ANTI-AVOIDANCE

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Introduction

Some scientists spend their time trying to find a unified theory which will explain, all in one go, the weak and the strong forces at work in the universe. I once thought that there might be one theory of law which explained every case the Courts had ever decided. My idea was that the Courts were always trying to remedy perceived inequalities between the parties to a dispute, and, in some ways, I do not think this theory was too far wrong. Indeed, a theory of this sort can be seen at work in contract law and in questions of estoppel and in tort law and, even more explicitly, in the field of administrative law, where the Courts have said that an administrator has the overriding duty to be fair. There is, however, a problem with a theory which says that the overriding attempt of the judge is to remedy inequalities or to be fair. What do we mean by the concepts of inequality and fairness? The concept will have different meanings to different people, and the content of any duty of fairness or to remedy inequality will vary according to the viewpoint of the observer: the plaintiff in litigation will have one view of what is fair, the defendant another and the judge a yet different view which may not coincide with that of either of the parties.

Indeed we see in tax cases how different people will regard the concept of inequality. Most taxpayers, I would assume, believe that the Revenue are in the dominant position and the taxpayer in the weaker position. We look to the Courts to protect us from an overbearing executive. The Revenue would not think themselves overbearing – might not really think in terms of inequality at all. And, in my experience, the judge in a tax case tends to think of the Revenue as the weaker party, burdened by the duty to carry out a difficult job against the opposition of a strong, well-advised, and often cunning opponent, who has command of the facts.

The Concept of Avoidance

This is an article about tax avoidance, about the approach of the Courts to tax avoidance and about the recent case of *MacNiven*, so I must begin by defining terms. When we come to consider the concept of avoidance, we find that, just as it is difficult to define fairness and inequality, so it is difficult to define avoidance. When we say that something is avoidance, we imply both a statement of fact – that no tax has been payable, and a statement of opinion – that tax ought to have been payable or, perhaps, that, without making the moral judgement implied by the word "ought", we would have expected it to be paid. The statement of fact – that tax has not been payable – will not occasion much controversy; but the statement of opinion – that tax ought to have been payable or that we would have expected it to be paid – is inevitably going to be controversial and different people will hold different opinions.

The cases show that judges use the expression "tax avoidance" in at least three different ways. The first way is to refer to tax avoidance as a purely moral concept: when tax avoidance is referred to in this way, it is a statement by a judge that he does not like what has been done. When used in this way, the expression “tax avoidance” has no legal content whatever; it is a conclusion based on facts, but little help in guiding us as to what is or what is not tax avoidance. Secondly, judges sometimes use the phrase “tax avoidance” to distinguish between acceptable tax mitigation and transactions which, while legal, are unacceptable in the sense that they do not achieve the purpose of reducing taxes that they were intended to achieve. In this context, the distinction is often said to be between transactions which have real economic consequences and transactions which do not have real economic consequences. Everybody knows that, in the days of the window tax, the tax was avoided by blocking up a window; and it can be seen that a person who blocked up his window suffered the consequences, because he got less light coming into his house: window blocking worked as a device for mitigating that tax. Interestingly – this is a bit of an aside, but I found it interesting - some people did not wish to suffer the consequences of window blocking. In 1757 one taxpayer fixed a short glass connection between two windows, and claimed that he had made them into one window; and won before the Commissioners. But on appeal, the Court of Kings Bench decided that “this is a manifest evasion of the Act, therefore the determination of the Commissioners is wrong”. Presumably this was because the short glass connection did not have the real consequence of turning two windows into one, with perhaps difficult problems of draft control. And while a distinction between acceptable tax mitigation and unacceptable tax avoidance may, at times, seem useable and useful, it again evaporates upon examination: what, after all, are real consequences and what not? What is it that makes the avoidance unacceptable? We find ourselves back at a purely moral view.

A third judicial commentary on the meaning of tax avoidance is to be found in the context of statutory references to tax avoidance, and here, as exemplified by the *Willoughby* decision, a distinction is made between transactions which accept statutory invitations (which are not avoidance) and those which are doing something other than accepting statutory invitations – which are, or may be, avoidance. But here again the formulation of what is and of what is not tax avoidance leaves an unanswered question: when is a statute making an invitation? The taxpayers in *Furniss v. Dawson* might well have thought that they were accepting a statutory invitation, though they found out that they were not.

The Relevance of the Concept

I could go on identifying the difficulties that lie in the way of an attempt adequately to define tax avoidance but, even without doing that, it is possible to conclude that the concept of avoidance is elusive and is, to a large extent, a matter of opinion, not susceptible of precise analysis. Nonetheless, some of our recent case law appeared to suggest that the correct way of approaching a tax case was to consider whether it involved "avoidance" and that there were rules which applied only where there was avoidance. However, if avoidance is a difficult concept, it is unlikely to be a useful analytical tool; and it will not be helpful to have rules which only apply where avoidance is found to exist.

Happily, the *MacNiven* case has exploded what may now be seen as the myth that there are special judge-made rules which apply to cases of tax avoidance. As Lord Hoffman has lucidly explained in the *MacNiven* case, the concept of avoidance is or, rather, ought to be, at most a conclusion arrived at after analysis and not an analytical tool; and it is as well that this should be so, because, if the term "avoidance" cannot be fully defined, it cannot usefully be employed in determining the outcome of a tax case. On a true analysis then, the concept of avoidance should, as a matter of law, tell us nothing about how we approach the analysis of a transaction in tax terms. The tax consequences of a transaction should not, in the absence of a special statutory provision making it relevant, vary according to whether we characterise the transaction as avoidance or not. And, indeed, as the *MacNiven* case has reaffirmed, a taxpayer is entitled to choose the way in which he structures his transaction. If he has a choice between carrying out a transaction in a way which reduces tax and a way which leaves it unaffected, he can legitimately and effectively choose the way which reduces or avoids tax.

Nonetheless, we all know that judges will react unfavourably to transactions which they feel are avoidance. This is an emotional, not a rational, response but we cannot pretend that it does not exist. A judge will be unfavourably disposed to a transaction if he feels that tax is not being paid where it is fair that it should be paid; and in part this is due, I think, to a judge's belief that, in a tax matter, where a taxpayer has actively taken steps to reduce his tax bill, there is inequality, and that it is the taxpayer – the person who strove to reduce his tax - who is in the stronger position. When a judge will feel that it *is* fair for tax to be paid and when not is unpredictable; and one of the huge changes which has been brought about by the *MacNiven* case is that it should no longer be relevant as a matter of law. Until *MacNiven* it was intellectually respectable for a judge to say "this is tax avoidance and therefore I shall apply special principles which the courts have devised to counter tax avoidance". That sort of approach is no longer permissible in law. The question of whether something is tax avoidance is not any more the key to the application of some separate set of principles: it is no more than a moral expression of indignation. Thus, although I have begun by commenting on the definition of the phrase tax avoidance, I do not think that it is any longer of legal significance, save in cases where a statute expressly refers to the concept. But it is still a concept of practical significance. As I have said, on an emotional level, judges – at least some judges – will react differently and unfavourably to cases which they consider to be avoidance; and we need to take this reaction into account in advising clients; and for that reason, if for no other, the concept of what is avoidance remains relevant. In the days when men went to barbers rather than hairdressers, the man with the scissors would, as is well known, ask, at the end of the procedure, whether there would be "anything for the weekend sir" and, at the beginning, he would quite often ask "Are they treating you alright sir?" When I refer in what follows to tax avoidance I am referring to something which the "they" of the barber's question would disapprove of; and I now turn to the question of how they – in this context legislators and judges – have responded to avoidance.

The Beginnings of Avoidance

As is well known, income tax has been around since 1799, but nobody seems to have been terribly bothered about avoidance until the beginning of the 20th century. In part, this was because low rates of income tax meant that it was not worth avoiding, and in part it was because, with a less intrusive system of administering tax than we have now, evasion was an easy and the principal way of reducing taxes. My researches suggest that the phrase "tax avoidance" does not appear at all until 1906 or 1907. Austin Chamberlain, in a debate in Parliament in 1907, drew a distinction between evasion and avoidance and said that: "evasion was an illegitimate denial of the imposition of the tax. The Honourable Gentleman spoke of avoidance as if it were a refusal to recognise a moral obligation. I do not think there is any moral obligation on the part of any taxpayer to pay more taxes than he was legally liable to pay". And as late as 1927, Mr Churchill as Chancellor of the Exchequer said, in remarks which find an echo in the Duke of Westminster's case, that "the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes enforced by the Crown so far as he can legitimately do so within the law”. Indeed, it seems that it was only after the First World War, when excess profits taxes were enacted to deal with wartime profits, that taxpayers first became interested in structuring or managing their affairs so as to reduce taxes; and it is only then that we see Parliament becoming concerned with tax avoidance as distinct from tax evasion, so that legislation designed to counter what was perceived as avoidance was included in the Acts relating to these excess profits taxes. I think the only legislative example we have in this country of something approaching a general-anti avoidance rule is to be found in the excess profits tax enacted by the Finance Act 1941. Under s.35 of that Act, the Revenue could counteract transactions, the main purpose of which was the avoidance or reduction of liability to excess profits tax. Legislation had, of course, by then already been enacted to prevent the avoidance of tax by transfers of assets abroad and by the creation of settlements, and the Courts were already familiar with Estate Duty planning.

So there has always been concern with the evasion of taxes, but what might be called tax avoidance did not play any significant role in economic life until after the First World War and remained at a relatively low level until after the Second World War. Indeed, it was not until the 1960’s and 1970’s, when tax rates were penal, that tax avoidance seems to have been regarded at an official level as a really serious issue. The problem began with dividend stripping in the late 1950’s and spread with the introduction of what might be called the mass marketed tax avoidance schemes of the 1970's, which were designed to reduce both income tax and capital gains tax.

The Approach of the Courts

It is then only in the late 1970's that the Courts had to wrestle to any significant extent with cases about avoidance and four comments may be made about the Courts' approach. First, Courts have always been kinder to arrangements designed to mitigate taxes on inherited wealth than they have been to transactions designed to mitigate taxes on earned money. I cannot explain this phenomenon. It is, of course, economically absurd: we should encourage earning and be more relaxed about taxes on inheritance, but the Courts have not behaved that way. It may be that a judge subconsciously feels that, as he has to pay tax on his earnings, everybody else should have to as well, but I don't quite see how this explains the favour shown to inherited wealth. Secondly, while neither of these things are dispositive, it helps to have a title and to be protestant rather than catholic (the Vesteys usually win their tax cases, the De Waldens usually lose theirs). Thirdly, the Courts usually feel more favourable to taxpayers with earnings when the economy is in a healthy state than they do when the economy is suffering a downturn, and again this seems to me in some ways economically the wrong way round, because, again, you would think that we ought to be encouraging people to earn all the more when times are economically bad. And, fourthly, the Courts here have always done the job of limiting tax avoidance for the legislature by the way in which they have decided the cases before them. Thus there has been no need here, as there has been in other countries, for the legislature to introduce a GAAR: the response of the Courts to avoidance has been adequate to deal with the problem.

I make these comments both light-heartedly and seriously: I make them seriously because they represent observable facts; and I make them light-heartedly because, obviously, points like this cannot be taken too far as a guide to what a Court will do. However, up until 1981, the Courts had one guiding and overriding principle: regard could not be had to substance but only to form; and this cardinal principle was derived from the *Duke of Westminster* case, decided in 1936.

The Duke of Westminster's Case

It is, perhaps, useful to remind ourselves what the issue was in the *Westminster* case. The Duke had a large staff and he paid them wages which were not deductible in computing his income. In those days, all charges on income – annuities and the like – were deductible in computing taxable income, so somebody came up with the wizard wheeze of the Duke agreeing to pay annuities to his staff while they went on working for him at, it was expected, a reduced wage, though there was no obligation to take a reduction in wages. The question was whether the annuities were really annuities or whether they were really wages. A number of features suggested that the annuities really were annuities and not wages: they would stop if the Duke died, even if the employment continued; they would continue to be paid for their stipulated duration even though the employment terminated; and the Crown's primary argument was that there was really a contract, not written down but to be implied, which made the annuities wages and not annuities. If that argument had been accepted – and the issue was largely one of fact - then, of course, the annuities would have been wages and not annuities. But it was not accepted by the majority of the judges who heard the case. Faced with that problem, the Crown also argued that, even in the absence of any contract, the annuities were, in substance, wages and so, as a matter of law, ought to be taxed as wages. But in the absence of the alleged contract, which was found not to exist, the annuities were not wages. And what the Court was saying was that there is no principle in our law that enables something to be treated as wages when they are not wages. This is what Lord Tomlin meant in *Westminster* when he said that "there could be no appeal to the substance of the matter". It is worth noting that this is, in effect, a decision that a payment which has one character cannot be recharacterised as another type of payment by appealing to the substance of the matter. This is a rule against recharacterisation, and nothing more extravagant than that.

The New Approach

And so the law seemed settled until, in 1981, there was the explosion – the nuclear explosion – of *Ramsay*, setting off a chain reaction, leading through *Burmah*, *Furniss v. Dawson* and *Ensign Tankers* to *McGuckian*. These cases seemed to proclaim a new approach –

sometimes called an emerging principle, and they rightly caused a good deal of disturbance in the dovecotes inhabited by tax advisers. The problem was not so much what the cases were actually deciding – that is the actual outcome of the case, looking only to its own facts – but, rather, with the way in which the decisions were expressed.

I think exception can be taken to three particular features of the judgments before *MacNiven*. First, there was an appeal to jurisprudence derived from the United States. This was dangerous and uncertain. It was dangerous because, although there are many features common to all tax systems, there are very considerable differences between the US and the UK tax systems, and principles developed in the context of US statutes cannot easily be applied to our domestic law. And it was uncertain, because the American Courts seem to have adopted at least four different approaches to tax avoidance cases. They are:

(a) a sham doctrine, which is unobjectionable and broadly the same as we have here and which nobody will get very excited about;

(b) a no business purpose doctrine, that a transaction may be disregarded if it has no commercial purpose;

(c) a step doctrine which is that, where a transaction is carried out in several steps, the steps may be disregarded; and

(d) a substance over form doctrine, which is that one looked to the substance and not to the form.

Before *MacNiven*, the English Courts appeared to be creating a doctrine which was an amalgamation of the step doctrine with the no business purpose doctrine, but the *McGuckian* case suggested that we might be adopting a substance over form approach which is, of course, a different thing altogther. It did, however, appear that we were developing a distinct UK doctrine, rather than just importing a US doctrine; and *MacNiven* shows that, while there remains some universality in the common law (so that we do not altogether disregard what common law judges in other jurisdictions are doing), nonetheless, the doctrines applied here are UK doctrines and not doctrines imported from the United States.

The second feature of the judgements before *MacNiven* to which exception can be taken is that many of the judges were putting forward a moral principle as if it were a legal principle. There were, undoubtedly, some judges who were, in effect, saying that the principle was “if we do not like it, it is not going to work”. Lord Templeman was, of course, chief amongst these judges, but he was not the only one. This is not the way to run a legal system: this is to substitute discretion for law and we should not do that. It is right to say that the judges who took this moral view were very much in the minority, but they were there and were not without influence; and the worry was that their view might spread. We can see from *MacNiven* that it has not done so.

The third feature is that some of the remarks made by some of the most respected judges in these cases were excessively extravagant. Lord Diplock's well-known, if slightly nauseating, remark in *Burmah* that "it would be disingenuous to suggest and dangerous on the part of those who advise on elaborate tax avoidance schemes to assume that *Ramsay*'s case did not mark a significant change" is one of these rather extravagant remarks. A friend of mine was once going to write an essay called "Lord Doplick's Ligoc"; and remarks of this sort explain why. Another extravagant remark was Lord Scarman's map-making analogy in *Furniss v. Dawson*, where he says that it will be in an "area of judge made law that our elusive journey's end will be found". Pausing here, then, and looking at the dicta in these cases up to *McGuckian*, it would or might appear that we had developed a doctrine that tax avoidance cases were to be decided by some principle of judge-made law, which might depend to some extent upon decisions of the US courts, and which could also turn heavily on the degree of indignation and repugnance felt by the judge who was deciding the case in question. If that is what had happened it would, of course, have been very unsatisfactory: judges are supposed to decide cases in such a way as to provide a guide to the result of future cases: they ought to be providing a degree of certainty and a doctrine of this sort certainly did not do that. Happily, however, what is important in our system of jurisprudence is the point which is actually decided by a case rather than the peripheral commentary which surrounds the decision. When each of these individual cases up to *McGuckian* is analysed, it will be found that what it actually decided was something very much narrower than the commentary suggested: we would have been looking after our blood pressure better if we had concentrated on the actual decision rather than on the extravagant remarks, although it does have to be said that the remarks were, at the least, worrying.

And then came *McGuckian*.

McGuckian

McGuckian was and is an interesting and important case for three or four reasons. First, two of the judges who decided the case were trained in non-domestic jurisdictions, Lord Steyn in South Africa and Lord Cooke in New Zealand, so that they brought to the case a different, non-UK and non-US perspective. Secondly, the case suggests that there is a rule of substance over form, which is to be applied in tax cases while, thirdly, it emphasises that the principle being dealt with is one of statutory construction and not something else. The second and third aspects of *McGuckian* are somewhat contradictory: if the question is one of statutory construction what is the scope of a rule about substance over form, which is a fact related rule? It appears from *MacNiven* that the substance over form aspect of *McGuckian* does not exist; so, while it is undoubtedly a feature of the *McGuckian* decision, I think we can put it into the extravagant remarks compartment. The fourth aspect of the *McGuckian* case is that it is not entirely clear what it actually decided. Did it decide that capital could be treated as income or did it decide that the taxpayer's vehicle got income? I want to come back to this in a moment when I have considered the *MacNiven* decision in a bit more detail.

MacNiven

Although recent, it is not the latest word on the story because we have, since it was decided, had the decision in the *DTE* case, but it is, I think, the most important case we have had on tax at least since *Ramsay* and *Furniss*. Why is it so important? The answer is because it has swept away all the clutter and has left us with a rule and, although neither the content of the rule nor the result of the rule may yet be absolutely clear, the rule itself *is* clear. There is no moral content to a tax case: as Rowlatt J said all those years ago, "there is no equity about a tax"; and a taxpayer is entitled to arrange his affairs so that he pays the least possible tax. Where the statute does not mention tax avoidance, the question of whether there has been tax avoidance is irrelevant to the analysis; and it does not matter whether the factual background can be described as a device or a stratagem or just as a transaction. None of this has any impact upon the analysis. The only thing which has any impact is the wording of the relevant statute. This is the rule. It is all a matter of looking at the statute and seeing whether the taxpayer falls within it or without it. So the case is important because it has swept away a lot of the clutter and all of the extravagance and taken us back to the right place, which is the wording of the statute itself.

It is, I think, even more important because of the instruction which it gives us as to how we should approach the issue of statutory construction. In every case it is necessary to ascertain with precision the question being posed by the statute; and, in determining what the statutory question is, a purposive approach is adopted to the construction of the statute. This is, I think, the absolutely key and fundamental point. It is always necessary to identify the statutory question. In *Ramsay* and *Burmah*, the statutory question was, “Has the taxpayer realised a loss?” The analytical error made at the time the transactions were being considered in the 1970’s was to think that the statutory question was, “Did the taxpayer make a loss on this particular asset?” and to fail to realise that, implicit in that question, was the issue of whether the taxpayer made a loss at all. A taxpayer can only make a loss on a particular asset if he suffers a loss: if he does not have a loss at all, he cannot realise a loss on a particular asset. The statute posed the question, “Does the taxpayer as a matter of fact have a loss?” and the Courts were able, by analysing the facts, to see that he did not. In *Ensign Tankers* the question was, “Did this taxpayer incur expenditure?” and a factual analysis enabled the Court to say that it had not. In *Furniss* the question was, “To whom was this disposal made?” and the Court was again able to analyse the facts and find that there was a disposal to the ultimate purchaser, rather than to the intermediate company. And it can be seen from an analysis like this that nothing in the cases up to *McGuckian* at least, infringes the rule laid down in the *Duke of Westminster* which is that there can be no recharacterisation by reference to substance.

What we learn above everything else from *MacNiven* is that identification of the statutory question is absolutely key. Now, for reasons to which I shall come, I do not think *MacNiven* is a very useful guide, when it comes to identifying what the statutory question is in each case: indeed, in one respect at least, I think it may be rather unhelpful on that point, but what is quite clear is that we do need in every case to identify the correct statutory question. All that *MacNiven* actually decides is that, as Westmoreland discharged its debt for interest, it had a charge on income for the purposes of s.338 ICTA 1988, because it paid the interest. That is all that it actually decides: it decides something, now no longer relevant, in relation to s.338 ICTA 1988. It does not decide anything more and it does not decide anything less. And it does not tell us very much about how that decision was arrived at. I think everybody recognises that, using the same analytical theory as expounded in *MacNiven*, the conclusion that Westmoreland had not discharged its debt could have been arrived at just as easily as the conclusion that it had. Now, because that is so, I do not think that *MacNiven* is a very good guide to the result in future cases: it tells us what approach to take, and it is highly important for that reason, but it does not actually point to the outcome of any future case, and I should make five points here.

First, although I have emphasised the absence of moral content in the making of any analysis, it is, perhaps, worth noting that it is not wholly absent from this decision itself. The House of Lords has said that the feature objectionable to the Revenue was the ability of the pension scheme to recover tax; but I rather doubt if that is what was objectionable to the Revenue. What was objectionable to the Revenue was that Westmoreland was put in a position to claim tax relief while being, economically, in exactly the same position as it was in when it could not obtain tax relief. However, a point to note here is that Westmoreland really did have a loss: it really had lost money, so that *MacNiven* is not a case where relief was being obtained for something unreal.

Secondly, in some ways, *MacNiven* has created rather than eliminated uncertainty. Before *MacNiven* it appeared that a particular set of circumstances had to exist as a matter of fact before a *Ramsay* approach could be adopted. There had, for example, to be pre-ordination - and this is no longer the case. A rule like that – that certain facts had to exist before *Ramsay* applied – was obviously inconsistent with an approach which gives the guiding role to the meaning of the statute and looked uncomfortably like judicial law making. However, the removal of any such rule means that the facts alone cannot now determine the applicability or non applicability of the *Ramsay* approach.

Thirdly, there is a good deal in *MacNiven* about the distinction between legal and commercial concepts. I do not believe this is going to be important in other cases. The Court says the point was important in *MacNiven* but I have to say I am not quite clear why: even if commercial concepts were relevant, would not a businessman, if told that Westmoreland had discharged its debt for interest, say that Westmoreland had paid its interest? Some commercial concepts are dependent on or interlinked with legal ones. The point which I have made and that I want to emphasise is that the actual decision is only that Westmoreland had paid its interest, given the terms of s.338 ICTA 1988. The reasoning as to *why* Westmoreland is treated as having paid its interest belongs in the commentary category, not in the class of the truly important, and, while there is much commentary on it, it will be a mistake to focus on the distinction between legal and commercial concepts when the real issue is, “What question is being posed by the statute?”

Fourthly, because it is a mistake to pay too much attention to the distinction between legal and commercial concepts, I do not myself think that the *DTE Financial Services* case in the Court of Appeal is incompatible with *MacNiven*. I do think that there are a number of objections to that decision, partly because the interpretation which it puts on the word “payment” is inconsistent with the provisions about “trading arrangements”, and partly because the Court’s approach to the application of *Ramsay* principles is somewhat out of line with the approach indicated by *MacNiven* itself. This in a way goes to illustrate how the *MacNiven* concepts can create uncertainty. Indeed any purposive approach inevitably brings uncertainty, because the perceived purpose of a statute will vary with the degree of knowledge and familiarity of the person doing the construing. But I fully accept that the statutory question asked in the *DTE* case is, “Was there a payment by the employer to the employee?” And for my own part, on the facts of the case, I do not think it too difficult to say that the answer was, "Yes" in the context of the particular statutory provision in issue.

And this brings me to my fifth and last point on *MacNiven*. As I have been at some pains to expound, I believe that its importance lies in emphasising the paramount role of the statutory question, and, on the whole, I do not have too much difficulty with the way in which the statutory question has been identified by Lord Hoffman in relation to *MacNiven* itself, or in relation to the earlier cases, save for *McGuckian*. I do, however, have a little difficulty with the way in which Lord Hoffman has identified the statutory question in *McGuckian*. Lord Hoffman has said that the statutory question in *McGuckian* was, "Was this receipt income or capital?" And the answer to the question was that it was income, because the sale of the dividend did not work the alchemy of turning income into capital. I have difficulty with this. If the statutory question really is, "Was this receipt income or capital?" it is necessary to look at the receipt itself as sale proceeds and to characterise it as income or capital. On its face, the receipt, being sale proceeds of a right to a dividend, is capital, and it follows that a conclusion that the receipt is income involves treating the sale proceeds as a dividend. This is to recharacterise the receipt in a way which is prohibited by the *Duke of Westminster*'s case, the paramountcy of which has been re affirmed yet again by *MacNiven*. Now if that is what *McGuckian* has decided – that sale proceeds can be taxed as income it does more than interpret the statute: it would have gone so far as to recharacterise what is essentially capital as income; and this would go further than any case before *McGuckian* and further than *MacNiven* suggests it is permissible to go. The problem I think is caused because Lord Hoffman had slightly mis-stated the statutory question posed in *McGuckian*. I do not think the question was, "Is this receipt capital or income?" I think it was, "Who received the dividend?" And, on the facts of the case, the answer to that question was the apparent vendor, because, as a matter of fact, it got the dividend.

Somewhere in Four Quartets, T S Eliot has some lines to the effect that in the end is our beginning. *MacNiven* has got rid of a lot of extravagant stuff, and it has taken us back to the paramount role of the statute, while emphasising the modern approach of purposive construction – which is not new, but which is more greatly emphasised today than it once was. Is it the end of the journey to which Lord Scarman referred in *Furniss v. Dawson*? The answer is no for two reasons.

First, as Lord Hoffman, with a, to me, welcome lucidity, points out, we are not always on the same journey. Indeed, I suspect each case takes us on a different journey, so that, just as you cannot step into the same river twice, you cannot end the journey more than once. But, secondly and more crucially, I think we still have a great deal to learn about how to identify, in the context of modern and elaborate transactions, what the statutory question is. But I am quite sure that correct identification of the statutory question is critical to the analysis of any tax case, and clarification of that point is a significant analytical avoidance.

Some years ago I had the privilege – it was, I think, then a privilege – of advising the Conservative Party, and, afterwards, Mrs Thatcher wrote to me to thank me for my help in what she called “the battle against the Inland Revenue”. Some of us think of tax practice as a war, if not of arms at least of wits, and so it may be appropriate for me to finish with Mr Churchill’s famous remark after the Battle of El Alamein had been won by General Montgomery:

> “Now, this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”