

## **Milking McGuckian**

**by Nicola Shaw**

A recent decision of the Special Commissioners in Scotland provides welcome reassurance for taxpayers concerned about the implications of IRC v. McGuckian [1997] STC 908. In Aberdeen Milk Co Ltd v. Commissioners of Inland Revenue (9 February 1998) the taxpayer successfully employed the purposive approach to statutory construction advocated by Lord Steyn in McGuckian.

The Aberdeen Milk Co (“the taxpayer”) was established in 1994 following the introduction of statutory arrangements in the Agriculture Act 1993 (“the 1993 Act”) for the reorganisation of milk marketing. As a result of the 1993 Act, the Aberdeen and District Milk Marketing Board (“the Board”) provided for the transfer of its trade to the taxpayer and for the taxpayer to take over its milk marketing activities. The issue to be resolved was whether the taxpayer could bring itself within the provisions of s.239(3) ICTA 1988 and carry back surplus ACT to the 1990 accounting period of the Board, or whether the fact that the taxpayer did not exist in 1990 precluded it from doing so.

Certainly on a strict reading of the legislation, the taxpayer could not carry back its surplus ACT to 1990. Subsection (3) provides that the surplus be treated as ACT in respect of distributions “**made by the company** in any of **its** accounting periods” beginning in the six preceding years. On that basis, as the taxpayer did not have an accounting period in 1990 it did not seem to fall within the subsection. If such an approach had been the last word on interpretation then the taxpayer would undoubtedly have lost.

However, the taxpayer argued that the correct approach, following the decision in McGuckian, was to adopt a purposive construction of the 1993 Act with the result that “its” in s.239(3) meant “its or its predecessor bodies” in this context. Looking to the provisions of the 1993 Act it was clear that the legislative aim was to achieve tax neutrality in the transfer of the Board’s trade to the taxpayer. Paragraph 1 of Schedule 2 to the 1993 Act treats the transferee as always having carried on the transferor’s trade, the trade transferred to and carried on by the transferee is deemed to be the same trade as was carried on by the transferor and the property, and the rights and liabilities transferred are treated as having always been those of the transferee.

From this it was held that the taxpayer was to be treated as the same person as the Board and that the right to carry back surplus ACT under s.239(3) had been transferred. Therefore, the Board's accounting periods were to be treated as the taxpayer's accounting periods such that "its accounting periods" within subsection (3) must include the accounting periods of the Board within those of the taxpayer. On that basis, the taxpayer's appeal succeeded.

McGuckian took tax avoidance jurisprudence to another level, by advocating the adoption of a purposive approach to the interpretation of tax statutes. However, the difficulty with this and with seeking to give effect to Parliament's intention is in ascertaining what Parliament's intention is. Furthermore, it is easy to use "Parliamentary intent" as a fig-leaf to conceal what is ultimately judicial manipulation. The fear for taxpayers was that "Parliament's intention" would more often than not be to tax the transaction and that McGuckian had thus narrowed the goal posts on an already sloping playing field.

But fear not. The Aberdeen Milk Co illustrates that McGuckian is not just for the Revenue's armoury and that the taxpayer does not always fall on the wrong side of the line when it comes to purposive

interpretation. Here's hoping that the approach in Scotland will be followed across the border.