenant agreement or undertaking made or entered into whether by deed, or in writing, or verbally either before or after the commencement of this Act between or by any person or persons or companies whatsoever which but for the provisions of this section would altogether or partially relieve any person or company from the burden or incidence of the tax or from liability to pay any tax shall so far as such contract covenant agreement or undertaking relates to or covers the tax be wholly and absolutely null and void.
- (2) Every person or company who is a party to any such contract covenant agreement or undertaking made after the commencement of this Act shall be guilty of an offence and shall on conviction be liable to a penalty not exceeding One hundred pounds.<sup>8</sup>

In the body of his book, Justice Pagone cites Lord Nolan's distinction between 'impermissible tax avoidance' and 'permissible tax minimisation'.<sup>9</sup> Again, with respect, this puts it correctly, although it must always be remembered that both are perfectly lawful activities.

Where the line becomes blurred, is when judges and academics apply adjectives to 'tax avoidance' attempting to distinguish between 'acceptable' and 'unacceptable' tax avoidance, 'effective' and 'ineffective' tax avoidance and, more simplistically, 'good' and 'bad' tax avoidance. Such distinctions play into the hands of politicians, and the journalists who assist them, in the practice of demagoguery.

<sup>7</sup> Ibid.

<sup>8</sup> *Land and Income Tax Assessment Act 1895* (NSW) s 63 was an equivalent provision to *Income Tax Act 1895* (Vic) s 44(1), but did not provide for a penalty — proving yet again that things are more lenient north of the border.

<sup>9</sup> Pagone, above n 6, 6. See also *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311, 335–6 [62] (Lord Hoffmann).

In her 2004 paper titled ‘Defining Taxpayer Responsibility: In Support of a General Anti Avoidance Principle’, Professor Judith Freedman equates ‘acceptable avoidance’ with ‘tax planning or mitigation’.<sup>10</sup> Lord Hoffmann, in his 2005 lecture on ‘Tax Avoidance’, refers to a decision that employees who were paid in platinum sponge which was instantly convertible into cash were, for Pay-As-You-Earn purposes, ‘paid in money’ and says: ‘Judges sometimes draw a distinction between acceptable tax avoidance, like giving up smoking, and unacceptable tax avoidance, like schemes with platinum sponge’.<sup>11</sup> In concluding, Lord Hoffmann says:

The lesson, in my opinion, is that tax avoidance in the sense of transactions successfully structured to avoid a tax which Parliament intended to impose should be a contradiction in terms. The only way in which Parliament can express an intention to impose a tax is by a statute which means that such a tax is to be imposed. If that is what Parliament means, the courts should be trusted to give effect to its intention. Any other approach will lead us into dangerous and unpredictable territory.<sup>12</sup>

Again, as will be seen, in the writer’s view this statement is correct in Australia because our statute contains anti-avoidance provisions — both specific and general. I later hazard the view that the position now ought to be the same in the United Kingdom.

In a joint paper published by Oxford University, Professors Freedman and Devereux and Dr Vella refer to ‘effective’ tax avoidance.<sup>13</sup> Its opposite is, presumably, ‘ineffective’ tax avoidance. Yet isn’t all tax avoidance ineffective under a statute with provisions which target ‘avoidance’ and render it ineffective? The authors later seem to arrive at this result when they opine that ‘[s]trictly speaking, a ‘scheme [which] is effective ... is not tax avoidance at all’.<sup>14</sup>

<sup>10</sup> Judith Freedman, ‘Defining Taxpayer Responsibility: In Support of a General Anti Avoidance Principle’ [2004] *British Tax Review* 332, 350.

<sup>11</sup> Lord Leonard Hoffmann, ‘Tax Avoidance’ [2005] *British Tax Review* 197, 204–5. Platinum sponge is a porous form of platinum which is almost pure.

<sup>12</sup> *Ibid* 206.

<sup>13</sup> Michael P Devereux, Judith Freedman and John Vella, ‘Tax Avoidance’ (Paper No 1, Oxford University Centre for Business Taxation, 3 December 2012) 5.

<sup>14</sup> *Ibid* 6.

## II THE RELEVANCE OF MORALITY

In a speech delivered to the 18<sup>th</sup> Australian Legal Convention in Canberra on 8 July 1975 (and published in the *Australian Law Journal*) Sir Anthony Mason, then a Justice of the High Court of Australia and later Chief Justice, said:

There is the never-ending debate on the morality of tax avoidance and, more recently, the morality of lawyers participating in it. To me it has always seemed that the morality of tax avoidance (as distinct from tax evasion) is very much a matter for the individual taxpayer, although he runs the risk of adverse comment ...

However, the morality of tax avoidance is a matter separate and distinct from the issue of tax liability in particular cases.<sup>15</sup>

In a 2004 paper, Professor Freedman pointed out that the ‘debate about whether morality has a place in the arena of tax avoidance is nothing new’.<sup>16</sup> She refers to an article by Professor Wheatcroft where he concluded that

whatever may be the personal sympathies of a judge who tries a Revenue case, his decision has to be based on purely legal and technical grounds, and Parliament can expect no discretion or elasticity from the courts in enforcing taxation law.<sup>17</sup>

It is worth noting, while we are on the tricky subject of morality, that not everyone shares the government’s fervent zeal for taxation and its collection. Whether the Parliament likes it or not, income tax is, in every sense, an imposition. Thus, by the *Income Tax Act 1986* (Cth) s 5(1) ‘income tax is imposed’ upon taxable incomes, not anything else; and the tax imposed by s 5(1) is levied and made payable for the financial year by s 7.<sup>18</sup>

One could, perhaps appropriately, begin this discussion at Runnymede. But an interesting definition of taxation appears very much later, in 1980, in *The Oxford Companion to Law*:

<sup>15</sup> Sir Anthony Mason, ‘Where Now?’ (1975) 49 *Australian Law Journal* 570, 574.

<sup>16</sup> Freedman, above n 10, 335.

<sup>17</sup> G S A Wheatcroft, ‘The Attitude of the Legislature and the Courts to Tax Avoidance’ (1955) 18 *Modern Law Review* 209, 218.

<sup>18</sup> See also *Income Tax Assessment Act 1997* (Cth) pts 1-2-1-3 divs 3-4.

Traditionally the principal way in which the ruling classes in organized communities have oppressed, fleeced, and expropriated some of their subjects. It has been known from very early times, and from the earliest times the tax-gatherer has been an object of public fear, hatred, and execration. Taxation was originally a contribution levied from people generally to defray the major common expenses of the State, namely defence and the maintenance of law and order, but not only have the public purposes for which taxation is levied widened to include public health, education, housing, town planning, social services, subsidies to industries, and many other purposes, but taxation is now even in nominally liberal-democratic countries the major weapon of class-warfare, designed to rob some people of their earnings and property in the interest of 'redistribution of wealth'. Indeed, in effect some individuals are expected to work gratuitously, receiving a small percentage commission from the State for their efforts. The tax system is the greatest inhibitor of effort, ingenuity, and exercise of ability. There are no adequate rewards for ability, skill, ingenuity, and responsibility. Subsidiary purposes are to limit the expenditure on socially undesirable consumption goods, such as alcohol or tobacco, and to stimulate or inhibit economic activities. In practice all taxation does far more to inhibit than ever to stimulate economic activity or growth.

The taxing power and its exercise was frequently a matter of dispute between King and Commons and only from 1689 onwards has it been settled that taxation is controlled by Parliament and, within Parliament, by the House of Commons as nominal representative of the community ...

The incidence and weight of taxation on any legal transaction is today a factor of major importance in considering whether, and how, to try to attain some desired result, and this frequently gives rise to involved legal devices seeking to avoid or minimize taxation.

Not the least evil features of the modern tax system are the army of unproductive civil servants concerned with the assessing and collecting of taxes, the enormous volume and constantly changing detail of the chaotic and largely incomprehensible body of verbiage called the law of taxation, the incomprehensible and frequently incorrect assessments, and the utterly irrational nature of the whole topic. In the law of taxation justice has no place at all.<sup>19</sup>

<sup>19</sup> David M Walker, *The Oxford Companion to Law* (Clarendon Press, 1980) 1208, citing Sir James H Ramsay, *A History of the Revenues of the Kings of England: 1066–1399* (Clarendon

III *EXITUS ACTA PROBAT*

In a speech to the Institute of Chartered Accountants Australia in November 2012 (in a transparent attempt to garner support for new transfer pricing legislation which had nothing to say on the topic of his speech) the then Assistant Treasurer, Mr Bradbury, referred to ‘multinational businesses’ who ‘refuse to pay their fair share’ of tax and who were, therefore, ‘free riding on efforts of others.’<sup>20</sup> He continued: ‘If enormous multinational corporations aren’t paying their fair share of tax on economic activity in Australia, then that’s not fair game.’<sup>21</sup> One is used to hearing statements such as ‘it’s not fair’ from children — the use of them by politicians somewhat reduces the standard of debate. And ‘fair game’? Really? This from the side that actually makes the rules.<sup>22</sup>

Specific taxpayers were named, ie ‘outed’, the point said to be not to ‘single’ them out ‘for criticism’ but rather because of the ‘strong public interest in drawing attention to practices that have the potential to undermine the future sustainability of Australia’s corporate tax base.’<sup>23</sup> This hyperbole about multinationals not paying enough tax in Australia has led to a federal Senate inquiry into ‘[t]ax avoidance and aggressive minimisation by ... Australia[n] and multinational corporations operating in Australia’, established by terms of reference dated 2 October 2014.<sup>24</sup> The Senate committee conducting the inquiry, chaired by Labor Senator Sam Dastyari, has been granted an extension of time to report by — currently — 26 February 2016.

Press, 1925); Stephen Dowell, *A History of Taxation and Taxes in England: From the Earliest Time to the Year 1885* (Longmans, Green, and Co, 2<sup>nd</sup> revised ed, 1888); Hubert Hall, *A History of the Custom-Revenue in England: From the Earliest Times to the Year 1827* (Elliot Stock, 1892).

<sup>20</sup> David Bradbury, ‘Towards a Fair, Competitive and Sustainable Corporate Tax Base’ (Paper presented at National Tax Conference of the Institute of Chartered Accountants Australia, Sydney, 22 November 2012).

<sup>21</sup> *Ibid.*

<sup>22</sup> In my experience it is taxpayers who are regarded as ‘fair game’, not the revenue.

<sup>23</sup> Bradbury, above n 20.

<sup>24</sup> Senate Economics References Committee, Parliament of Australia, *Inquiry into Corporate Tax Avoidance* (2016). See Parliament of Australia, *Corporate Tax Avoidance* (2015) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Corporate\\_Tax\\_Avoidance](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Corporate_Tax_Avoidance)>.

Proceedings so far have shown scant respect for the reputations of those targeted, and for the secrecy provisions of the income tax legislation.<sup>25</sup> Thus Senator Dastyari is reported to have called on the Commissioner of Taxation to ‘name and shame’ those ‘evading or avoiding or minimising their tax in this country’.<sup>26</sup> Where the secrecy provisions have inhibited this he is reported to have said: ‘It is disappointing that the [Australian Taxation Office (‘ATO’)] has decided to protect some of Australia’s worst tax minimisers’, and to have added: ‘If companies are prepared to engage in aggressive tax minimisation they should be prepared to face up to it publicly’.<sup>27</sup>

The Greens (whose former leader was also on the Senate committee) would apparently go one step further. Again according to *The Australian Financial Review*:

Companies would be forced to reveal any arrangements that are used to avoid tax, and those not paying their fair share of tax would be named and shamed on a ‘worst offenders’ list, under a plan by the Greens.

The party has released a discussion paper detailing policies to fight multinationals exploiting loopholes in our tax laws. It said billions of dollars was being lost via ‘aggressive tax planning’ by companies that could instead be spent on schools, hospitals and creating jobs.

The party wants multinationals to ‘open up their books’ and for the ATO to publicly name and shame the ‘worst offenders’ of tax avoidance.<sup>28</sup>

Much of the attack on ‘multinationals’ has focused on their cross-border dealings with related entities. Until recently, this was dealt with domestically in the *Income Tax Assessment Act 1936* (Cth) pt III div 13, which, in certain circumstances, permitted the substitution, for revenue purposes, of an ‘arm’s length price’ for the actual price charged in the dealing. Division 13 was described by the Full Federal Court in *Federal Commissioner of Taxation v SNF (Australia) Pty Ltd* (‘SNF’) as ‘the domestic implementation of Australia’s

<sup>25</sup> *Taxation Administration Act 1953* (Cth) sch 1 ch 5 pt 5-1 div 355.

<sup>26</sup> Sky News, ‘Calls To Name and Shame Tax Avoiders’, *Sky News* (online), 8 April 2015 <<http://www.skynews.com.au/news/politics/national/2015/04/08/calls-to-name-and-shame-tax-avoiders.html>>.

<sup>27</sup> Neil Chenoweth and Phillip Coorey, ‘ATO Protecting Dodgers: Dastyari’, *The Australian Financial Review* (Sydney), 8 April 2015, 4.

<sup>28</sup> Nassim Khadem, ‘Name, Shame Tax Offenders Say Greens’, *The Australian Financial Review* (Sydney), 21 April 2015, 9.



various undertakings embodied in Art 9 of the [Organisation for Economic Cooperation and Development ('OECD')] Model Law.<sup>29</sup>

When amended in 1982, div 13 was not, however, intended as an 'anti-avoidance' provision, despite being referred to as such in the second reading speech to the Bill for the Act which introduced the new GAAR, namely pt IVA.<sup>30</sup> In that second reading speech, Mr Howard, then Treasurer and later Prime Minister of Australia, described arrangements to which div 13 would apply as involving situations 'not necessarily ... as reprehensible' as the 'blatant, contrived and artificial schemes' to which the proposed pt IVA would apply.<sup>31</sup> Accordingly, the percentage of additional tax under the two provisions was significantly different — 200 per cent under pt IVA, but only 10 per cent under div 13.

In *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation*,<sup>32</sup> the High Court of Australia considered an argument by the taxpayer that the application of div 13 was dependent upon the finding of a tax avoidance purpose. The Commissioner argued that div 13 'does not require any purpose of tax avoidance.'<sup>33</sup> The Court agreed with the Commissioner, saying:

There remains the proposition put in the Appellants' Statements that in making a determination under para (d) of s 136AD(1), the Commissioner was *obliged* to consider whether the transactions had 'a tax avoidance purpose' and 'a profit shifting motive'.

The appellants seek to draw some comfort from the circumstance that what became Div 13 was first proposed in Parliament in the Second Reading Speech to the Bill which became the *Income Tax Laws Amendment Act (No 2) 1981* (Cth). That statute inserted Pt IVA (ss 177A–177G) which is headed 'Schemes to reduce income tax'. It is true that the Treasurer described to the Parliament

<sup>29</sup> (2011) 193 FCR 149, 186 [118] (Ryan, Jessup and Perram JJ). Division 13 has recently been supplemented by the *Income Tax Assessment Act 1997* (Cth) pt 4-5 sub-div 815-A, with retrospective effect to the 2004 tax year: see *Income Tax (Transitional Provisions) Act 1997* (Cth) s 815-1(1). Division 13 was replaced from 29 June 2013 by *Income Tax Assessment Act 1997* (Cth) pt 4-5 sub-divs 815-B–815-D: see *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth) s 2(1), sch 2 pt 1.

<sup>30</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1981, 2686 (John Howard, Treasurer); *Income Tax Laws Amendment Bill (No 2) 1981* (Cth).

<sup>31</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1981, 2685, 2687.

<sup>32</sup> (2008) 237 CLR 198.

<sup>33</sup> *Ibid* 202 (Alan Robertson SC) (during argument).

the proposed Div 13 as a further ‘anti-avoidance’ measure which was ‘complementary’ to Pt IVA. However, the Treasurer also said on that occasion:

There is also the point that, damaging as they are to the Australian revenue, international transfer pricing arrangements may be entered into for a complex mixture of tax and other reasons. The fact, if it is one, that tax saving is not a key purpose of an arrangement or transaction is, however, no reason why we as a nation should not be in a position to counteract any potential losses of Australian tax inherent in it. Other major countries have in recent times acted against the growing use of international arrangements that have a tax avoidance purpose or effect, especially those involving transfer pricing. Methods adopted by tax authorities to re-allocate profits on a more appropriate basis than pricing arrangements throw up are usually based on the internationally accepted ‘arm’s length’ principle, and this will form the foundation of our proposed new measures.

With that background in mind, it is unsurprising that the criteria spelled out in paras (a), (b) and (c) of s 136AD(1) do not include any requirement of a profit shifting motive or tax avoidance purpose. To have included such criteria would have burdened the operation of what the Treasurer had identified as the internationally accepted ‘arm’s length’ principle which was the foundation of Div 13. Paragraph (d) of s 136AD(1) does not introduce under cover of general words a consideration which would be at odds with the scope and purpose of Div 13.

What on the applications for particulars the primary judge called ‘the real issues’ on the Pt IVC appeals cannot include the requirement of any investigation or consideration by the Commissioner of these matters of motive and purpose when making the determinations under para (d) of s 136AD(1).<sup>34</sup>

<sup>34</sup> Ibid 212 [35]–[38] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (emphasis added) (citations omitted). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1981, 2686 (John Howard, Treasurer); *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2006) 234 ALR 451, 459 [37] (Lindgren J).

Referring to this last paragraph, the Full Federal Court in *SNF* said: ‘The questions posed by the concept of arm’s length consideration “cannot include ... any investigation or consideration ... of motive and purpose”’.<sup>35</sup>

Accordingly we are faced with a Senate committee investigating, and — publicly — unfavourably criticising, these perfectly lawful activities:

- 1 tax avoidance schemes generally which, if found to exist, will be struck down by what is in the United Kingdom called a ‘targeted anti-avoidance rule’ (‘TAAR’), or the GAAR (for the reasons given above, div 13 is not a TAAR);
- 2 ‘tax minimisation’ which, ‘aggressive’ or otherwise, is not struck down by legislation; and
- 3 transfer pricing when the relevant transfer pricing provision requires no finding of a purpose of tax avoidance for its application.

#### IV THE OBLIGATION TO PAY TAX IS, OF NECESSITY, LEGAL AND NOT MORAL

In his memoirs, *A Radical Tory*, Sir Garfield Barwick wrote:

The liability to pay income tax is wholly derived from the law imposing and providing for the assessment of that tax. *The obligation to pay it is a legal one. Some politicians try to treat it as a moral obligation. But it is not.* The citizen is bound to pay no more tax than the statute requires him to pay according to the relevant state of his affairs.

Consistently with this view, it has long been a principle of the law of income taxation that the citizen may so arrange his affairs as to render him less liable to pay tax than would be the case if his affairs were cast in some different form. In the language of the layman, the citizen is entitled to minimise his liability to pay tax. This is sometimes expressed as a right to avoid tax, an expression which is in contradiction to the evasion of tax, a failure to pay tax which is properly due.

On this principle, I regularly acted. Provided the citizen’s transactions were not shams, pretences, the form of his transactions and their legal consequences

<sup>35</sup> (2011) 193 FCR 149, 152 [7] (Ryan, Jessup and Perram JJ), quoting *W R Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198, 212 [38] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

would affect his liability to tax, even though that form might be unusual and adopted for the express purpose of limiting the liability to pay tax.

I do not countenance fraudulent dealings, or give effect to sham transactions or the destruction of records. But clearly I did not accept the view that there was a moral duty to pay tax.<sup>36</sup>

Two of his Honour's more important pronouncements on this topic are to be found in 1977 and 1980. In *Slutzkin v Federal Commissioner of Taxation* his Honour said:

the choice of the form of transaction by which a taxpayer obtains the benefit of his assets is a matter for him: he is quite entitled to choose that form of transaction which will not subject him to tax, or subject him only to less tax than some other form of transaction might do. *Inland Revenue Commissioners v Duke of Westminster*, too easily forgotten, is still basic in this area of the law. There is no room in that area for any doctrine of economic equivalence. To the legal form and consequence of the taxpayer's transaction, which in fact has taken place, effect must be given ...<sup>37</sup>

In *Federal Commissioner of Taxation v Westraders Pty Ltd*, his Honour said this:

Because of the employment of the provisions of the Act to produce a very large diminution of tax, the case affords an occasion to point out the respective functions of the Parliament and of the courts in relation to the imposition of taxation. It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the court is to interpret and apply the language in which the Parliament has specified those circumstances. The court is to do so by determining the meaning of the words employed by the Parliament according to the intention of the Parliament which is discoverable from the language used by the Parliament. Is it not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament

<sup>36</sup> Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, 1995) 229.

<sup>37</sup> (1977) 140 CLR 314, 319. See also *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1, 8, 19–20 (Lord Tomlin); *Inland Revenue Commissioner v Europa Oil (NZ) Ltd* [1971] AC 760, 771 (Lord Wilberforce).

may have intended to achieve, though not expressed in the actual language employed. In this connection, I would indorse what was said by Deane J. in his reasons for judgment in this case, and which, in my opinion, are worthy of repetition. Speaking of the result of this case in upholding the taxpayer's claim to deduction, his Honour said:

That result may seem both contrary to the general policy of the Act (if it be possible to discern any general policy other than that people pay income tax) and unfair to the ordinary taxpayer who willingly or reluctantly contributes, without resort to tax avoidance, the share of his net income which the Parliament has determined is required by the nation for the common good. If there be, in truth, such contrariety or unfairness, the fault lies with the form of the legislation at the relevant time and not with the courts whose duty it is to apply the words which the Parliament has enacted. For a court to arrogate to itself, without legislative warrant, the function of overriding the plain words of the Act in any case where it considers that overall considerations of fairness or some general policy of the Act would be best served by a decision against the taxpayer would be to substitute arbitrary taxation for taxation under the rule of law and, indeed, to subvert the rule of law itself ...

The principle to which his Honour calls attention is basic to the maintenance of a free society.

Parliament having prescribed the circumstances which will attract tax, or provide occasion for its reduction or elimination, the citizen has every right to mould the transaction into which he is about to enter into a form which satisfies the requirements of the statute. It is nothing to the point that he might have attained the same or a similar result as that achieved by the transaction into which he in fact entered by some other transaction, which, if he had entered into it, would or might have involved him in a liability to tax, or to more tax than that attracted by the transaction into which he in fact entered. Nor can it matter that his choice of transaction was influenced wholly or in part by its effect upon his obligation to pay tax. Of course, the transaction must not be a pretence obscuring or attempting to supplant some other transaction into which in fact the taxpayer had earlier entered. Again, the freedom to choose the

form of transaction into which he shall enter is basic to the maintenance of a free society.<sup>38</sup>

Those who hold the view that this sort of thinking in Australia was confined to the Barwick era would be mistaken. Thus, in *Carr v Western Australia*, Gleeson CJ said:

To take an example removed from the present case, it may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.<sup>39</sup>

And, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*, French CJ said:

The ultimate purpose of Div 8A was to impose stamp duty on the transactions to which it applied. Its purpose says nothing about the extent of that imposition, which must be determined by reference to its terms. The terms are not to be read by reference to some general principle that requires taxing statutes to be construed so as to maximise the recovery of revenue.<sup>40</sup>

That position may be contrasted with the view in the United States. In his dissenting judgment (on the facts) in *Gilbert v Commissioner of Internal Revenue*, Learned Hand J said:

<sup>38</sup> (1980) 144 CLR 55, 59–61 (citations omitted). See also *Federal Commissioner of Taxation v Westraders Pty Ltd* (1979) 24 ALR 139, 151 (Deane J); *Ransom v Higgs* [1974] 1 WLR 1594, 1617 (Lord Simon); *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1, 19–20 (Lord Tomlin).

<sup>39</sup> (2007) 232 CLR 138, 143 [6].

<sup>40</sup> (2009) 239 CLR 27, 35 [11].

It is a corollary of the universally accepted canon of interpretation that the literal meaning of the words of a statute is seldom, if ever, the conclusive measure of its scope. Except in rare instances statutes are written in general terms and do not undertake to specify all the occasions that they are meant to cover; and their 'interpretation' demands the projection of their expressed purpose, upon occasions, not present in the minds of those who enacted them. The *Income Tax Act* imposes liabilities upon taxpayers based upon their financial transactions ... 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 [A]ct to provide an escape from the liabilities that it sought to impose.<sup>41</sup>

This was referred to with apparent approval by Lord Wilberforce in *W T Ramsay Ltd v Inland Revenue Commissioners* ('*Ramsay*') (discussed further below in Parts VIII and IX).<sup>42</sup>

#### V THE DUKE OF WESTMINSTER CASE

In the oft-referred-to case of *Commissioners of Inland Revenue v Duke of Westminster* ('*Duke of Westminster*'), Lord Tomlin observed:

Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners ... or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.<sup>43</sup>

This was not, in 1936, a novel approach. In *Commissioner of Stamp Duties v Byrnes*, Lord Macnaghten had said: 'No one may act in contravention of the law. But no one is bound to leave his property at the mercy of the revenue authorities if he can legally escape their grasp'.<sup>44</sup>

<sup>41</sup> 248 F 2d 399, 411 (2<sup>nd</sup> Cir, 1957).

<sup>42</sup> [1982] AC 300, 326–7.

<sup>43</sup> [1936] AC 1, 19–20.

<sup>44</sup> [1911] AC 386, 392.

And indeed, in the 17<sup>th</sup> century, Tuscan bakers, resisting an increase in the taxes on salt, elected to not use salt in their bread.<sup>45</sup> Such a practice, having its genesis in tax planning, continues to this day. In the late 17<sup>th</sup> to mid-18<sup>th</sup> centuries in England, the bricking up of windows was an answer to the ‘windows tax,’ a property tax imposed on inhabitants and based on the number of windows in a house (France, Scotland and Wales favoured this form of tax too, France’s apparently not being repealed until 1926).<sup>46</sup> It would appear that in 1765 the ministers of the Church of Scotland wrote to His Majesty’s Treasury seeking exemption from the tax for the houses in which they lived.<sup>47</sup> Their Lordships in the Treasury felt unable to ‘give ... relief as they have no Authority to dispense with an Act of Parliament, and if relief is to be obtained, it can be only by Act of Parliament’.<sup>48</sup>

No doubt, to the Ministers, this was ‘unfair’, though they did not resort to this terminology. But that is the way it was in 1765 and is the way it is now. What is taxed by the statute is taxed, like it or not. Equally what is not taxed by the statute is not taxed, again like it or not. The solution in either case is to change the statute; to change what is or is not taxed. It is the government which alone has this power.

Finally, and even earlier, in the 12<sup>th</sup> century, immigrants from Normandy and Wales were encouraged to marry women residing in Hereford upon the basis that were they to do so they would not have to pay local taxes.<sup>49</sup> These are all examples, long before 1936, of persons ‘order[ing their] ... affairs so as

<sup>45</sup> See, eg, Walks Inside Florence — Private Guided Tours in Florence, Italy, *The Debate on Florentine Bread* (2015) Walks Inside Florence <<http://www.walksinsideflorence.it/the-debate-on-florentine-bread.html>>; T F T Antonios and G A MacGregor, ‘Scientific Basis for Reducing the Salt (Sodium) Content in Food Products’ in A M Pearson and T R Dutson (eds), *Production and Processing of Healthy Meat, Poultry and Fish Products: Advances in Meat Research Series* (Blackie Academic and Professional, 1997) 84, 97.

<sup>46</sup> See *An Act for Granting to His Majesty Severall Rates or Duties upon Houses for Making Good the Deficiency of the Clipped Money 1695–96*, 7 & 8 Wm 3, c XVII.

<sup>47</sup> Copies of the original request and rebuff are obtainable from the United Kingdom government’s National Archives: United Kingdom National Archives, ‘Request for Window Tax Exemption’ (Taxation Documentation Studies, Catalogue Reference No SP 54/45, 1765) 619, 623.

<sup>48</sup> *Ibid* 623.

<sup>49</sup> See Hannah Furness, ‘Archaeologists Discover Earliest Tax Exiles in History — In Hereford’, *The Telegraph* (online), 23 May 2015 <<http://www.telegraph.co.uk/culture/hay-festival/11626292/Archaeologists-discover-earliest-tax-exiles-in-history-in-Hereford.html>>.



that the tax attaching under the appropriate Acts is less than it otherwise would be.<sup>50</sup>

Let us turn to a modern example. When a resident entity of one country does business in another it is necessary to ensure that it is not taxed in both jurisdictions — that is, taxed twice. To that end, countries have increasingly negotiated double tax treaties in the form of the OECD model with such amendments as the treaty parties may agree upon. Article 7 of the typical Australian double tax treaty effectively provides that the profits of an enterprise of the other country shall be taxable only in that other country unless that enterprise carries on business in Australia through a ‘permanent establishment’ here.<sup>51</sup> ‘Permanent establishment’ is broadly defined in art 5, with some exclusions.

Now, if a so-called ‘multinational’ manages to conduct business in Australia without a ‘permanent establishment’, other specific provisions aside, its profits are not taxable here. Can it seriously be argued that taking steps to, for instance, come within one of the exclusions, is any different from bricking up windows, not buying salt or moving to marry in Hereford? The tax, in each case, simply does not apply. If the legislature desires to change that position the answer is for it to change the legislation so that it does apply.

The passion shown for attacking multinationals — in 1692 it would have been witches — is absent when a decision about the tax which ought to be increased — the Goods and Services Tax — is so politically unpalatable. Obviously a populist attack on multinationals would not smooth the path for an increase in that tax. Of course, as will be seen, the *Duke of Westminster* doctrine has no application in Australia where the GAAR applies; but it should be enough to protect from public excoriation a taxpayer to whom the GAAR does not apply and who pays the full amount of tax lawfully imposed upon them.

Like many things, public criticism of taxpayers for not paying their ‘fair share of tax’ did not originate in Australia. There are recent criticisms by United Kingdom politicians, reported in the press, of American companies as

<sup>50</sup> *Duke of Westminster* [1936] AC 1, 19 (Lord Tomlin).

<sup>51</sup> *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*, opened for signature 21 August 2003, 2258 UNTS 119 (entered into force 17 December 2003) art 7.

well as, more recently, so-called ‘non-doms’ — ie persons resident, but not domiciled in the United Kingdom — and who, as a consequence, are entitled to preferential income and inheritance tax treatment.<sup>52</sup> In their 2012 joint paper Professors Devereux and Freedman and Dr Vella refer to the former and, in terms which, in the writer’s view, aptly respond to the emotive attacks of our Senate committee, say as follows:

we can take some of the recent examples of companies discussed in the media, Starbucks and Facebook. They have been criticized for not paying tax where they are making sales, but sales are not the basis for the corporation tax, so this alone is no cause for criticism of the companies concerned. We could argue that the tax base should change, but unless and until that occurs, the fact that there is a high turnover but no taxable profit is not in itself an indicator that the taxpayer is behaving in an unreasonable way.

Relying on the lack of ‘morality’ of particular taxpayers to argue that a ‘fair share’ of tax is not being paid is not helpful, for the simple reason that abstract concepts such as ‘fairness’ cannot be used to determine a taxpayers’ [sic] tax liability. This is not to say that morality is unimportant or irrelevant to how an individual behaves or a business operates, but simply that it cannot answer the question of how much tax is payable. As a distinguished legal philosopher (Tony Honoré) has written:

According to most people’s moral outlook members of a community should make a contribution to the expense of meeting collective needs. ... So members of a community have in principle a moral obligation to pay taxes. But this obligation is incomplete or, if one prefers, inchoate, apart from law. It has no real content until the amount or rate of tax is fixed by an institutional decision, by law. What amounts to a reasonable contribution is not otherwise determinable, since what is required is a co-ordinated scheme which can be defended as fair not merely in the aggregate amount it raises but in its distribution. Taxpayers cannot settle it for themselves, as people can within limits settle for themselves, say, the proper way of showing respect for the feeling of others. Apart from law no

<sup>52</sup> See, eg, Tom Bergin, ‘Special Report — How Starbucks Avoids UK Taxes’, *Reuters* (online), 15 October 2012 <<http://uk.reuters.com/article/2012/10/15/uk-britain-starbucks-tax-idUKBRE89E0EW20121015>>; Juliette Garside, ‘Permanent Non-Dom Tax Status To Be Abolished, Chancellor Announces’, *The Guardian* (online) 8 July 2015 <<http://www.theguardian.com/uk-news/2015/jul/08/non-dom-tax-status-abolished-individuals-born-uk-budget-george-osborne>>.

one has a moral obligation to pay any particular amount of tax. An obligation to pay an indeterminate amount is not an effective obligation; it requires only a disposition, not an action. So, apart from law no one has an effective obligation to pay tax.

Morality is relevant to what society decides its tax laws should be, and a healthy and informed discussion of this is important, but this then needs to be given content by an institutional decision, by law, as Honoré suggests.

There are other reasons why we must necessarily turn to the law to determine the tax due by a taxpayer. Subject to some exceptions, the rule of law requires that taxpayers are able to determine the tax consequences of their actions in advance. This can only be done through legislation and not vague notions of fairness.<sup>53</sup>

## VI THE ROLE OF THE COURTS AND OF THE PROFESSION

In his 1975 speech, discussed above in Part II, Sir Anthony Mason said:

The taxpayer who wishes to reduce his liability to tax or death duty is ... as much entitled to legal advice as any other member of the community, and the lawyer who practises in that field is as much entitled, and bound, to assist a client as the lawyer who practises in other fields of law. So long as tax avoidance is not an offence — and it is difficult to conceive how it could be made an

<sup>53</sup> Devereux, Freedman and Vella, above n 13, 10 (emphasis in original) (citations omitted). In relation to Starbucks, see Bergin, above n 52; BBC, ‘Starbucks “Paid Just £8.6m UK Tax in 14 Years”’, *BBC* (online), 16 October 2012 <<http://www.bbc.com/news/business-19967397>>; Simon Neville, ‘Starbucks “Pays £8.6m Tax on £3bn Sales”’, *The Guardian* (online), 16 October 2012 <<http://www.theguardian.com/business/2012/oct/15/starbucks-tax-uk-sales>>. In relation to Facebook, see Gideon Spanier and Jerome Taylor, ‘Facebook: The Antisocial Network Branded “Disingenuous and Immoral”’, *The Independent* (online), 11 October 2012 <<http://www.independent.co.uk/news/business/news/facebook-the-antisocial-network-branded-disingenuous-and-immoral-8206123.html>>; Simon Goodley, ‘Facebook Accused of Taking UK for a Ride over Taxes’, *The Guardian* (online), 11 October 2012 <<http://www.theguardian.com/technology/2012/oct/10/facebook-uk-taxes>>; Seumas Milne, ‘A Roll Call of Corporate Rogues Who Are Milking the Country’, *The Guardian* (online), 31 October 2012 <<http://www.theguardian.com/commentisfree/2012/oct/30/roll-call-corporate-rogues-tax>>. See generally Tony Honoré, ‘The Dependence of Morality on Law’ (1993) 13 *Oxford Journal of Legal Studies* 1.

offence — the taxation lawyer should be as free from criticism as lawyers in other fields.<sup>54</sup>

In a speech delivered at the same convention, and also published in the *Australian Law Journal*, D G Hill, then a solicitor and subsequently a justice of the Federal Court of Australia, speaking in relation to death and estate duties, said:

The community is not ... to be blamed if it seeks advice on how to avoid the exaction of the tax. We as a profession are also not to be blamed if we devote our energies and skills to assist our clients in this regard. It is not really to the point to argue that these professional skills could be better utilised for the benefit of the community as a whole. The laws of supply and demand will regulate where professional skills are to be used.

If it is desired to direct professional skills away from estate planning, at least where this planning involves revenue avoidance, the answer will lie not in legislative action to patch up loopholes; for history has shown each loophole patched up generates its own loophole for those astute enough to see it. The answer will lie in producing a system of capital taxation whether it be a death tax, a succession duty or an estate duty pitched at a level which does not encourage wholesale avoidance and which is regarded as ‘just.’<sup>55</sup>

As Justice Hill, his Honour would later deliver a paper at the Australia Centre, University of Potsdam, at a conference entitled ‘Tax and Transfer Reform in Australia and Germany.’ Justice Hill, who was conveniently fluent in German, published — thankfully (for me) in English — an article adapted from his paper entitled ‘The Judiciary and Its Role in the Tax Reform Process.’<sup>56</sup> Under the heading, ‘What limits, if any, should there be on a court negating tax avoidance?’ his Honour said:

<sup>54</sup> Mason, above n 15, 574. This view of the role of lawyers in providing taxation advice would seem unaffected by the ‘promoter’ provisions in *Taxation Administration Act 1953* (Cth) sch 1 ch 4 pt 4-25 div 290; see Pagone, above n 6, 172–6. Death duties have since been abolished in Australia.

<sup>55</sup> D G Hill, ‘Latest Developments in Estate Planning’ (1975) 49 *Australian Law Journal* 344, 351–2.

<sup>56</sup> Justice Graham Hill, ‘The Judiciary and Its Role in the Tax Reform Process’ (1999) 2 *Journal of Australian Taxation* 66. See also Justice Graham Hill, ‘The Judiciary and Its Role in the Tax Reform Process’ in Hans-Georg Petersen and Patrick Gallagher (eds), *Tax and Transfer Reform in Australia and Germany* (Berliner Debatte Wissenschaftsverlag and Australia Centre, 2000) vol 3, 151.

First, there is a real danger in judges deciding cases by reference to their own morality or sense of justice. This is so for no other reason than that views of morality differ from person to person. Second, to adapt a metaphor from another area of law and another time, the outcome of each case would depend upon the size of the Chancellor's foot, rather than the application of some predictable principle.

A most significant characteristic of perceived views of justice is that the law be predictable. Business, lawyers and citizens should be able to see that like cases will be decided in like ways and that analogous cases will also be decided in like ways to those with which the analogy is cogent. Commercial activity depends upon the ability to plan. Decisions based upon individual judge's [sic] concepts of what constitutes acceptable or unacceptable tax avoidance, or none at all, and views about that, would make decision making, to say the least, difficult. It is obvious enough, in areas outside tax, that some part of the public disquiet concerning the judiciary stems from the perception that certainty has been departed from and in its place there has been substituted some abstract and personal sense of justice.

The outcry against the *Consolidated Press* decisions, concentrating, as it did, on the fact that behind the taxpayer was a high profile wealthy individual raises an important question. We would all decry a system where justice was denied to a person because he or she was poor? Do we want a system which distinguishes between rich and poor in the opposite way? Is a person to be denied justice just because he or she is rich?

Another problem of applying different standards to tax avoidance cases than to other cases in the absence of a general anti-avoidance provision is that the law is likely to pursue somewhat peculiar paths. General principles as to what is taxable income or what are allowable deductions are expressed by the legislature in general terms applicable to all. They can not be given different interpretations depending just on the motivation of taxpayers.<sup>57</sup>

In a different but not unrelated area,<sup>58</sup> Middleton J recently, in *Paciocco v Australia & New Zealand Banking Group Ltd*, said:

<sup>57</sup> Hill, 'The Judiciary and Its Role in the Tax Reform Process', above n 56, 77-8. See generally *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235.

<sup>58</sup> Cf *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

a rationally based system of law needs to set out the limits of acceptable commercial behaviour in order that persons can order their commercial affairs in advance. Such a system cannot depend on the personal approach of a judge, based upon his or her view of commercial morality. Worse still, if there is the perception that the judge makes the law in any individual case and then applies it retrospectively.

Commercial law must keep up with the development of commerce, and hard and fast rules may readily become out of date. As many contemporary judges have stated, commercial values, norms and community expectations evolve over time. Rigid rules (as distinct from general principles) are often unable to withstand the pressure of change. The European civil law codes recognise the need for general principles directed to commercial behaviour, although there is an attempt to strike a balance between specificity and generality. However, no legislator can predict every individual dispute situation, and must resort to legislating in a proactive manner.

Lord Mansfield appreciated that a systematic and principled system was required, although in some ways the articulated legal principles that were developed almost became a 'code' of commercial law. However, the important aspect of the work of Lord Mansfield was the creation of a clearly articulated set of legal principles, informed by commercial values and standards. These principles provided the proper basis for a court's ability to decide a commercial dispute.

Similarly ... the task of a court is to make an evaluation of the facts and an ultimate determination by reference to a statutory standard of conduct, guided by the text and structure of the statute and its purpose. This task is a familiar one undertaken in the course of the judicial process.

This approach is not to be seen as any particular judge imposing his or her perception of desirable social goals as the basis for his or her ultimate determination. Nor does this process involve the court in determining policy. The legislature has enacted the law in pursuit of the community standard or expectation of commercial behaviour, which the court then applies in any given factual scenario.<sup>59</sup>

<sup>59</sup> (2015) 321 ALR 584, 672–3 [402]–[406].

## VII THE AUSTRALIAN GAAR

Since 1915, Australia has had a general anti-avoidance provision in its federal income tax legislation.<sup>60</sup> Much of the early jurisprudence on this topic concerns s 260 of the *Income Tax Assessment Act 1936* (Cth), which was, in 1981, replaced by pt IVA of the same Act.

In his ‘Tax Dodgers’ Dictionary’, Clyne wrote, with some degree of prescience:

This section [s 260] says that any arrangement designed to reduce tax liability is void against the Commissioner. Such easy solutions to the prevention of tax avoidance are not popular with our courts and recent High Court decisions have virtually killed this section ...

A new ‘jazzed-up’ Section 260 is on the drawing boards, but it will take many years to find out whether this is effective. My theory is that the High Court will assassinate the new Section 260 for the same reasons which caused judges to negate the former one.<sup>61</sup>

The High Court’s decision in *Federal Commissioner of Taxation v Spotless Services Ltd* (‘*Spotless Services*’), representing as it does a somewhat extreme interpretation of pt IVA in favour of the revenue, was not delivered until 15 years after the part’s enactment.<sup>62</sup> But, as it always will, the pendulum swung back — in *RCI Pty Ltd v Federal Commissioner of Taxation*,<sup>63</sup> a decision which, in the view of the revenue, necessitated a further amendment to pt IVA. Assisted by the revenue, the Parliament obviously agreed; and in 2013 the provision was amended.<sup>64</sup>

<sup>60</sup> There were earlier examples in New Zealand and in state land and income tax Acts: see, eg, *Land Tax Act 1878* (NZ) s 62; Craig Elliffe, ‘Policy Forum: New Zealand’s General Anti-Avoidance Rule — A Triumph of Flexibility over Certainty’ (2014) 62 *Canadian Tax Journal* 147, 148–9.

<sup>61</sup> Peter Clyne, *Peter Clyne’s Tax Dodger’s Dictionary, or How to Out-Bluff, Out-Hassle and Out-Litigate the Fiscal Fiend from A to Z* (Cassell Australia, 1980) 107.

<sup>62</sup> (1996) 186 CLR 404.

<sup>63</sup> (2011) 84 ATR 785.

<sup>64</sup> *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth).

## VIII THESIS

The essence of a general anti-avoidance provision, taken with such specific anti-avoidance provisions as may be enacted, is, as Pagone points out, ‘to nullify tax advantages brought about by avoidance arrangements.’<sup>65</sup>

In *Commissioner of Inland Revenue v Challenge Corporation Ltd* (‘*Challenge*’), Lord Templeman, for Lords Keith, Brightman, Templeman and Goff, said (in relation to *Income Tax Act 1976* (NZ) s 99, the New Zealand equivalent of the former *Income Tax Assessment Act 1936* (Cth) s 260):

Section 99 does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability. Section 99 does apply to tax avoidance.<sup>66</sup>

It will by now be clear that it is my view — and this is confirmed by the decision in *John v Federal Commissioner of Taxation* (‘*John*’)<sup>67</sup> — that tax avoidance is that which is struck down by the GAAR and the TAARs; and, axiomatically, it is always unsuccessful, always ineffective.

That is certainly the position in Australia. Whether it should, following the enactment there of a GAAR,<sup>68</sup> also be the position in the United Kingdom, is a matter to which I will, shortly, turn. In the absence of a GAAR, the courts of the United Kingdom unearthed what was, initially, confidently described as a ‘principle’ which was known as ‘fiscal nullity.’<sup>69</sup> Attempts were made — unsuccessfully — to introduce the ‘principle’ into Australian jurisprudence. In *John*, the plurality, relying upon the existence of the Australian GAAR, declined the invitation at the highest level. Thus the Court said:

The principle which has come to be known as ‘the principle of fiscal nullity’ derives from the decisions of the House of Lords in [*Ramsay*, *Burmah Oil*, and *Furniss*]. The principle was stated in *Furniss* by Lord Brightman:

<sup>65</sup> Pagone, above n 6, 3.

<sup>66</sup> [1987] AC 155, 168.

<sup>67</sup> (1989) 166 CLR 417.

<sup>68</sup> *Finance Act* ch 5 pt 5.

<sup>69</sup> See, eg, *Ramsay* [1982] AC 300; *Inland Revenue Commissioners v Burmah Oil Co Ltd* [1982] STC 30 (‘*Burmah Oil*’); *Furniss v Dawson* [1984] AC 474 (‘*Furniss*’).



First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end ... Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax — not ‘no business *effect*’. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

On behalf of the Commissioner it was argued that the principle expressed in *Ramsay*, *Burmah Oil* and *Furniss* is one of statutory construction, and, as such, applicable in the present case. In *Craven v. White* Lord Goff so described the principle adding that it was ‘essentially a principle arising from the construction of the statute’.

If any such or similar principle is to be applied in relation to the Act, it is one that must be capable of implication consonant with the general rules of statutory construction. One such general rule, expressed in the maxim *expressum facit cessare tacitum*, is that where there is specific statutory provision on a topic there is no room for implication of any further matter on that same topic. The Act, in s. 260 and now in Pt IVA, makes specific provision on the topic of what may be called tax minimization arrangements and thereby excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage. We would respectfully adopt as correct that which was said by Gibbs J. in *Patcorp*:

The presence of s. 260 makes it *impossible* to place upon other provisions of the Act a qualification which they do not express, for the purpose of inhibiting tax avoidance.

Notwithstanding the observations of Gibbs J. in *Patcorp*, it was argued on behalf of the Commissioner that the principle described by Lord Brightman in *Furniss* should be adopted in construction and application of s. 51 of the Act. By this we understand it to be argued that s. 51 should be construed so as to exclude therefrom a loss or outgoing that has been artificially contrived by a preordained series of transactions or a composite transaction into which there have been inserted steps which have no commercial purpose apart from the avoidance of a liability to tax. If that construction is to be reached as a matter of implication then, for the reasons already given, the presence of s. 260 precludes that approach. If it is advanced as a matter excluded by the plain meaning of

s. 51, there is no occasion to resort to any new principle of construction. We should add that on ordinary principles of construction there is no warrant for limiting s. 51 by reference to the two quite specific ingredients identified by Lord Brightman in *Furniss*. We would thus reject the principle of fiscal nullity as one appropriate to be adopted in the construction of the Act generally, or one appropriate to be adopted in the construction and application of s. 51.<sup>70</sup>

This approach is consistent with the Parliament's view of the role of the GAAR. In his second reading speech for the Bill which introduced pt IVA, Mr Howard, said:

We are acutely aware that the term 'tax avoidance' means different things to different people. Reasonable men and women are bound to differ on this crucial question and on the ... appropriate tests for determining what behaviour a general anti-avoidance provision ought to proscribe.<sup>71</sup>

Where pt IVA applies it is incompatible with the *Duke of Westminster* doctrine. Thus in *Spotless Services*, the plurality said:

In this Court, counsel for the taxpayers referred to the repetition by the Privy Council in [*Challenge*] of the statement by Lord Tomlin in [*Duke of Westminster*] that '[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be.' Lord Tomlin spoke in the course of rejecting a submission that in assessing surtax under the *Income Tax Act 1918* (UK) the Revenue might disregard legal form in favour of 'the substance of the matter'. His remarks have no significance for the present appeal. Part IVA is as much a part of the statute under which liability to income tax is assessed as any other provision thereof.

<sup>70</sup> *John* (1989) 166 CLR 417, 434, 435 (emphasis altered) (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). *Income Tax Assessment Act 1936* (Cth) s 51 was at the time the general deductions provision, since replaced by the *Income Tax Assessment Act 1997* (Cth) s 8-1.

<sup>71</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1981, 2683. Although he went on to say that the provisions should only apply to 'blatant, artificial or contrived arrangements', those words do not appear in the statute and have been largely ignored by the courts. As will be seen, by contrast the United Kingdom GAAR is in terms expressed only to apply to arrangements defined as 'abusive': *Finance Act* ss 206(1), 207(2).

In circumstances where s. 177D applies, regard is to be had to both form and substance.<sup>72</sup>

That is because the sole or dominant purpose of a party to a scheme is, under s 177D, to be ascertained taking into account all of the matters referred to in s 177D(2).<sup>73</sup> They include ‘the form and substance of the scheme.’<sup>74</sup> But if once that exercise has been completed, pt IVA has been found, for whatever reason, not to apply, no further warrant remains for elevating substance over form. It follows that, in the absence of the application of the anti-avoidance provisions, the need to respect form over substance is, in Australia, very much alive.

Thus in *Australia & New Zealand Savings Bank Ltd v Federal Commissioner of Taxation* (‘ANZ Savings’) Hill J (with whom Davies and Heerey JJ agreed) said:

What must be determined in the present case is whether the transaction into which the parties have entered is a loan involving the repayment of a principal sum with interest, or whether it is a contract for an annuity, or a contract for insurance. In the absence of a submission that the transaction entered into by the parties is a sham, a disguise for some other and different transaction, and in the absence of the application of the anti-avoidance provisions of Pt IVA of the Act, the Court must look to see what the transaction entered into by the parties by its terms effects. That is to say, regard must be had to the legal rights which the transaction actually entered into confers. Invocation of the doctrine of substance is of no assistance in this task.<sup>75</sup>

In other words, for the purposes of seeing whether pt IVA applies, one may have regard to the substance of a transaction; but if, after that exercise, it is concluded that it does not apply, form not substance ought to prevail.

## IX THE UNITED KINGDOM GAAR

An interesting question will be whether, following the enactment in the United Kingdom of a GAAR, the same position as applies in Australia

<sup>72</sup> (1996) 186 CLR 404, 414 (citations omitted) (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

<sup>73</sup> *Income Tax Assessment Act 1936* (Cth). See also at s 177A(5).

<sup>74</sup> *Ibid* s 177D(2)(b).

<sup>75</sup> (1993) 42 FCR 535, 560. An appeal to the High Court was successful on unrelated grounds.

according to both *John* and *ANZ Savings* will apply in the United Kingdom. In the absence of a GAAR, the courts of the United Kingdom uncovered, as we have seen, the ‘principle’ of fiscal nullity. In the years that followed, and displaying even greater ingenuity perhaps than the taxpayers whose paper schemes invited its discovery, the United Kingdom courts went about explaining what the principle was; and indeed that, possibly, it was not a principle at all. It has no ‘juristic basis independent of statute’, said Lord Steyn in *Inland Revenue Commissioners v McGuckian* (‘*McGuckian*’), adding that such ‘would have been indefensible since a court has no power to amend a tax statute. The principle was developed as a matter of statutory construction’.<sup>76</sup>

While it may be ‘wrong to regard the decisions of the House of Lords since the *Ramsay* case as necessarily marking the limit of the law on tax avoidance schemes’,<sup>77</sup> in *Shiu Wing Ltd v Commissioner of Estate Duty* (‘*Shiu Wing*’)<sup>78</sup> Sir Anthony Mason, sitting as a Non-Permanent Justice of the Hong Kong Court of Final Appeal, observed that in *Inland Revenue Commissioners v Fitzwilliam*,<sup>79</sup> the House of Lords ‘not only took a restricted view of what can be done by way of reconstitution of particular transactions’ but also explained *Furniss* as a ‘decision turning on its own particular facts’.<sup>80</sup> Mason NPJ said:

the majority in the House of Lords proceeded on the footing that [two] steps ... were genuine (i.e. non-sham) transactions, though forming part of a series of transactions which were pre-ordained in the sense that they all formed part of a pre-planned tax avoidance scheme. It followed that it would have been possible to disregard [those two] steps ... along with other intermediate steps, for the purpose of the *Ramsay* principle. But it was not possible, in disregarding them, to give them another character. Or, to put it another way, having disregarded [those two] steps ... it was not permissible to re-constitute the entire transactions by giving these two transactions a character different from their genuine character.<sup>81</sup>

<sup>76</sup> [1997] 1 WLR 991, 1000.

<sup>77</sup> *Ibid.*

<sup>78</sup> [2000] 3 HKLRD 76.

<sup>79</sup> [1993] 1 WLR 1189.

<sup>80</sup> *Shiu Wing* [2000] 3 HKLRD 76, 104 (Mason NPJ).

<sup>81</sup> *Ibid.* 105.

In *MacNiven v Westmoreland Investments Ltd* ('*MacNiven*') Lord Nicholls preferred the term '*Ramsay* approach' to '*Ramsay* principle'.<sup>82</sup> It was, his Lordship said, an 'approach to ascertaining the legal nature of transactions and to interpreting taxing statutes'.<sup>83</sup> Furthermore:

*Ramsay* ... did not introduce a new legal principle ... The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application.<sup>84</sup>

In the same case, Lord Hoffmann said:

For present purposes, however, the point I wish to emphasise is that Lord Brightman's formulation in the *Furniss* case, like Lord Diplock's formulation in the *Burmah* case, is not a principle of construction. It is a statement of the consequences of giving a commercial construction to a fiscal concept. Before one can apply Lord Brightman's words, it is first necessary to construe the statutory language and decide that it refers to a concept which Parliament intended to be given a commercial meaning capable of transcending the juristic individuality of its component parts. But there are many terms in tax legislation which cannot be construed in this way. They refer to purely legal concepts which have no broader commercial meaning. In such cases, the *Ramsay* principle can have no application. It is necessary to make this point because, in the first flush of victory after the *Ramsay*, *Burmah* and *Furniss* cases, there was a tendency on the part of the Inland Revenue to treat Lord Brightman's words as if they were a broad spectrum antibiotic which killed off all tax avoidance schemes, whatever the tax and whatever the relevant statutory provisions.<sup>85</sup>

The United Kingdom GAAR only applies to tax 'arrangements' which are 'abusive'. And the onus of establishing that an arrangement is 'abusive' lies on the revenue. A 'tax arrangement' is one which, viewed objectively, has the obtaining of a tax advantage as its main purpose, or one of its main

<sup>82</sup> [2003] 1 AC 311, 319 [7].

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* 320 [8].

<sup>85</sup> *Ibid* 332 [49]. Those interested in a complete discussion on this topic should read David Goldberg, 'Words from the Heart: Tax Avoidance of the Third Kind; The Lessons of Schrodinger's Cat' (2004) 4(1) *Gray's Inn Tax Chambers Review* 19, where he attempts to chart the progress of the non-principle in *Ramsay* and *Furniss*.

purposes.<sup>86</sup> It is similar to the test for determining whether a ‘scheme’ is one to which pt IVA applies, save that, like former s 260, the purpose to be ascertained is that of the ‘arrangement’ rather than of a party to it.<sup>87</sup>

Her Majesty’s Revenue and Customs has published a GAAR ‘Guidance’ (which has been approved by the GAAR Advisory Panel (‘the Panel’) with effect from 30 January 2015).<sup>88</sup> The consequence is that, from that date, the *Guidance* is an aid to interpretation. The *Finance Act* s 211(2) requires any court or tribunal which is considering the application of the GAAR to take into account those parts of the *Guidance* approved by the Panel.<sup>89</sup>

Determining whether an arrangement is ‘abusive’ is at ‘the core of the GAAR legislation’, and the ‘abusive’ requirement is part of the legislation itself.<sup>90</sup> The *Guidance* says this:

There may be arrangements which cannot be described as abusive, but which nonetheless HMRC regards as seeking to achieve some tax advantage and as falling outside the range of acceptable tax planning. The fact that the GAAR would be inapplicable in those situations does not inhibit HMRC’s right to challenge such cases, relying where appropriate on other parts of the tax code applied in accordance with the legal principles developed by the courts.<sup>91</sup>

The question which remains is: to what extent is there now room for the *Ramsay* ‘approach’ in the United Kingdom? One hopes none. Notwithstanding the above paragraph of the *Guidance*, the need to invoke the doctrine (let alone explain it) would seem to have disappeared.

While pt B of the *Guidance* is one of the parts which has been approved by the Panel, that means only that it is, under the *Finance Act* s 211(2), required to be ‘take[n] into account’ in ‘determining any issue in connection with the general anti-abuse rule’; not otherwise. The way would thus appear to be open for the English courts to draw a line under the decisions in *Ramsay* and

<sup>86</sup> *Finance Act* s 207(1).

<sup>87</sup> *Ibid.*

<sup>88</sup> Her Majesty’s Revenue and Customs, *HM Revenue and Customs (HMRC) General Anti Abuse Rule (GAAR) Guidance* (at 30 January 2015) (‘*Guidance*’).

<sup>89</sup> *Ibid* 10 [B12.1], provides that before the revenue can proceed to apply the GAAR, it must obtain the opinion of the Panel as to whether an arrangement constituted a reasonable course of action. If, in the view of the Panel it did, it cannot be ‘abusive’.

<sup>90</sup> *Ibid* 18 [C5.1]; *Finance Act* ss 206(1), 207(2).

<sup>91</sup> *Guidance* 8 [B8.3].

*Furniss* (and the cases explaining them) and to adopt the approach favoured by the High Court of Australia in *John*. In other words, the enactment of the GAAR in the United Kingdom provides a perfect excuse for the courts there to embrace the opportunity to henceforth construe the *Finance Act* on the basis that the 'presence of ... [the GAAR] makes it impossible to place upon other provisions of the Act[s] a qualification which they do not express, for the purpose of inhibiting tax avoidance'.<sup>92</sup>

We may, in any case, have to wait for some time to find the answer as the United Kingdom GAAR has yet to be invoked. To finish by paraphrasing Peter Clyne's *Adventures in Tax Avoidance* — the United Kingdom GAAR is sleeping just as s 260

slept in the Act for over 20 years, like Snow White, until the Commissioner found it necessary to waken it with a kiss. During this time the section was not used at all, though grim warnings and portentous hints occasionally emerged from the [revenue]. Finally, a series of schemes which would have involved tremendous loss to the revenue drove the Commissioner to digging out this Ultimate Weapon and detonating it ...<sup>93</sup>

<sup>92</sup> *John* (1989) 166 CLR 417, 434–5 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), quoting *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1976) 140 CLR 247, 292 (Gibbs J). It is worth noting that the Court in *John* denied the possible application of the 'principle' of fiscal nullity in Australia but at the same time reached a conclusion — that the dividend used to pay up bonus shares issued to a trader in shares was not part of the 'cost' of those shares — which bears real similarity to the approach favoured by Lord Hoffman in *MacNiven*. See also Pagone, above n 6, 9 n 41.

<sup>93</sup> Clyne, *Adventures in Tax Avoidance*, above n 3, 9.