THE PROBLEM IS THE PERCEPTION[1]

David Goldberg

Why do we have a tax statute? To put the question in a slightly expanded form, why do I, when advising on or thinking about the direct taxes, have to use four volumes with pages numbered from 1 to 22,000. (The numbering is not consecutive but there are, nonetheless, an awful lot of pages.)

Or, again, why doesn't the tax statute consist of three sentences. Let me suggest these three:

> "Everybody shall pay as much tax as the Revenue decides they should pay: However, in deciding how much tax each person must pay the Revenue must act fairly as between different people and groups of people. Anybody who doesn't like what the Revenue decides can appeal to a judge who will decide what is fair in all the circumstances."

I rather suspect that we should not find a statute in these terms very satisfactory. It would, I think, be too uncertain, too lacking in principle to be an acceptable guide to how much tax we had to pay. But it is a possible statute.

Why the tax statute is not in that form is, accordingly, a question we need to consider.

I shall leave you to think about those questions for a while. I haven't decided yet whether I shall ask for suggested answers at the end or tell you what I think the answer is.

I am leaving some uncertainty as to what will happen; and I must confess that I am doing so deliberately.

Actually, I know what I expect will happen but, of course, I could change my mind, and while you are thinking about the basic question I have posed so far – why do we have a tax statute? – you might also think about whether you are entitled to expect me to answer the question.

And then you might also consider whether, if you are entitled to an answer from me, the fact that I am leaving some uncertainty, deliberately instead of accidentally, can have any impact, at all upon the question of your entitlement to an answer, the nature of this talk or, for that matter, anything else. Might it, for example, change this talk from being about anti avoidance into a talk about, say, avoidance?

And here is another question which quite often arises in relation to tax cases: what is money?

Have you ever thought about money? Every sterling note which you carry bears, on its face, a promise from the Governor and Company of the Bank of England to pay the bearer on demand the sum of whatever it might be - £5, £10, £20 or £50.

If you take your bank note to the Bank of England, they will honour the promise by giving you another note. Odd that. Why do we believe in money?

And now let me ask you another question: If a statute doesn't mean what it says, what does it mean?

And then I suppose there's another question which you may, by now, be asking yourselves: Why is he asking all these questions?

I am asking all these questions because they are relevant to the debate, current in this country, about the judicial development of our tax law.

Is this development taking us to what, in the jargon of the day, might be called a happy place? Or are we, to adopt a phrase once used in the case law, on a map making journey without a map or, as it might then be termed, lost?

The answer is that we are lost or, at least, in danger of getting lost; and, no matter where we are on the map, in taking us to wherever we are, the judges, who should have been true helmsmen, have been false to the compass of our tax statutes.

It used to be recognised, in the early days of our direct taxes, that they were an unnatural construct, laid upon the relationships of organic life, as a wholly artificial framework. They were not part of the law of nature.

Tax acts thus had no reason to them and no rhyme: they were full of jagged edges.

The tax starts here and stops there; and if you ask why, the only answer is because that is where the legislator chose to start and chose to stop: the legislator was not working to some deep plan in the basic construct of the tax. Let me give just one illustration. It is necessary to hold a business asset for 2 years to get full taper relief. Why is the period 2 years and not 2½ years or 1½ years? The answer is: because it is. There is and cannot be any underlying rationale for 2 years. It's the figure chosen.

Scientists tell us that the universe exists as it is because it is in a Goldilocks equilibrium; and everything must be as it is because the equilibrium prevents it from being different. Like it or not, we are made from the ashes of dead stars; and that's the way it is.

But none of this is true with tax. Although there may be some underlying basic logic to a tax system, tax does not operate according to some Goldilocks equilibrium, but entirely by the whim of its all too human creators.

The jagged edges mean that any tax system is inherently irrational as well as being wholly artificial.

Because this is so there are two irreducible facts about tax.

The first is that tax problems are not solvable either by an appeal to the existence of a rational tax system, such as Lord Hoffmann made in *Carreras*[2], or by an appeal to the existence of a fair tax system, such as he made in his recent speech to the Addington Society, soon to be published in the B.T.R.

The second is that tax law is unlike other areas of law both because it is artificial and irrational and also because it deals with the relationship between the individual and the collective state rather than governing the relationship of citizens to each other.

At any rate, tax law cannot properly be compared to any other area of law which does not have these features of artificiality, irrationality and state rule.

The early and, indeed, not so early case law recognised all this. Thus in *Canadian Eagle Oil Co Ltd v The King* ([1946] AC 119) a case which is not yet 60 years old, Viscount Simon said this:

> "But the opinions delivered by Lord Macnaghten and Lord Davey in that well-known case proceed upon a meticulous construction of those particular provisions and not upon the supposition of any general principle underlying them, and remaining unexpressed. No such supposition is legitimate. In the words of the late Rowlatt J., whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase, "in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at

> the language used." *(Cape Brandy Syndicate v. Inland Revenue Commissioners*."

The principle was sometimes expressed a little differently.

In *W.T. Ramsay Ltd v IRC* [1982] STC 174 at 179j Lord Wilberforce, in words which are interestingly omitted in the quotations from him in *Mawson*[3], put it this way:

> "A subject is only to be taxed on clear words, not on "intendment" or on the "equity" of an Act. Any taxing act of Parliament is to be construed in accordance with this principle."

However, an appeal to the clarity of clear words is inevitably going to be misleading, because words are seldom clear: words are, as Wittgestein and Hart tell us, generally fuzzy around the edges.

Accordingly, Lord Wilberforce added this:

> "What are clear words is to be ascertained on normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded …"

There is perhaps the beginnings of a puzzle here. If a taxpayer is only to be taxed on clear words and without regard to intendment, what role is purpose playing in the process of construction?

Nonetheless, the basic rule is clear: You start with the words of the statute and tax may only be imposed where there are clear words – and this is the guiding star.

It is true that purpose has intruded, but it appears to have done so in a subsidiary role: Here words come first and purpose second.

So, perhaps with some exceptions, the general rule in this country, at least up until *Ramsay* was decided, was that the words of the statute were what governed what it meant.

Most of us would have no difficulty with that proposition. It accords well with the notion of a tax as an unnatural and artificial construct.

Nonetheless, a question which arose was whether *Ramsay* marked a departure from the usual way of reading tax statutes and created special rules applicable to the interpretation of taxing acts alone.

I have set out the history of what I will call, for the purposes of brevity but without meaning it, the *Ramsay* principle and of its development in the article[4] which is in the papers handed out to you. The article covers the period from *Ramsay* itself up to and including the decisions in the cases of *Arrowtown*[5] and *Carreras*.

Putting the matter briefly, I said in that article that the principle being applied by the courts or, perhaps more accurately, the principle which the courts said they were applying, was that they looked for and found what might be called the statutory question, the question posed by the statute in the particular circumstances of the case.

Identification of the statutory question brought with it a determination of the analytical method which was to be adopted in answering the statutory question.

Thus a narrow or precise statutory question required a narrow perhaps, even, a step-by-step, approach to finding the answer to it, while a broad or fuzzy question permitted a wide examination of the facts.

For example, in a case I have recently argued, the question was whether F was carrying on a trade which it had acquired from A with the intention of selling part of it on.

There was a period of 40 days between F's acquisition of the trade and the identification of the proposed purchaser B; and there were another 80 days or so before part of the trade was actually sold by F to B.

The 40 days have a biblical connotation, so we can use an analogy of Moses on Mount Sinai.

If the questions is: "where did Moses go?" then, if he went up one side of the mountain and came down another, it may be possible to disregard the route he took and say that he went from one side of the mountain to the other.

But if the question is "what was Moses doing for 40 days and nights?" the answer can only be "he was up the mountain".

Examples of this kind can be multiplied. If a person gives up biscuits for lent, he has still given up biscuits for lent, even though when he started his lenten fast he intended to start eating biscuits again.

And if a person is eating biscuits, the act of eating them cannot be ignored, even though the biscuit begins its journey to the stomach from outside the mouth.

The answer to the question: "is this man eating a biscuit?" cannot vary according to how quickly or with what intent he eats it.

I suggest that the question: "is F carrying on a trade?" is an eating biscuits type question. F either was or wasn't; and neither its intent nor the duration of its ownership is really relevant.

I also suggested in the article that this approach to tax cases - the approach of ascertaining the statutory question - provided a good framework for their solution, although one which still contained considerable latitude and scope for error.

For example, the court might ask the wrong statutory question and so reach the wrong answer or, even though it found the correct statutory question, might apply the wrong analytical technique in answering it.

I suggested that *Arrowtown* was a case in which the right question had been asked and the wrong analytical technique applied in answering it (with the result that *Arrowtown* went further than any case in any other common law jurisdiction in distorting the tax statute); while *Carreras* was a case in which it was very difficult to tell what question had been asked or what analytical technique had been applied.

Since I wrote that article, we have had two more cases in the House of Lords in this country supposedly explaining the *Ramsay* principle: these cases are, of course, *Mawson* and *Scottish Provident*[6].

I do not believe that these cases have really changed the analysis which is set out in my article, which is still, accordingly, as worth reading as it was when it was written.

Even so, there are a number of features of these two cases which are worth mentioning.

First, no single judge is given credit or, as it might be, responsibility, for the decisions in these cases: there is one speech in each case to which all members of the panel have contributed.

One reason for this is, I suppose, to send the message that there is absolute unanimity of view between all the judges involved, so that there is no scope for trying to make use of differences between different judges.

A second reason must, I think, be to stop judicial in-fighting of the sort which Lord Millett may have been trying to start in *Arrowtown*.

Secondly, in both these cases, as in *Carreras*, the actual citation of authority is reduced to a minimum. For example in paragraph 19 of *Scottish Provident*, the House of Lords says simply this:

> "Since … Ramsay it has been accepted that the language of a taxing statute will often have to be given a wide practical meaning …"

This vision of a taxing statute with a wide practical meaning allows (and indeed requires) the court to have regard to the whole of a series of transactions which are intended to have or can be regarded as having a commercial unity.

The concept of commercial unity is, I think, an important one.

Ramsay type cases concerned with the analysis of linear commercial transactions have been concerned to treat an A to B to C transaction as a simple A to C transaction, and so the synthesis of the cases as dealing with things which have a commercial unity is actually highly accurate and perceptive.

It may therefore be that, as the law stands, the revenue cannot disassemble transactions. Going back to my recent case, if A sells to F which sells on part of the business to B, the revenue cannot say that A sells partly to F and partly to B, because that is to create a disunity not permitted by the statute.

As I say, the reference to commercial unity is right, but it has been made on a sweeping basis without analysis of the authorities.

We may think, perhaps, that this abandonment of the citation of authority means that the House of Lords is in an inventive phase of the developmental process, as old guidelines are being abandoned.

There seems little doubt, both from the way in which the speeches in *Mawson* and *Scottish Provident* are worded and also from extra judicial lectures given by the Law Lords, that the present House of Lords wishes to abandon the factual pre-requisites for the operation of the *Ramsay* principle which were held, in *Furniss v Dawson*[7] and in *Craven v White*,[8] to be fundamental to the operation of what was then called the new doctrine or the emerging principle.

Thus, subject to what I have to say in a moment, questions of pre-ordination and things of that sort are no longer going to be relevant unless, of course, the particular wording of the statute makes it so: whether the present generation of Law Lords thinks that *Furniss v Dawson* was correctly decided is unclear, but what is clear is that they believe the basis of the decision still needs further exegesis, despite the extensive analysis of it in *Craven v White*, an important decision to which, I suggest, insufficient attention has been paid.

The third point about these decisions is that they emphasise the need for a purposive construction of the statute: literalism is to be avoided.

One of the chief proponents for purposive construction is Lord Steyn; and he does not limit his non-literal approach to statutory interpretation, but extends it to contractual issues as well.

In the recent case of *Sirius v FAI Insurance Limited*[9], Lord Steyn gives the example of Temures, who promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them alive.

Lord Steyn clearly believes that Temures breached his promise, but I wonder if he did.

Temures meant exactly what he said when he made his promise to the garrison; and he intended to mean what he said and no more.

The garrison thought he meant more than he said and, no doubt, he may have been hoping that that would happen. But what he said had a limited meaning which might, I suppose, be expanded by the context, but I do not think it can be changed by the facts.

There would, I think, have been a considerable change of emphasis if the promise had been "if you surrender there will be no bloodshed" which, to my mind, conveys a wider meaning than "if you surrender no blood will be shed." Of course, the garrison should have been advised by a lawyer before accepting the surrender terms.

But, if a draughtsman uses words with the deliberate intent to convey a specific and limited meaning (I will shed no blood) is it right to say that the circumstances – the fact that he later buries everyone alive - can change the meaning of what he wrote.

For myself, at any rate, I have some doubts as to whether it is right; and I say that not as some tax lawyer shut up in an ivory tower but as a person living in the world who has to listen to and to understand what people say to him.

The late Professor Daiches once said:

> "The English do not say what they mean and they do not mean what they say"

It is a clever inversion but I am not sure that is true either.

On the whole, I do think that people mean what they say; and if what they said has meaning, then we should give what they say that meaning without trying to distort it. Interestingly recent US case law – the *Black & Decker*[10] case and the *Coltec*[11] case, both of which are about tax, emphasise the cardinality of this principle.

It is, of course, different if what people say does not have immediate meaning or has a meaning which is absurd; but this is seldom the case where a tax statute is concerned.

And it is true that context can give an extended or more limited meaning to words.

For example, ICTA 1988 Section 118ZA(2)(b) provides that, in the Tax Acts:

> "references to members of a partnership include members of a limited liability partnership."

As it happens there are quite a lot of references in the Tax Acts to partners but not many (if any) to members of a partnership.

Nonetheless, there is no doubt that references to partners are references to members of a partnership so that now, when you see a reference to a partner in the Tax Acts, you include in the reference to partner a member of a Limited Liability Partnership.

This is not to construe purposively or not to construe literally: it is just to construe.

There is no doubt at all about what is meant, even if the wording used in Section 118ZA(2)(b) could have been more precise.

Another example is to be found in ICTA 1988 Schedule 25 paragraph 8(1)(a) which contains conditions which have to be fulfilled if a CFC is to satisfy the exempt activities test.

Paragraph 8(1)(a) provides that it can only do so if:

> "The number of persons employed by the company in the territory in which it is resident is adequate to deal with the volume of the company's business."

At first sight the reference to the company's business seems to be to the company's business wherever it is carried on.

But if this is what the paragraph means, it will virtually never provide protection to a CFC and, read in context, the reference here to the company's business is, I think, to the company's business in the territory in which it is resident.

In both these examples it is the context and not the purpose which enables us to determine the meaning of the words used.

The words used might not be precise but they are, nonetheless, clear words.

There is no need to appeal to purpose or to the need to avoid a literalist construction.

The problem with purposive construction is that it gives to words which have one meaning an altogether different meaning from that which, whether read on their own or in context, they convey.

There is, of course, no doubt that Lord Wilberforce did refer to purpose in what he said in Ramsay.

But, in my view, he began with the words of the statute and allowed the purpose of the statute the limited role of informing what the words meant.
The method now adopted appears to me to involve beginning with the purpose or supposed purpose of the statute and then allowing that purpose to overwhelm the words so that, more or less regardless of what words are used, the statute must be given a meaning which accords with the supposed or pretended purpose.

One of the things that I wish to suggest is that this is a wrong thing for the courts to be doing in a tax context.

It may be great in the context of commercial disputes where a draughtsman has fallen into error which the court puts right (although even in such cases one side will be saying there is no error); but it has no place in determining the liability of the individual to the State under what is still regarded, as a matter of private international law, as confiscatory legislation.

But whether it is a right thing or a wrong thing, it is a thing that is happening.

The fourth point about these cases is the way in which business purpose is slipped into the UK authorities.

Thus in paragraph 32 of the *Mawson* judgement, *Carreras* is explained as a case where a transaction without a business or commercial purpose failed to attract an exemption from tax.

There is, however, nothing about business purpose in *Carreras* itself and, indeed, *Craven v White* shows conclusively that there can be no business purpose test in cases like *Carreras*.

But here is the business purpose test, derived from our old friend Judge Hand of the United States and beloved of Lord Millet in *Arrowtown*, here is the business purpose test rearing its head as such for the first time in the UK authorities.

It has been suggested, in a recent article in The Tax Journal, that *Mawson* and *Scottish Provident* kill off the business purpose test. That is to misunderstand the decisions, and I shall have more to say on why that is so in a moment.

Fifthly, in both *Mawson* and *Scottish Provident*, the court has insisted that the paramount question is always one of interpretation of the statute.

It is because this is so that questions about what the facts are – for example about pre-ordination or about whether a step has been inserted without any commercial purpose – are now seldom relevant.

Thus the commercial purpose test of *Furniss v Dawson* has been reduced in importance or gone altogether (but more of this in a moment.)

However, the commercial purpose test of *Furniss* is not the business purpose test of *Arrowtown*.

The business purpose test of *Arrowtown* is used in construing the statute as a matter of law, while the commercial purpose test of *Furniss* was used in ascertaining whether the facts were of a nature which permitted application of the *Ramsay* doctrine.

The two things are different and *Mawson* and *Scottish Provident* do, as I say, introduce a business purpose test which applies, or may apply, in construing the statute.

The question which then arises is whether this is a special rule which applies only to taxing acts.

In *Mawson*, it is said that the way in which tax statutes are interpreted is no different from the way in which any other statute is interpreted – see paragraph 28.

However, in *Scottish Provident*, the court says something different.

In paragraph 23 of *Scottish Provident* the House of Lords says this:

> "We think that it would destroy the value of the Ramsay principle of construing provisions … as referring to the effect of composite transactions if their composite effect had to be disregarded simply

> because the parties had deliberately included a commercially irrelevant contingency, creating an acceptable risk that the scheme might not work as planned. We would be back in the world of artificial tax schemes …"

An issue which arises immediately from this passage is this: What is the value of the *Ramsay* principle?

It appears that the value of the *Ramsay* principle is that it stops artificial tax schemes.

The approach here is worth contrasting with the approach in *MacNiven*.

We learned, or thought we learned, two things from *MacNiven*.

The first was that there really was no such thing as the *Ramsay* principle at all: there was a *Ramsay* approach, but it was not a new principle. This is what the House of Lords says about it in *Mawson*, at paragraph 33,

> "The *Ramsay* case did not introduce a new doctrine operating within the special field of revenue statutes".

The second thing that we learned from *MacNiven* was that to characterise something as avoidance did not help in interpreting the statute – see Lord Hoffmann [2001] STC page 256/7 paragraph 62.

It is thus perhaps a little surprising to find in the passage from *Scottish Provident*, which I have just quoted, the decision being given on the same day and by the very same judges as *Mawson*, that there is a *Ramsay* principle and that its purpose is to stop artificial tax schemes.

I might add that the use of the word artificial is no more helpful to analysis than the use of the word avoidance.

All that is meant when a judge uses the word artificial, just as when he uses the word avoidance, is that he is going to decide that the transaction does not work to save tax.

But, apart from that, what is artificial about the real contracts in *Scottish Provident*?

What all this shows is that the common law is not like the laws of the Medes and Persians which were cast in stone and unchangeable.

We are dealing with changing principles and we are watching them at a stage of evolution: the differences that we can see between what the court says in *Scottish Provident* and what the same judges say in *Mawson*, show that we are watching a caterpillar that has not decided whether to be a moth or a butterfly (I know that moths do not come from caterpillars; and lizards, some of which are evolving into snakes and some of which are not, would be a better example, but this is close enough as an example for the purposes of illustration).

The next point about these two recent decision is the distinction, which is now apparently to be made, between what might be called planned uncertainty – uncertainty arising from the terms of the composite transaction itself – and unplanned uncertainty which is uncertainty as to whether the transaction will occur at all.

This distinction is drawn in paragraph 22 and 23 of the *Scottish Provident* decision and there is no doubt that, at first blush, it seems very elegant and, perhaps, even compelling.

However, at least two issues arise here.

The first is why we are concerned with composite transactions and uncertainty at all.

If there is no particular rule of law applying to the interpretation of tax statutes and if there is no rule that a particular set of facts must exist before the *Ramsay* principle (which, remember, does not exist) can be applied, why is it that we are concerned with composite transactions?

The answer is – according to the House of Lords - that provisions such as section 150A(1) of the 1994 Act are construed as referring to the effect of composite transactions.

It appears, therefore, that there are some provisions of the Tax Acts which must be construed as referring to composite transactions.

The question which then arises is what provisions are to be construed as referring to composite transactions?

I can answer that question for you because the House of Lords has told me the answer.

It is provisions like section 150A(1) of the 1994 Act.

On its face this appears to be a provision asking about the terms of a particular contract. It is very hard for an ordinary person reading the provision to see what in it brings in a reference to composite transactions. Which bit of the language of section 150A(1), exactly, refers to a composite transaction?

Perhaps this means that every provision in a tax statute brings with it a reference to composite transactions: But that would seem to be a rather odd rule; and it would surely be a rule which would be limited to taxing acts and not to statutes generally.

In that case there would be a special rule for the way in which tax statutes are interpreted, but this cannot be so because we have been told it isn't so.

I don't know about anybody else, but I am a bit puzzled by all of this.

I think there may be a special rule being applied in tax cases, which is actually nothing at all to do with the construction of tax statutes; and the special rule is that the taxpayer doesn't win the case if what he has done is regarded by the court as avoidance.

That is quite contrary to everything that was said in *MacNiven*, but it does seem to be what is said or implied in *Scottish Provident*.

However, it may be – indeed, almost certainly is – that the rule is not that all avoidance fails. The rule is that avoidance only fails when it is artificial.

Accordingly, the question: “what is artificial?” becomes important.

The second issue which arises is whether, if the question of composite transactions and certainty is relevant, there really is a difference between planned uncertainty and unplanned uncertainty.

The difference is said to be that planned uncertainty is part of the composite transaction while unplanned uncertainty prevents the composite transaction from existing.

As I have said this is elegant. But it is also nonsense.

If there is uncertainty, so that the composite transaction may not happen, there cannot be a composite transaction in existence.

Thus, the supposed difference between planned and unplanned uncertainty is a device for using hindsight to determine whether or not there is a composite transaction: if the expected transaction happens, it will be composite; if it does not happen it will not be a composite transaction.

Indeed, in that case, it will not be a transaction at all.

And, since, once there is uncertainty, the transaction may not happen, it cannot be right to characterise the uncertainty as part of the transaction.

Again, I cannot help thinking that the statute is being interpreted so as to impose tax regardless of what it actually says or doesn't say.

The last point about *Mawson* and *Scottish Provident* is that they both emphasise that the *Ramsay* approach is an approach not only to the statute but also to the facts: the fashionable phrase is that we now adopt an unblinkered view of the facts.

So pausing here, the question which arises is whether any coherent principle can be distilled from this mish mash?

There is no special principle applicable to tax cases, but this non existent principle has the beneficial effect of stopping artificial tax schemes.

There is no rule that a particular set of facts must exist before the non- existent principle can be applied, but it sometimes matters whether there is a composite transaction or not, which appears to be a question of fact depending on just how any uncertainty as to execution of the transaction was created.

The facts must be regarded in an unblinkered way.

All this is a matter of construction, which may be done purposively and, non-literally except, I suppose (the courts have not actually said this) where the words used mean what they say, in which case it is all right to construe literally.

Whether the words used mean what they say is, of course, a matter of the purpose of the legislation, which can only be discovered if it is understood that words sometimes don't say what they mean.

And, by the way, do not, while construing, mix up purpose and intendment. You may use purpose, but you must not use intendment. Anybody who knows what words mean can tell you the difference between purpose and intendment and since all my listeners will know the difference, I am not going to tell you.

That might be because I can't, but that's for me to know and you to find out.

Do not forget, in the process of construction, that some provisions, especially those that give exemptions and reliefs (which may, by the way, be the same thing) contain an implied business purpose test, so that they do not apply where a transaction is carried out for the purpose of coming within the relief or exemption.

This is sort of the obverse of the accident rule: you can only get a relief or exemption if you stumble into it by accident and not if you set out to get it on purpose.

But this is not a universal rule, especially where capital allowances are concerned, because you can get those even if you wanted them, it being the purpose of the legislation to give you those reliefs when you want them, except where films or enterprise zones are concerned, when the purpose of the legislation may be different.

I hope that is clear. It will be appreciated that the principle is one which might be described as fluid, like the sea, since it is in a state of constant change; and flexible, like supple plastic, because it can produce different results in different cases.

So that's all right then. At last we know where we are.

Which, actually, is more or less where we were.

Before *MacNiven*, the courts seemed to be saying that tax avoidance would not work if the court did not approve of it. *MacNiven* seemed to say that there were rules which were more solid than that, but the rule propounded in *MacNiven* was, even if there was scope for arguing about what it was, undoubtedly very flexible.

Mawson and *Scottish Provident* increase the flexibility by taking account of the developments in *Arrowtown* and *Carreras* while leaving the framework for the flexibility as I have described it in the article in your papers.

And, as I have mentioned, *Mawson* and *Scottish Provident* both emphasise the need to take a realistic view of the facts.

This is the first time that this emphasis on the factual aspect of the *Ramsay* approach has featured in the UK authorities, but it has a certain honesty to it.

Indeed, this aspect of the matter may be – in my view is – much more important than purported questions about the construction of taxing acts.

How does a judge decide a case?

Or, put that question a different way, how can I make sure that I win my case?

Jurists who have studied this question at length say that "you have to capture the facts and stick the capture".

It is a striking phrase, the meaning of which is not altogether clear if you look at the words themselves (showing that sometimes you have to construe contextually) but there is a sense conveyed that, if you want to win your case, you have to get your view of what the facts were into the mind of the judge and make it stick there.

In less colourful language, we might say that, if you want to win a case, you must show that the merits are on your side.

And the reason why this is so is that a judge decides a case according to what he feels about the facts.

When the judge looks at the facts, he will get an instinctive reaction as to whether he wants to decide the matter in favour of one side or the other, in favour of the Revenue and against the taxpayer or the other way round.

Any barrister – or, at any rate, any experienced barrister – will tell you that something similar happens when he first opens a set of papers: he will either like the proposals and say they work or dislike them and say they don't work.

What informs the initial reaction is difficult to say, just as it is hard to explain why one painting pleases and another displeases.

But whatever informs the initial reaction, it is undeniably there.

Once the judge has had that reaction, everything in the judgement is designed to show why the result, indicated by that first feeling, should be the result.

In the usual case no doubt will be expressed. The judge does not say" I am affirming your death sentence. I recognise it is a difficult point and I could just as easily quash it." He says: "I affirm your death sentence because the law is plain."

The recognition in paragraph 27 of *Mawson* that: "there will be borderline cases about which people will have different views" is unusual and refreshingly honest in itself.

However, in order to support his initial reaction, the judge will interpret the statute in the way which leads to the conclusion which he reached on his very first reading of the facts.

In other words, all cases – and this is so of tax cases just as much as any other – are decided in a way which might, perhaps, be regarded as back to front.

I suppose most people think that a case is decided by beginning with the law and then applying it to the facts,

The House of Lords has cautioned against any such rigid approach in paragraph 32 of the *Mawson* decision; and I am not suggesting that there is any rigid approach at all.

But what I am suggesting is that, whether you begin with the law and come to the facts or approach the case the other way round, it is the facts that decide the outcome of a case and the law will be made to fit the desired result, which will only be discovered once the facts have been looked at.

The difficulty in a tax case – perhaps in any case - is knowing when a judge will react violently and adversely to the facts and when he will not.

We know that some tax schemes work. Others don't.

This is the second sentence of the decision in Scottish Provident:

> "This appeal concerns an artificial scheme devised in 1995 to take advantage of a prospective change in the system of taxing gains on options to buy or sell bonds and government securities."

You can tell from that sentence who is going to lose the case but what you do not know – and nothing in the case will tell you – is why the scheme has been characterised as artificial.

But I am sure of one thing: the taxpayer lost this case because, when the facts were looked at, the House of Lords had the immediate reaction that the arrangement was artificial.

On the other hand, despite the elaborate financial arrangements made in *Mawson*, the House of Lords clearly thought that they were looking at a normal commercial arrangement.

The question which arises is why the House of Lords saw *Mawson* as a commercial arrangement while they saw *Scottish Provident* as artificial. In considering tax planning arrangements in future, this will be amongst the most critical of questions.

There was, of course, some particularly unhelpful correspondence in *Scottish Provident*: the game was rather given away.

And there is the point in *Mawson* that, apparently, the arrangement was originally put to the owners of the pipeline on the basis that a bank other than Barclays would put up the money for the venture: that was no doubt helpful in suggesting that the circularity which existed in *Mawson* was unimportant.

But, nonetheless, it is perfectly possible to regard *Mawson* as involving tax avoidance and it is perfectly possible to regard *Scottish Provident* as involving real transactions, even though they were designed for the purpose of avoiding tax.

Thus when the House of Lords says that the transactions in *Scottish Provident* are artificial, what it actually means is that the transactions had no purpose except tax avoidance.

Unfortunately, I cannot tell you why this makes the transactions in *Scottish Provident* artificial and I cannot tell you why the transactions in *Mawson* were commercial.

I can only tell you that that is what has been decided; and I am quite sure that it has a great deal to do with how the facts were presented to the Law Lords and how the facts struck them.

We have pages of judicial outpouring on the topic of tax avoidance, many of which came from Lord Templeman, who made a distinction between what he called unreal transactions, taking place in what Lord Wilberforce might have referred to as the world of make belief, and real transactions, which had actual economic consequences. The unreal transactions involved avoidance according to Lord Templeman while he characterised the real transactions as tax mitigation.

However, despite all that, we really have not been given any very good guidelines as to when the facts will strike a court well and when they will strike a court badly.

And I do not think that *Mawson* or *Scottish Provident* advance our knowledge of what will succeed and what not at all.

The House of Lords has referred in *Mawson* (paragraph 39) to the perceptive judgement of the Special Commissioners in *Campbell v IRC* [2004] STD (SCD) 296.

That judgement may be perceptive, but I cannot predict with any great accuracy what will happen when that particular avoidance case reaches the higher courts.

Neither *Mawson* nor *Scottish Provident* give me much light here.

I have a feeling that the higher courts might regard the judgement in *Campbell* as perceptive; but they might also regard it as wrong, on the basis that the result reached by the Special Commissioner is a bit too good to be true.

I am not, in this talk, going to make a detailed case-by-case analysis, but what I do suggest is that nearly all the so-called *Ramsay* cases could have been decided purely on the basis of the facts and without any appeal to purposive construction at all.

For example, *Ramsay* itself could have been decided on the basis that there was no real money and no loss.

There is no need to interpret the word "loss" in any particular way at all: all you needed to say was, that looking at the particular facts, there was no expenditure incurred by the loss claiming taxpayer on the asset in respect of which he claimed the loss.

I have just recently returned from Hong Kong, where I have been litigating a case for the Hong Kong Revenue.

The Revenue's attack in the case was originally based on the general anti avoidance rule in section 61A of the Hong Kong Inland Revenue Ordinance.

However, the GAAR only operates when there has been an avoidance, postponement or reduction of tax; and it turns out to be surprisingly difficult to know when there has been an avoidance, postponement or reduction of tax.

For example, a problem which arose in Australia on their original form of GAAR and which may arise in Hong Kong on its present form of GAAR is this: suppose taxpayer B acquires a business from taxpayer A having certain arrangements in place before he acquired the business from taxpayer A. These arrangements result in B paying less tax than he would have paid if they were not in place.

Has taxpayer B avoided, reduced or postponed his tax?

In this sort of case, taxpayer B will say that he did not have any tax to pay until he acquired A's business and, therefore, he cannot have avoided, postponed or reduced tax at all: he has become liable to pay tax.

Now, wearing my Revenue hat, I do not believe that at all: of course B has avoided tax. B is paying less tax than he would have done, without the arrangements. Whatever avoidance is, this is it.

But if I were wearing a taxpayer hat, I should be arguing these points like billy-o, and history shows that taxpayers sometimes win this kind of point.

The Australians have dealt with this problem by having pages of legislation and an enormously lengthy definition of tax benefit. But, even so, there is still litigation about whether people are hit by the GAAR or not.

What this shows is that a general anti-avoidance rule is not necessarily a panacea to what is nowadays perceived to be a problem by legislators, administrators and tax academics.

Indeed, it also shows that it is extremely difficult to define avoidance or even a benefit in the context of tax:

we do not actually know what tax avoidance is; and, since that is so, it is, of course, rather difficult to be against it or to set out rules to stop it.

The difficulty is, I suggest, derived from the original irrationality of any tax system which precludes a fully logical analysis.

Because this is so, it is sometimes easier to attack a transaction on general principles rather than by using a GAAR.

And this brings me back to one of the questions I posed near the beginning of this talk: What is money?

In the case I have just been arguing in Hong Kong, the taxpayer was H who appears at the bottom centre of the diagram which is found at the end of this article.

H said that it had borrowed US$1.735bn by issuing floating rate notes, or FRNs, and was claiming a deduction in computing its taxable profits for interest which, it said, it was paying on the notes.

US$587m of these notes were subscribed by genuine third party investors.

As I have used the word “genuine” in the previous sentence you can tell that I do not regard the rest of the borrowing as a real borrowing at all.

The rest of the “borrowing” amounted to US$1.148bn which, it was said, had been lent by the bank, on the terms of the floating rate notes, to their issuer, H.

The money flows were than supposed to go like this:

From H to I as a loan

From I to E in payment of a debt

From E to D as a dividend

From D to K as an interest free loan, and

From K to the bank as a purchase of FRNs

And, in the papers at the end of this article, you will see a wonderful chain of documents, bank statements and so on, showing that all these things happened in the order I have just described.

Amongst those papers you will see two telexes showing transfers on 28 November 1994.

The first of these telexes shows a transfer from the bank in Hong Kong to the credit of its Singapore branch at its correspondent bank in New York. This is supposed to be the transfer of money from I to E.

The last document in the pile is the telex showing a transfer from the correspondent bank in New York back to Singapore and this is supposed to be the payment by K to the bank for the floating rate notes.

K was a newly formed company which had only nominal assets and could not have any money to pay to the bank unless and until it got the interest free loan from D. D could not make the interest free loan to K until it received a dividend from E.

E could not pay a dividend to D until it had got money from I; and I cannot give money to E until it has been lent money by H. H cannot have money to pay to I until the bank has subscribed for the floating rate notes.

The bank says that the money it used to subscribe for the floating rate notes came from K.

But K cannot have had the money until after the subscription by the bank for the floating rate notes.

So what is going on here? This transaction looks impossible and the sense of confusion one feels when looking at it is compounded by the series of documents which I have given you, which shows all these beautiful transfers of money in the right order.

But does it?

It turned out from a close examination of the documents that the telexes are actually timed: the figure 0944 on the first telex is the time; the figure 0938 on the last telex is also the time; and this means that the telexes are the wrong way round in the bundle I have given you.

When these telexes are put in the right order, it becomes apparent that K paid money to the bank when it didn't have any money to give it. How did this happen?

One possible answer is that all these beautiful entries on the bits of paper before you are just that: entries on a bit of paper.

And that is why I asked, near the beginning of this talk, what is money?

Is money just entries on pieces of paper like this? Is it really transferred from one place to another by entries on a telex?

I do not know how it strikes you – many of you may be more accustomed to looking at this sort of thing than I am – but when I looked at these papers and worked out that the telexes were the wrong way round, it seemed to me that all these papers were a work of complete fiction.

I do not see that these entries can be really regarded as money in any sense of the word: you cannot take these entries down the shop and change them into motorcars or sweets, which is what you can do with real money.

Because of these entries, I have argued that H did not really borrow anything and so cannot have been paying interest.

We (the revenue) have won the case and I found it very interesting because it has, to me, illustrated four things.

The first is that what looks like money is, perhaps, quite often not money at all.

Taking the example of this case, I can understand why a court sometimes reacts violently against the facts and says "this is artificial: the transaction did not happen."

Secondly, this case has shown me that there may be more in Lord Templeman's distinction between avoidance and mitigation, between economic reality and artificiality, than I first thought, and that this distinction might actually provide a surer method of predicting the outcome of tax cases than the uncertain guide given by cases like *MacNiven*, *Mawson* and *Scottish Provident*.

The third point is that an obsession with whether money exists or not can sometimes obscure the real issue in a case.

For example, in *Mawson* a major issue appears to have been whether *Barclays* laid out money in acquiring the pipeline. But the actual issue was whether it incurred expenditure on the pipeline; and it did do that even if it did not initially lay out cash to buy it.

The fourth point is that, if I am right that some transactions are completely artificial, most of the cases up to *Arrowtown* could have been decided on the basis of the facts alone.

As I indicated earlier, *Ramsay*, and *Burmah* too, could have been decided on the basis that, as a matter of fact, no expenditure had been incurred on the relevant asset, so that the taxpayer had no base cost for it.

And, although *Furniss* raised different issues, it could have been decided entirely on the basis that Greenjacket's acquisition of the shares in the family companies was so transient that it did not really acquire them at all.

And I could go on through the cases up to *Arrowtown* making similar analyses.

However, something different happens in *Arrowtown*: in *Arrowtown* it is not possible to say that the shares do not exist and so *Arrowtown* is only explicable on the basis that the statute was construed in a way which gave it a meaning different from that conveyed by the words used in it.

I think, subject to what I say about *Scottish Provident* in a moment, that *Arrowtown* remains unique as a case which can only have been decided on a very special interpretation of the statute.

Carreras is, I think, really decided on the factual basis that, as a matter of fact, the debenture in that case was no different from cash. I think that was the basis of the actual decision in *Carreras*, although in *Mawson* it is suggested that a no business purpose rule was applied.

But, as I have said, there is no evidence of that rule being applied in *Carreras* itself and I do not think that was the true ratio of the decision, even though it may be how it is explained in later cases for the benefit of history.

There is clearly no special interpretation of the statute in *Mawson*.

And I do not think any special rule needed to be applied in *Scottish Provident*.

The question there was one of entitlement and, although the word has legal connotations, I think the question of whether you are entitled or not can, as a matter of the ordinary use of language, respond to a factual analysis.

Nonetheless, there has to be some unease about the approach adopted in *Scottish Provident*: a contract which said one thing was interpreted as meaning another, so it might be said that its nature was changed, in the way that the debenture was regarded as cash in *Carreras* and the shares as the wrong sort of shares in *Arrowtown*.

Accordingly, *Arrowtown* remains the sole case where it is really necessary to apply a supposedly purposive construction of the statute as distinct from an analysis of the facts in order to arrive at the result which was actually reached.

However, the *Arrowtown* approach has not been rejected in *Mawson* or in *Scottish Provident*; and there is nothing in those cases which precludes a court in the UK, faced with the same issue as arose in *Arrowtown*, reaching the same conclusion as the CFA in Hong Kong did.

Indeed, as there is no adverse comment on the result in *Arrowtown*, in *Mawson* or *Scottish Provident*, and as *Scottish Provident* uses the same sort of technique as *Arrowtown* and *Carreras*, it might be said that these UK cases encourage adoption of an *Arrowtown* analysis.

Nonetheless, it remains arguable that *Arrowtown* is not in accordance with the UK authorities, which can, as I say, largely be explained as decisions on the facts.

On that basis, we may draw the conclusion that, despite *Scottish Provident*, what Lord Templeman used to call legitimate tax mitigation still has a future, while tax avoidance is dead.

The difference between tax mitigation and tax avoidance is that the first involves real transactions while the second involves artificial ones.

All we need to do now to discover what will work and what will not is to identify what is real and what artificial.

I suggest this is a matter of how the facts strike the court rather than a matter of deep principle.

On this basis structured finance transactions still have a future, especially if they have real economic consequences and work with the grain of legislation rather than obviously abuse it.

But, if it is the facts which are important, why have the courts insisted that this is all a matter of statutory construction? Why have they given up the rule that there is no intendment about tax and exchanged it for a rule – the rule about purposive construction – which seems to me to be a rule that there is?

And why have they done that without it being necessary to do it?

I think there are three reasons.

One is that some of the judges, especially in the House of Lords, have the concept that they can see further and deeper into the tax statutes than practitioners who have to work with them on a daily basis.

As it is so fashionable now, it is worth mentioning that there is something Cabbalistic about this. Cabbalists read the bible on four levels – literal, homiletical, allegorical and secret.

I cannot help feeling that, while most practitioners read tax legislation on the literal level, some of our judges read it at the secret level – readings known only to the initiated and beyond ordinary uninstructed mortals.

Since, in the usual case, this is done with only a passing acquaintance of the legislation, it is a remarkable achievement.

Cabbalistic contemplation of absolute infinity is believed to be the origin of infinity theory in mathematics, a set of equations which is neither provable nor disprovable given our present knowledge. That, too, has some passing resemblance to *Ramsay* theory where different minds can reach different interpretations of a provision, so that there is always some uncertainty about the outcome of a case in which *Ramsay* type arguments are raised.

This uncertainty is, of course, a planned part of the judicial approach but, even so, cannot be ignored!

The second reason is that lawyers tend to think of law as a series of rules; and it is easier to lay down rules, or appear to lay down rules, if one regards the result of a case to be a matter of law – how do I construe this statute? – rather than only a matter of fact.

I think the third reason is that the courts have fallen into the trap of believing that tax is now part of the law of nature.

To some extent this may be because of Mr Justice Holmes' famous remark that tax is the price we pay for civilisation.

That's a good remark: it is catchy, it sticks in the mind; it is the sort of thing we would all like to have said and been famous for.

Unfortunately it is nonsense: tax is not the price we pay for civilisation and it is not the price we pay for liberal democracy.

Taxes are the price we pay for common services which we deem it sensible to provide on a shared basis.

But they are certainly not the price for civilisation: they are the price for, say, the National Health Service, but the National Health Service is not civilisation, even if it's a good thing.

However, the view that taxes are essential to civilisation has stuck.

It has led to the perception that tax avoidance is automatically a bad thing, which is why I have called this talk "The Problem is the Perception"; and it has led judges to the view that the taxing act carries with it an intendment that tax is generally to be paid, unless it is absolutely clear beyond reasonable doubt that it should not be.

This is an inversion of the true principle, a price we are paying for the fact that some American judges can write most beautifully in English; and I challenge it, not only as a matter of law but as a matter of economics and as a matter of morality.

I began by asking a number of questions and now let me ask another one.

Why do people avoid tax?

Maynard Keynes said that planning the avoidance of tax was the only intellectual activity which was well rewarded; so might it be that people avoid tax just for fun?

My own view is that people do not avoid tax just for fun, but as a response to injustice or to pressure from the need to compete, on a worldwide basis, with businesses which operate in low tax or no tax jurisdictions.

There is, of course, a difference here between businesses avoiding tax and individuals avoiding tax: an individual who avoids tax outside the scope of his business activities is not responding to commercial pressure, but he may be responding to a feeling that taxes are too high.

This was certainly so in the mid to late 1970s when tax rates were at 83% on earned income and 98% on unearned income.

There was no economic need for taxes at these rates and they were designed to be redistributive or, as some might see it, punitive.

Taxes at these rates were, actually, an economic nonsense and everybody reacted to them by looking for ways of avoiding or evading them. That was a response to injustice.

When taxes are at the rates presently in force in this country, there is obviously less reason to avoid them, and the lower tax rates go so the less becomes any perceived need for avoidance. Indeed, there is some evidence – considerable evidence now - that lower and flat tax rates actually produce greater fiscal receipts for Government than higher and progressive rates do.

Accordingly, in Hong Kong which has a widely accepted low flat rate tax system, my impression is that there is very little personal avoidance going on, although it is fair to say that the whole structure of the Hong Kong tax system, which has no tax on investment income, is such that the need for personal avoidance is obviously very small indeed.

Nonetheless, even in Hong Kong, businesses do quite often seek to avoid tax; and the reason why they do it is because they get a commercial advantage from the management of their tax rate.

Looked at from the point of view of a business, taxes are an expense just like any other which should be kept as low as possible.

It is generally the view that a company which manages its wage bill so as to keep it as low as possible is well managed, leaner and fitter than a company which does not.

If that is so of a company which manages the wage bill, why is it not so of a company which manages the tax bill?

In my view the two cases are just the same: a company which manages its tax bill successfully will be better equipped to compete in the business market than a company which does not.

And a company which has saved money by managing its tax bill will not use it frivolously, but will use it to grow its business, so that the money stays working in the known economy producing bigger profits and more tax.

The same is more or less true when individuals have saved tax – they will have more money to invest and so produce bigger investment returns which will be taxed, or they will go out and spend the money producing profits for someone else.

Thus it is very short-sighted to be against the avoidance of tax in any general way.

And, sometimes, when businesses avoid tax, it becomes accepted that it was sensible and right to do so.

For example, many companies found it objectionable to have to pay tax when they sold a subsidiary.

Accordingly many devices were found for limiting the tax on this sort of sale.

At first, the Government reacted by trying to shut these schemes down, but recognition that it was fair to avoid tax in this situation has now been given by the enactment of the substantive shareholding exemption, an exemption which, while welcome, contains so many rules without apparent reason that it is almost the perfect example of how tax systems are irrational.

It follows from all this that it is not possible to characterise tax avoidance as bad or something to be stopped.

In part this is because of the difficulty of identifying what tax avoidance is and in part it is because some tax avoidance (whatever it means) is a good thing.

Whether tax avoidance is good or bad depends not on the method adopted to achieve it but on the use to which the tax saved is put.

Businesses benefit when tax is managed: when businesses use the benefit commercially, as they usually do, there are beneficial consequences for the whole economy and for everybody living within that economy.

It follows that tax avoidance can be good.

I can understand why courts sometimes react against tax avoidance. I am not suggesting that people should go and carry out artificial transactions with pretend money.

But where a court is faced with a planned transaction which is real and does not involve pretend money, the court should not - and I hope will not - be against it just because it reduces tax.

And, more than that, the courts should not impose what is, in truth, a moral conception that everybody should pay some supposedly right amount of tax, which is surely the proposition which underlies all the cases which might be called *Ramsay* type cases.

Despite these decisions, there is undoubtedly still room in the law for legitimate tax mitigation. The *Mawson* case shows that. But what is objectionable about the two recent decisions is that they create more flexibility than statute based law should permit.

Where they do that, courts come close to reducing our volumes of statutes to the three sentences I suggested might do as the statute at the beginning of this talk – or more accurately, to the last of those sentences alone.

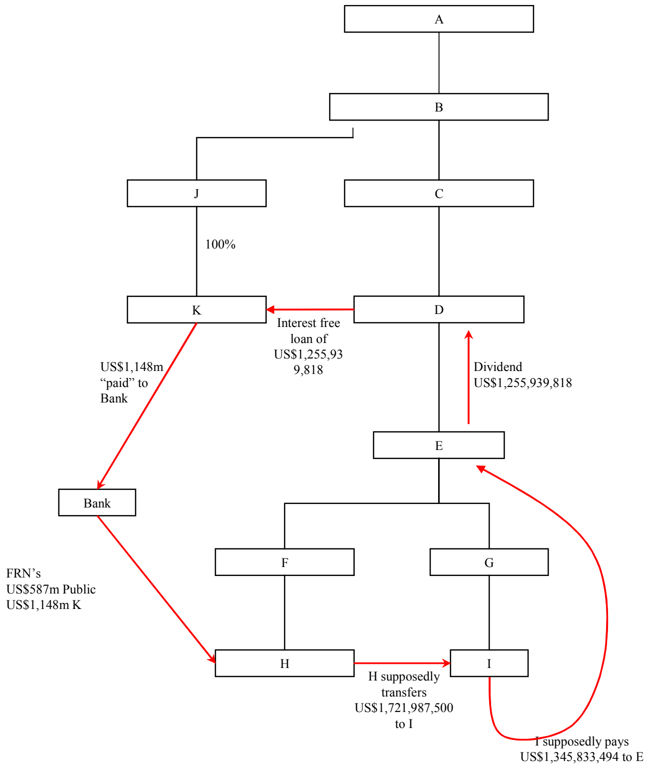
That seems to me, to use a neutral word, unsatisfactory.

And now, because I have decided to do it, removing the uncertainty I created at the beginning, I will answer the question with which I began.

Why do we have a tax statute?

The answer is to set boundaries between what is taxable and what is not taxable. The statute is there to tell you what is taxable and what is not. Or, to put it another way, the only reason for having four volumes of direct tax statutes and regulations is to allow people to avoid the tax.

That is a fundamental and unavoidable truth. Commentators who fail to recognise it are misguided. Cases which impose tax on the basis of some supposed intendment or purpose bring dishonour on our legal system.


A
B
J
C
100%
K
D
Interest free loan of US$1,255,939,818
US$1,148m "paid" to Bank
Dividend US$1,255,939,818
E
Bank
F
G
FRN's
US$587m Public
US$1,148m K
H
I
H supposedly transfers US$1,721,987,500 to I
I supposedly pays US$1,345,833,494 to E

BANK

HONG KONG BRANCH

H

123456-USD-7789-02 123456789 Branch – Hong Kong 729
A/C No.

USD SAVINGS A/C	U.S DOLLARS	1DEC94	1
ACCOUNT	CURRENCY	DATE	PAGE

POSTING DATE	VALUE DATE	CHEQUE NO	PARTICULARS	DEBITS	CREDITS	BALANCE
24NOV04			B/F			0.00
24NOV94			CR RATE CHANGE TO 4 5000000			0.00
28NOV94			CA7553	1,721,987,500.00		
28NOV94			IRT10327		850.00	
28NOV94			FRN ISSUE		1,721,987,500.00	850.00CR
29NOV94			CA7537		150.00	
			C/F			1,000.00CR

IMPORTANT – PLEASE EXAMINE THIS STATEMENT IMMEDIATELY. YOUR ACCOUNT WILL BE CONSIDERED CORRECT AND ACCEPTED BY YOU UNLESS WE ARE NOTIFIED OF ANY DISCREPANCIES WITHIN 14 DAYS

BANK
HONG KONG BRANCH

H

DEPT: Cash DATE: 28/11/94
Ref:

DEBIT ADVICE

PLEASE NOTE THAT WE HAVE DEBITED
YOUR ACCOUNT No:

DETAILS	AMOUNT	
Being funds transferred to I's USD savings account with as per your instruction dated 24/11/94.		
	USD1,721,987,500.	00
	VALUE DATE	
	28/11/94	

For and on behalf of
BANK
Hong Kong Branch

BANK
HONG KONG BRANCH

I

DEPT: Cash DATE: 28/11/94
Ref: CA

CREDIT ADVICE

PLEASE NOTE THAT WE HAVE DEBITED
YOUR ACCOUNT No:

DETAILS	AMOUNT	
Being funds received from H's USD savings account with us in favour of yourselves		
	USD1,721,987,500.	00
	VALUE DATE	
	28/11/94	

For and on behalf of
BANK
Hong Kong Branch

E

BANK

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

PLEASE NOTE THAT WE HAVE CREDITED UNDER USUAL RESERVES YOUR ACCOUNT No.	CREDIT ADVICE
DETAILS	AMOUNT
I	USD 1,345,833,493.97
	VALUE DATE
	28-Nov-94

BANK

HONG KONG BRANCH

I

DEBIT ADVICE

Remittance to: BANK
Singapore

Credit:E
A/C No
Our No: XY43479 Amount: USD1,345,833,493.97 Value date: 28/11/94
By: Telegraphic Transfer

Exchange rate @	US$1,345,833,493.97	HK$
Plus: Postage		
Commission		
Telex charges		
Total amount:	US$1,345,833,493.97	HK$
	A/C No.	

☐ We have today debited your account

☐ Please find enclosed our Demand Draft/Cashier's Order No ____________
Please acknowledge receipt.

☐ In cover, we confirm receipt of your payment by Cash/cheque No.

____

☐ Please find enclosed Cash for US$ ________________ /
Travellers Cheque Nos.

☐ Please refer to the enclosed copy.

BANK
Hong Kong Branch

-UNITED STATES-

-Z BANK OF NEW YORK INTRA DAY –

-US DOLLAR-

ACCT: 65518-32283 BANK HONG KONG

-DEBITS- ON 11/28/94

1345,833,493.97 S 5162400329FS FTS 0944 R

YR REF: PS 43479
PD TO: BANK SINGAPORE SINGAPORE
DESCR: 1543479
REMARK:
RECGFP: 22391136

This is the transfer from I in Hong Kong to E in Singapore apparently effected by Z Bank New York as correspondent bank of Bank Hong Kong

BANK

E

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

PLEASE NOTE THAT WE HAVE DEBITED UNDER USUAL RESERVES YOUR ACCOUNT No.	DEBIT ADVICE
DETAILS	AMOUNT
FAVOUR OF D	USD 1,255,939,818.47
	VALUE DATE
	28-Nov-94

BANK

D

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

	CREDIT ADVICE
PLEASE NOTE THAT WE HAVE CREDITED UNDER USUAL RESERVES YOUR ACCOUNT No.	
DETAILS	AMOUNT
FROM E	USD 1,255,939,818.47
	VALUE DATE
	28-Nov-94

D

BANK

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

PLEASE NOTE THAT WE HAVE DEBITED UNDER USUAL RESERVES YOUR ACCOUNT No.	DEBIT ADVICE
DETAILS	AMOUNT
K	USD 1,255,939,818.47
	VALUE DATE
	28-Nov-94

K

BANK

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

PLEASE NOTE THAT WE HAVE CREDITED UNDER USUAL RESERVES YOUR ACCOUNT No.	CREDIT ADVICE
DETAILS	AMOUNT
D	USD 1,255,939,818.47
	VALUE DATE
	28-Nov-94

K

BANK

Singapore Branch

DEPT:
TREASURY OPERATIONS

DATE:
28-Nov-94

PLEASE NOTE THAT WE HAVE DEBITED UNDER USUAL RESERVES YOUR ACCOUNT No.	DEBIT ADVICE
DETAILS	AMOUNT
BANK	USD 1,148,000,000.00
	VALUE DATE
	28-Nov-94

-UNITED STATES-

-Z BANK OF NEW YORK INTRA DAY –

-US DOLLAR-

ACCT: 655-8-32283 BANK HONG KONG

-CREDITS- ON 11/28/94

1148,000,000.00 S 53950000329FS FTS 0938 001182 R

YR REF:	COVER SS/KI/NZ
REC FR:	BANK SINGAPORE SINGAPORE
DESCR:	COVER SS/KI/NZ B/O K SINGAPORE SINGAPORE
REMARK:	/BNF/ATTN MS M.H. AT PHONE NO (323) 749-2892 H FRN NEW ISSUE B/O
RECGFP:	11280025

[1] This is the text of a talk given by the author earlier this year.
[2] *Carreras Group Ltd v. Stamp Commissioner* [2004] UKPC 16.
[3] *Barclays Mercantile Business Finance Ltd v. Mawson (Inspector of Taxes)* [2004] UKHL 51.
[4] GITC Review Vol IV Number 1 page 19 *et seq*.
[5] *Collector of Stamp Revenue v. Arrowtown Assets Ltd* FACV no.4 of 2003.
[6] *IRC v. Scottish Provident Institution* 1 WLR 3172 HL (SC).
[7] 55 TC 324.
[8] 62 TC 1.
[9] [2003] 1 WLR 2214.
[10] 2004 US DIST Lexis 17351.
[11] 62 Fed Cl. 716.