

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Lloyd of Berwick Lord Steyn
Lord Cooke of Thorndon Lord Clyde

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE
COMMISSIONERS OF INLAND REVENUE
(ORIGINAL APPELLANTS AND CROSS-RESPONDENTS)

v.

MCGUCKIAN
(ORIGINAL RESPONDENT AND CROSS-APPELLANT)
(NORTHERN IRELAND)

ON 12 JUNE 1997

LORD BROWNE-WILKINSON

My Lords,

This appeal concerns a claim by the appellants, the Commissioners of Inland Revenue, against the respondent, Mr. McGuckian, for income tax upon a dividend paid on 27 November 1979 (in the tax year 1979-80) by Ballinamore Textiles Ltd. ("Ballinamore"), a company incorporated and resident in the Republic of Ireland.

At all times Mr. McGuckian and his wife have been resident and domiciled in the United Kingdom. In the early 1970s they each owned 500 £1 shares in Ballinamore, the entire issued share capital at the time. Over the years, Ballinamore made profits and had built up reserves which were available to be distributed by way of dividend. In 1976, or thereabouts, Mr. McGuckian was introduced to a Mr. Taylor, an English solicitor well known as a tax consultant. Acting on his advice, in 1976 and 1977 a number of steps (the details of which are not relevant) were taken whereby the shares in Ballinamore previously owned by Mr. and Mrs. McGuckian were transferred to the trustee of a settlement. At all material times the trustee of the settlement was a Guernsey company, Shurltrust Ltd. The beneficiaries of that settlement were Mr. and Mrs. McGuckian and the income was payable to Mrs. McGuckian.

In November 1979 Ballinamore had income available for distribution by way of dividend amounting to £400,055. On 23 November 1979 Shurltrust (the trustee which owned the Ballinamore shares) assigned to Mallardchoice Ltd. ("Mallardchoice") the right to any dividend payable by Ballinamore in 1979. Mallardchoice was a United Kingdom company associated with the tax consultant, Mr. Taylor. The consideration for the assignment was expressed to be £396,054. This sum represents 99 per cent. of the dividend in fact paid by Ballinamore.

On 27 November 1979 Ballinamore declared a dividend of £400,055. on the shares held by Shurltrust. Ballinamore gave a cheque for that amount to a Dublin solicitor for Mallardchoice. The solicitor paid the cheque into his client account out of which he then paid 99 per cent. of that sum (i.e. £396,054) to Shurltrust. The solicitor then paid the balance of one per cent. (less his own fee of £200) to an agent for Mallardchoice.

Thereafter there followed a long period during which the Inland Revenue sought to discover what had taken place. There was prolonged correspondence between them and Mr. Taylor who took every step to obfuscate what had happened and obstruct the revenue in discovering the true facts. Eventually, two weeks before the expiry of the six-year period applicable to the raising of assessments in respect of the year 1979-80 an assessment to income tax was made on Mr. McGuckian for 1979-80 in the amount of £400,055. The notice of assessment referred to Chapter III, Part XVII of the Income and Corporation Taxes Act 1970 which contains the charging provisions of section 478 but does not include the charging provisions of section 470. At the date of the assessment, the Revenue had not discovered the existence of the settlement.

Mr. McGuckian appealed against the assessment. The appeal came before the special commissioner, Mr. O'Brien, before whom the Crown contended, first, that the transactions between Shurltrust and Mallardchoice were a sham and, secondly, that there was a liability to tax under the Act of 1970, section 470. The revenue did not argue before the special commissioner that the principle stated in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300 applied. The special commissioner held that the transactions were not a sham and that, since the notice of assessment stated that the tax liability arose under section 478, he could not uphold it under section 470.

In the Court of Appeal the Crown contended that although the transactions were not a sham they fell to be disregarded under the *Ramsay* principle. The Crown further argued that the special commissioner should have upheld the assessment under section 470 and that, even if the special commissioner did not have the power so to do, the Court of Appeal had the necessary power to remit the case to him with a direction that he should uphold an assessment under section 470. The Court of Appeal (Sir Brian Hutton L.C.J., Kelly and Carswell L.JJ.) by a majority rejected the Crown's argument based on the *Ramsay* principle, Kelly L.J. dissenting. However, it held that it did have power to remit the case to the special commissioner with a direction that he uphold the assessment under section 470.

The Crown appeal to your Lordships against the dismissal of their claim based on the *Ramsay* principle. Mr. McGuckian cross-appeals against the order remitting the case to the special commissioner. Your Lordships heard argument only on the Crown's appeal and at the conclusion of the hearing indicated that, since the Crown's appeal would succeed, the issues raised by the cross-appeal did not fall for decision.

Section 478 of the Income and Corporation Taxes Act 1970 provides, so far as relevant, as follows:

"For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of

assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:-

"(1) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provision of this section, be deemed to be the income of that individual for all the purposes of the Income Tax Acts."

Five conditions have to be satisfied in order for section 478 to apply:

(1) The taxpayer (or his or her spouse) has made a "transfer of assets" by virtue of which income became payable to a person resident outside the United Kingdom. It is agreed that this condition was satisfied since Mr. and Mrs. McGuckian transferred the shares in Ballinamore to Shurltrust, whereby the dividends declared by Ballinamore were potentially payable to a non-resident, Shurltrust.

(2) There is *income* of the non-resident. Shurltrust received £396,054., being 99 per cent. of the consideration for the assignment of the right to the Ballinamore dividends. Prima facie, this sum, being the proceeds of sale of the dividends, would be capital. However, the Crown submits that, by virtue of the *Ramsay* principle [1982] A.C. 300, the sum falls to be regarded for tax purposes as income. This is the central issue in the dispute.

(3) The taxpayer (or his or her spouse) has power to enjoy the income of the non-resident. It is agreed that this requirement is satisfied.

(4) It is by virtue or in consequence of the transfer, or the transfer with associated operations, that the taxpayer has power to enjoy the income. Again, it is accepted that Mr. and Mrs. McGuckian had power to enjoy the income under the settlement by virtue or in consequence of the transfer of the shares by them to Shurltrust.

(5) The taxpayer cannot take advantage of the defence in section 478(3) afforded to transactions which did not have a tax avoidance objective. It is agreed that this defence is not open to the taxpayer.

The crucial question, therefore, is whether in the present case the moneys received by Shurltrust as consideration for the assignment of the right to the dividends from Ballinamore fall to be treated as "income" of Shurltrust. Prima facie those moneys, being the price of the sale by Shurltrust of its right to the future dividends of Ballinamore, constitutes capital not income. However, the Crown argue that, applying the *Ramsay* principle, that sale of the right to the dividends by Shurltrust to Mallardchoice, though not a sham, has to be disregarded for tax purposes. The sale was an artificial transaction inserted for the sole purpose of gaining a tax advantage: the reality of the transaction was the payment of a dividend by Ballinamore to the shareholder, Shurltrust, which received it as income.

My Lords, in my judgment nothing in this case turns on the exact scope of the *Ramsay* principle. The case falls squarely within the classic requirements for the application of that principle as stated by Lord Brightman in *Furness v. Dawson* [1984] A.C. 474, 527D-E:

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

In the present case, since the *Ramsay* principle was not invoked before the special commissioner there is no express finding on those issues of fact. However, there can be no doubt the only possible conclusion on the facts is that the requirements are satisfied. No *business* purpose for the assignment of the dividend rights to Mallardchoice has been suggested. Given the genesis of the composite transaction in the mind of the tax consultant, Mr. Taylor, the only possible inference is that the assignment was inserted for the sole purpose of gaining a tax advantage. Mr. Nugee, for the taxpayer, contended that the transaction was part of a larger, and different, tax scheme designed in 1976 with a view to avoiding an anticipated wealth tax. He submits that a "pre-ordained series of transactions" to avoid that wealth tax has not been demonstrated. But, whether or not that be right, the sale and assignment for value to Mallardchoice of the future right to the 1979 dividend was a discrete transaction directed to that dividend alone which was carried through by artificial and pre-ordained steps inserted for no business purpose. As such, the liability for tax on the indirect receipt of such dividend by Shurltrust has to be determined by stripping out the artificial steps and applying the provisions of the Taxes Acts to the real transaction, i.e. the payment of a dividend to the shareholder, Shurltrust, which received such dividend as income.

It follows that the Crown's claim to tax under section 478 must succeed unless there is some other statutory provision which demonstrates that section 478 does not apply. It was the main burden of Mr. Nugee's submissions that section 470 has that effect. It provides:

"470(1) Where in any chargeable period the owner of any securities (in this section referred to as 'the owner') sells or transfers the right to receive any interest payable (whether before or after the sale or transfer) in respect of the securities without selling or transferring the securities, then, for all the purposes of the Tax Acts, that interest, whether it would or would not be chargeable to tax apart from the provisions of this section -
"(a) shall be deemed to be the income of the owner or, in a case where the owner is not the beneficial owner of the securities and some other person (hereafter in this section referred to as 'a beneficiary') is beneficially entitled to the income arising from the securities, the income of the beneficiary; and

"(b) shall be deemed to be the income of the owner or beneficiary for that chargeable period, and

"(c) shall not be deemed to be the income of any other person; . . ."

Mr. Nugee submits that the assignment to Mallardchoice was a sale or transfer by the owner of the securities (Shurltrust) of the right to receive an interest in the Ballinamore shares (the 1979 dividend to be declared). As a result, the effect of section 470 is that "for all the purposes of the Tax Acts" the dividend paid by Ballinamore is to be treated as the income of Mrs. McGuckian (as income beneficiary under the settlement) and is not to be deemed to be the income of any other person (i.e. it is *not* the income of Shurltrust). On this premise, it is submitted, section 478 could not apply since section 478 only applies to "income of a person resident . . . out of the United Kingdom": Mrs. McGuckian (whose income it is deemed to be under section 470) was resident in the United Kingdom. He further submitted that since, if the Crown had assessed Mr. and Mrs. McGuckian under section 470, they would have been taxable, neither section 478 nor the *Ramsay* principle apply since no tax advantage was *in fact* gained as a result of the assignment.

As Mr. Nugee frankly conceded, these arguments had no ethical merit. The taxpayers are seeking to avoid liability under section 478 because, they say, they should have paid tax under section 470. The only reason they were not assessed under section 470 was because of the dubious stalling tactics adopted by their agent, Mr. Taylor, which prevented the Crown from learning in time of the existence of the settlement and therefore of the facts necessary to raise a section 470 assessment. But, as Mr. Nugee rightly submitted, liability to tax depends on statutory construction not moral disapproval. What then are the legal merits of these submissions?

First, in my judgment Mr. Nugee's basic premise is not correct. Section 470 only applies where "the owner of any securities . . . sells or transfers the right to receive any interest . . ." As I have already said, the *Ramsay* principle applies to the present case. In consequence, the artificial step inserted (i.e. the assignment by Shurltrust to Mallardchoice for value) falls to be disregarded in construing the relevant taxing provisions. Therefore, applying the *Ramsay* principle, the basic requirement to bring section 470 into operation (i.e. the sale of the right to the dividend to Mallardchoice) has to be disregarded. Accordingly, section 470 does not apply to this case and the income is not to be deemed to be the income of Mrs. McGuckian.

Next, Mr. Nugee submitted that since the dividend would in any event have been taxable under section 470, section 478 does not apply. He based this submission on the words in the preamble to section 478, "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax . . ." He submitted that section 478 does not apply unless tax has *in fact* been avoided. In my judgment, there is no warrant for this submission. The words quoted refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section. That parliamentary intention is certainly relevant in construing the section. But the words of subsection (1) make it clear that the actual avoidance of tax is not a precondition to the application of the section. The income is deemed to be the income of the United Kingdom resident "whether it would or would not have been chargeable to income tax apart from the provisions of this section". It is therefore clear that section 478 can still apply even

though the effect of the transfer of assets abroad would not have been successful in avoiding United Kingdom income tax.

Finally, Mr. Nugee submitted that the *Ramsay* principle only requires the artificial steps inserted for tax purposes to be disregarded if, apart from the *Ramsay* principle, they would have been effective to achieve a tax advantage. My Lords, I emphatically reject this submission. The approach pioneered in *Ramsay* and subsequently developed in later decisions is an approach to construction, viz. that in construing tax legislation, the statutory provisions are to be applied to the substance of the transaction, disregarding artificial steps in the composite transaction or series of transactions inserted only for the purpose of seeking to obtain a tax advantage. The question is not what was the effect of the insertion of the artificial steps but what was its purpose. Having identified the artificial steps inserted with that purpose and disregarded them, then what is left is to apply the statutory language of the taxing Act to the transaction carried through stripped of its artificial steps. It is irrelevant to consider whether or not the disregarded artificial steps would have been effective to achieve the tax saving purpose for which they were designed.

For these reasons, I would allow the appeal and uphold the assessment in the sum of £396,054. being the amount received by the shareholder, Shurltrust. The Crown formally sought to uphold the assessment in relation to the remaining one per cent. of the dividend, £400,001, paid by way of fees to the solicitor and to Mallardchoice. In my judgment that claim is unsustainable since the £400,001 was not, in fact, received by Shurltrust.

The respondents must pay the appellants' costs in the Court of Appeal and before your Lordships.

LORD LLOYD OF BERWICK

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Browne-Wilkinson, Lord Steyn, Lord Cooke of Thorndon and Lord Clyde. For the reasons they give I too would allow the appeal.

LORD STEYN

My Lords,

It matters how a court should approach the construction and application of a tax statute, notably in respect of the impact of the legislation on schemes for tax

avoidance. In this case the approach to be adopted may well be determinative of the appeal. In his excellent speech counsel for the taxpayer referred to the often quoted observations of Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1, 19. Lord Tomlin said that every man is entitled if he can to order his affairs so that the tax under a tax statute is less than it would otherwise be. The case was authority for the proposition that whatever the substance of the arrangements may have been, their fiscal effect had to be in accordance with the legal rights and obligations they created. Counsel for the taxpayer invited your Lordships to approach the appeal in this way, He said that the principle first laid down in *W. T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, and developed in later House of Lords decisions, amounted to "an extreme form of statutory interpretation." It was implicit in this argument that the foundation of the principle is somewhat suspect. Counsel said that while the actual decisions of the House of Lords must be respected the scope of the underlying principle should not be extended beyond those decisions. I understood his argument to be a plea for damage limitation. I would reject this approach as a false foundation for the consideration of this appeal.

It is necessary to distinguish between two separate questions of law. The first is whether there is a special rule applicable to the construction of fiscal legislation. The second question is whether there is a rule precluding the court from examining the substance of a composite tax avoidance scheme. I consider first the construction of tax statutes.

Towards the end of the last century *Pollock* characterised the approach of judges to statutory construction as follows: "Parliament generally changes the law for the worse, and that the business of judges is to keep the mischief of its interference within the narrowest possible bounds": *Essays on Jurisprudence and Ethics* (1882), 85. Whatever the merits of this observation may have been when it was made, or even earlier in this century, it is demonstrably no longer true. During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow *Duke of Westminster* doctrine tax law remained remarkably resistant to the new non formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute: *Pryce v. Monmouthshire Canal and Railway Cos.* (1879) 4 App. Cas. 197, 202-203; *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 K.B. 64, 71; *Inland Revenue Commissioners v. Plummer* [1980] A.C. 896. Tax law was by and large left behind as some island of literal interpretation. The second problem was that in regard to tax avoidance schemes the courts regarded themselves as compelled to adopt a step by step analysis of such schemes, treating each step as a distinct transaction producing its own tax consequences. It was thought that if the steps were genuine, i.e. not sham or simulated documents or arrangements, the court was not entitled to go behind the form of the individual transactions. In combination those two features--literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately--allowed tax avoidance schemes to flourish to the detriment of the general body of taxpayers. The result was that the court appeared to be relegated to the role of a spectator concentrating on the individual moves in a highly skilled game: the court was mesmerised by the moves in the game and paid no regard to the strategy of the

participants or the end result. The courts became habituated to this narrow view of their role.

On both fronts the intellectual breakthrough came in 1981 in *Ramsay*, and notably in Lord Wilberforce's seminal speech which carried the agreement of Lord Russell of Killowen, Lord Roskill and Lord Bridge of Harwich. Lord Wilberforce restated the principle of statutory construction that a subject is only to be taxed upon clear words at [1982] A.C. 300, 323C-D. To the question "what are clear words?" he gave the answer that the court is not confined to a literal interpretation. He added "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." This sentence was critical. It marked the rejection by the House of pure literalism in the interpretation of tax statutes.

But that left the problem of the courts' self denying ordinance of not examining the true nature of a composite transaction. Lord Wilberforce observed, at p. 323H that the *Duke of Westminster* case did not compel the court to look at documents or transactions in blinkers, isolated from the context in which they properly belong. Lord Wilberforce concluded, at p. 326C-D:

". . . . While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) to both. To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties' own intentions."

In other words, if it was shown that a scheme was intended to be implemented as a whole, legal analysis permitted the court in deciding a fiscal question to take into account the composite transaction

While Lord Tomlin's observations in the *Duke of Westminster* case [1936] A.C. I still point to a material consideration, namely the general liberty of the citizen to arrange his financial affairs as he thinks fits, they have ceased to be canonical as to the consequence of a tax avoidance scheme. Indeed, as Lord Diplock observed, Lord Tomlin's observations tells us little or nothing as to what method of ordering one's affairs will be recognised by the courts as effective to lessen the tax that would otherwise be payable: *Inland Revenue Commissioners v. Burma Oil Co. Ltd.* (1981) T.C. 200, 214-215.

The new *Ramsay* principle was not invented on a juristic basis independent of statute. That would have been indefensible since a court has no power to amend a tax statute. The principle was developed as a matter of statutory construction. That was made clear by Lord Wilberforce in *Ramsay* and is also made clear in subsequent

decisions in this line of authority: see the review in the dissenting speech of Lord Goff of Chieveley in *Craven v. White* [1989] A.C. 398, 520C-521E. The new development was not based on a linguistic analysis of the meaning of particular words in a statute. It was founded on a broad purposive interpretation, giving effect to the intention of Parliament. The principle enunciated in *Ramsay* was therefore based on an orthodox form of statutory interpretation. And in asserting the power to examine the substance of a composite transaction the House of Lords was simply rejecting formalism in fiscal matters and choosing a more realistic legal analysis. Given the reasoning underlying the new approach it is wrong to regard the decisions of the House of Lords since *Ramsay* as necessarily marking the limit of the law on tax avoidance schemes.

That brings me to the facts. The assessment under appeal was made upon Mr. McGuckian under section 478 of the Income and Corporation Taxes Act 1970. The assessment is in respect of income tax upon a dividend of IR£400,055 paid on 27 November 1979 (in the tax year 1979-80) by Ballinamore Textiles Ltd. Mr. and Mrs. McGuckian were resident and domiciled in the United Kingdom. Together they initially owned all the shares in Ballinamore, a company incorporated and domiciled in the Republic of Ireland. Ballinamore had made profits, and it had reserves, which were available to be distributed as dividends. But if dividends had been paid in the normal course to Mr. and Mrs. McGuckian it would have been taxable. Relying on the advice of a tax consultant, steps were taken by Mr. and Mrs. McGuckian to avoid liability to pay income tax on the dividends. A reorganization of the affairs of Mr. and Mrs. McGuckian was undertaken to create a framework for the contemplated tax avoidance scheme. They arranged that in future all the shares in Ballinamore would be held by a settlement. The trustee of the settlement was a Guernsey company, Shurltrust Ltd. Mrs. McGuckian was the income beneficiary of the trust which held the shares in Ballinamore. If Ballinamore had simply paid the dividends to its shareholder, Shurltrust, the dividends would have been income of Mrs. McGuckian and would have been taxable on her husband. But, relying on the *Duke of Westminster* doctrine, the taxpayer was advised that he could avoid such tax liability by the adoption of a number of other steps as a part of an overall scheme.

Concentrating on the assessment under appeal, the position is that late 1979 the scheme was implemented by the adoption of the following steps:

- (1) Shurltrust (of which Mrs. McGuckian was the income beneficiary) assigned the right to the dividend payable by Ballinamore in 1979 to Mallardchoice Ltd., a United Kingdom company associated with the tax consultant. The consideration payable for the assignment was £396,504.
- (2) Ballinamore thereupon declared a dividend of £400,055.
- (3) Ballinamore paid the dividend of £400,055 to Mallardchoice.
- (4) Having received £400,055 Mallardchoice paid £396,054 (99 per cent. of the dividend) to Shurltrust which kept it. The difference of 1 per cent. represented fees and commission.

In the Court of Appeal Carswell L.J. said [1994] S.T.C. 888, 921E, that "in theory at least, the directors could have decided to declare higher or lower dividends than those expected by the . . . assignee." That cannot be right. Mallardchoice would not have agreed to pay £396,054 for a dividend unless there was certainty that it was going to

be paid. There is only one reasonable interpretation of the primary facts: the four steps were inextricably limited as parts of a single composite transaction.

Neither the individual steps nor the composite transaction were simulated or sham transactions in the sense in which those terms are understood in contract law or trust law: see *Snook v. London and West Riding Investments Ltd.* [1967] 2 Q.B. 786. On the contrary, tax avoidance was the spur to executing genuine documents and entering into genuine arrangements. But this appeal is concerned with a different question, namely the fiscal effectiveness of the composite tax avoidance scheme.

It is now necessary to consider how the composite transaction should be categorized. The declaration of the dividend was an ordinary commercial decision. But the other steps--the assignment to Mallardchoice, the payment to Mallardchoice and the payment by Mallardchoice to Shurltrust--were not taken for any business or commercial reason. Those steps were taken in order to avoid tax. I would respectfully differ from the conclusion of Sir Brian Hutton L.C.J. and Carswell L.J. that the assignment was "the whole substance and *raison d'être* of the transaction." Like Kelly L.J. I am satisfied that the assignment was merely a means to an end, a step taken in an attempt to achieve the payment of £396,054 to Shurltrust as capital. Tax avoidance was the only conceivable explanation for the assignment.

That brings me directly to the question whether section 478 is applicable. Counsel for the taxpayer advanced two grounds upon which he contended that section 478 is inapplicable. First, he argued that section 478 does not apply because what Shurltrust received was capital. Secondly, he argued that section 478 is not applicable because section 470 applies. I will consider these arguments in turn.

On a formalistic view of the individual tax avoidance steps, and a literal interpretation of the statute in the spirit of the *Duke of Westminster* case [1936] A.C. 1, it is possible to say that the money which reached Shurltrust was capital. But the court is no longer compelled to look at transactions in blinkers, and literalism has given way to purposive interpretation. Like Lord Cooke of Thorndon, and for the reasons he has given, I would even without the benefit of the detailed legal analysis in the *Ramsay* line of authority have inclined to the view that the more realistic interpretation of the undisputed facts is that what Shurltrust received was income. But, if the *Ramsay* principle [1982] A.C. 300, is taken into account, as it must be, there is no room for doubt. The limits of the principle were summarized by Lord Brightman in *Furness v. Dawson* [1984] A.C. 474. In his leading speech Lord Brightman said (at p. 527D-E):

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

The governing principle, as Lord Wilberforce observed in *Ramsay* [1982] A.C. 300, 326, is that the court is not obliged to adopt "a step by step, dissecting approach which the parties themselves may have negated." In the present case the objective of the composite transaction was that Shurltrust should receive the dividend. It is a classic case for the application of the *Ramsay* principle. For fiscal purposes the steps involving Mallardchoice can be disregarded. The fiscal focus can therefore be on the end result, viz the receipt by Shurltrust of 99 per cent. of the dividend as income. The scheme was therefore an ineffective tax avoidance scheme.

That brings me to the second suggested escape route from the applicability of section 478. Counsel for the taxpayer relied on the opening words of section 478 viz "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax" He argued that section 478 can only be invoked if there has been an actual avoidance of liability to income tax. Counsel submitted that this condition is not satisfied: section 470 was applicable but the revenue did not invoke it. I am persuaded by the submissions of counsel for the Commissioners of Inland Revenue that this argument must fail for two reasons. First, once the *Ramsay* principle is applied there is no scope for the application of section 470 because for fiscal purposes the assignment to Mallardchoice is disregarded. Secondly, I would reject the argument that it is a condition precedent to section 478 applying that there must be proof of an actual avoidance of tax liability. Such a construction treats section 478 as a power of last resort and it substantially emasculates the effectiveness of the power under section 478 . Nothing in the language or purpose of section 478 compels such a construction. Properly construed the opening words of section 478 merely provide that there must be an intention to avoid liability for tax. The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax. That the revenue authorities should have overlapping taxation powers is an unremarkable consequence. And such a construction cannot cause any unfairness to the taxpayer since he cannot be taxed twice in respect of the same income.

For these reasons, I regard an assessment IR£396,054 as correct. I would allow the appeal to that extent.

LORD COOKE OF THORNDON

My Lords,

While a broad distinction between capital and income is deeply embedded in revenue law, the line can be notoriously difficult to draw, as the division is necessarily to some degree artificial and has to be worked out pragmatically by courts, lawyers and accountants. In many cases the price received for an assignment of the right to receive a dividend may be classified as a capital receipt; but it would be unsafe to assume that this will invariably be so. The circumstances surrounding the transaction may require the conclusion that the receipt is income. I think it plain that such is the case here.

Mr. and Mrs. McGuckian, residents of the United Kingdom, owned and controlled the Irish company Ballinamore, which had accumulated undistributed profits. For fiscal reasons, apparently including the avoidance of apprehended wealth tax, their shares were transferred to the Guernsey company, Shurltrust Ltd. Mrs. McGuckian was the income beneficiary of the trust upon which Shurltrust held the shares. A scheme was devised by a taxation consultant whereby from time to time Shurltrust would assign its rights to dividends during specified periods to Mallardchoice, an ad hoc and virtually assetless United Kingdom company formed by the consultant, for a price representing on each occasion the planned dividend less only commission or fees; on the declaration of the dividend, the company would pay it out to a Dublin solicitor who would in fact act for all parties but receive it on behalf of Mallardchoice, and he would immediately pay it to Shurltrust, after deducting commission or fees, in satisfaction of the price. In the transaction to which the present appeal relates the assignment by Shurltrust to Mallardchoice was dated 23 November 1979 and applied to dividends to be declared during the remainder of 1979. The consideration expressed was £396,054. On 27 November 1979 Ballinamore declared a dividend of £400,055, which the solicitor received and paid to his client account for Mallardchoice; on or about the same day he paid the £396,054, which represented 99 per cent. of the dividend, to Shurltrust.

My Lords, it seems to me that one has only to recount those facts to show that what was received by Shurltrust was essentially income. The dividend was intended to be for the benefit of Shurltrust and the circular route by which the payment was made was no more than machinery for giving effect to that intention. The assignment was created simply as a bridge or vehicle for attaining that end. The money was unmistakably traceable through a single link. Whether a receipt is income for tax purposes is a question of mixed fact and law. In this instance the facts, in my view, admit of only one reasonable answer.

I would lean towards that conclusion without the guidance of authority, but the matter is clinched by the authority of *W. T. Ramsay Ltd v. Inland Revenue Commissioners* [1982] A.C. 300 and the subsequent cases in the same line. As Lord Wilberforce said in *Ramsay*, at pp. 323-324:

"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1. This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. For this there is authority in the law

relating to income tax and capital gains tax: see *Chinn v. Hochstrasser* [1981] A.C. 533 and *Inland Revenue Commissioners v. Plummer* [1980] A.C. 896."

The principle of looking on a planned series of steps as a whole transaction appears to be, as one would expect, perfectly natural and orthodox. It is surely decidedly more natural and less extreme than the decision which in 1935 a majority of their Lordships felt forced to reach in the *Duke of Westminster's* case. One can well understand that in *Ramsay* this House was unwilling to carry the latter decision further. Nor can the position of the taxpayer plausibly be improved for the purposes of the *Ramsay* principle by the argument that the planned series of steps in question were incidental to an even wider scheme of tax avoidance devised against wealth tax.

The majority of the Court of Appeal in Northern Ireland (Sir Brian Hutton L.C.J. and Carswell L.J.) took the view that the assignment was "the whole substance and raison d'être of the transaction" and "the end result intended by the parties": see [1994] S.T.C. 888, 921C, 935D. I respectfully prefer the view of Kelly L.J. (at p. 942) that it was nothing more than a means to the end of achieving payment to Shurltrust of almost all the dividend, in the hope that it would be treated as capital for tax purposes.

Once that point is reached, I think it follows that Shurltrust as owner of the securities did not, within the purview and spirit of section 470 of the Income and Corporation Taxes Act 1970, sell or transfer the right to receive any dividend payable. In the particular context, the assignment merely provided a conduit by which the dividend was to reach Shurltrust. Section 470 therefore does not apply. Section 478 of that Act (relating to the avoidance of income tax by transactions resulting in the transfer of income to persons abroad) does, however, catch the previous transfers of the shares to Shurltrust for the reasons to be given by my noble and learned friend Lord Clyde. Accordingly I would hold that the assessment of Mr McGuckian under that section was correct.

I would also associate myself with all that my noble and learned friend, Lord Steyn, whose speech I have seen in draft, has said about statutory interpretation. The principle which your Lordships have been developing in *Ramsay* [1982] A.C. 300, *Inland Revenue Commissioners v. Burma Oil Co. Ltd.* (1981) 54 T.C. 200, and *Furniss v. Dawson* [1984] A.C. 474 is not uncommonly seen as special to the construction of taxing Acts. Perhaps more helpfully, however, it may be recognised as an application to taxing Acts of the general approach to statutory interpretation whereby, in determining the natural meaning of particular expressions in their context, weight is given to the purpose and spirit of the legislation. So, in *Ramsay*, Lord Wilberforce said, [1982] A.C. 300, 326, that it was well and indeed essentially within the judicial function to determine whether there was such a loss (or gain) as the legislation was dealing with. In *Burma*, p. 221, Lord Fraser of Tullybelton echoed those words in saying that there was no real loss and no loss in the sense contemplated by the legislation. In *Furniss* Lord Brightman said at p. 527 that in conditions which he defined the court must look at the end result: precisely how it would be taxed depended on the terms of the taxing statute.

Craven v. White [1989] A.C. 398, where the facts were distant from those of the present case, is a difficult case, partly because of the differences of opinion in your Lordships' House, but at least it can be said that one cardinal point of agreement was

that essentially the question is one of construction: see Lord Keith of Kinkel, at p. 479; Lord Templeman, at p. 487; Lord Oliver of Aylmerton, at pp.505 and 510; Lord Goff of Chieveley, at p. 520; and Lord Jauncey of Tullichettle, at p. 533.

My Lords, this approach to the interpretation of taxing Acts does not depend on general anti-avoidance provisions such as are found in Australasia. Rather, it is antecedent to or collateral with them. In *Furniss* [1984] A.C. 474, 527 Lord Brightman spoke of certain limitations (a preordained series of transactions including steps with no commercial or business purpose apart from the avoidance of a liability to tax). The present case does fall within these limitations, but it may be as well to add that, if the ultimate question is always the true bearing of a particular taxing provision on a particular set of facts, the limitations cannot be universals. Always one must go back to the discernible intent of the taxing Act. I suspect that advisers of those bent on tax avoidance, which in the end tends to involve an attempt to cast on other taxpayers more than their fair share of sustaining the national tax base, do not always pay sufficient heed to the theme in the speeches in *Furniss*, especially those of Lords Scarman, Roskill and Bridge of Harwich, to the effect that the journey's end may not yet have been found. I will profit from the example of Lord Roskill in *Furniss*, at p. 515, by refraining from speculating about whether a sharper focus on the concept of "wages" in the light of the statutory purpose and the circumstances of the case would or would not have led to a different result in the *Duke of Westminster* case.

For these reason I, too, would allow the appeal and restore the assessment as to the £396,054.

LORD CLYDE

My Lords,

The assessment to tax here was made under section 478 of the Income and Corporation Taxes Act 1970. The opening few lines of that section set out the purpose to be served by the enactment. That purpose is the prevention of avoidance by individuals ordinarily resident in the United Kingdom of liability to income tax by means of certain kinds of transaction. It is not required that the transaction should itself be carried out with that purpose. The statute is simply expressing the purpose of the section, not of the substance of the transaction.

The substance of the transaction is described in the first few lines of the section. There has to be a transfer of assets. Subsection (8)(b) explains that "'assets' includes property or rights of any kind, and 'transfer', in relation to rights, includes the creation of those rights . . ." Further, the transfer has to be one by virtue or in consequence whereof income becomes payable to persons resident or domiciled out of the United Kingdom. That suggests that but for the transfer the income would not have been payable to that person. Finally, so far as this part of the section is concerned, it is provided that the result of income becoming payable to such persons may be achieved either by the transfer alone or by the transfer in conjunction with any associated

operation. The expression "associated operation" is defined in subsection (4) as meaning:

". . . in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets."

All of the provisions which I have noted so far are expressed in very wide terms. In the present case the income with which we are concerned is income coming by way of dividend from Ballinamore. The person resident or domiciled out of the United Kingdom is Shurltrust.

I then turn to subsection (1) with which the present case is concerned. Subsection (1) relates to an individual ordinarily resident in the United Kingdom whose liability to income tax may be avoided by the transfers with which the section is concerned. It also relates to income of a person resident or domiciled out of the United Kingdom. That at least includes, and may only comprise, the income which, as was mentioned earlier, is expressed to be payable to such a person. The subsection is then concerned with the situation where such an individual as I have already described has power to enjoy any income of a person resident or domiciled out of the United Kingdom. A power to enjoy income arises in a variety of circumstances detailed in subsection (5) and it is not disputed that the Respondent has power to enjoy any income of Shurltrust if there was any income. The subsection then provides a hypothesis that if that income was the income of the individual received by him in the United Kingdom it would be chargeable to income tax. It then finally provides, on the basis that that hypothesis is satisfied, that where by virtue or in consequence of any such transfer as I have already described, with or without any associated operations, such an individual has power to enjoy that income it shall be deemed to be his income, whether or not it would have been chargeable to income tax apart from the provisions of section 478. That last phrase seems to me to answer any argument that an assessment under section 478 cannot lie where an assessment under another section is open, such as, as was contended in the present case, an assessment under section 470.

As a result of the transfer of the shares to Shurltrust and all the later associated operations 99 per cent. of the dividend for the year 1979-80 found its way to Shurltrust. In 1976 and 1977 a transfer and associated operations was made whereby the right to any dividends of Ballinamore became payable to Shurltrust. The operations which were effected in 1979 related in part to the dividend and in part to assets representing the dividend, but for the purposes of section 478(1) the operations did not have the effect in substance or reality of doing anything else than making the income which was payable to Shurltrust in respect of the 1979/80 dividend to be paid, to the extent of 99 per cent. of it, to Shurltrust. The income payable to Shurltrust was the income of Shurltrust for the purposes of the section.

Section 478 is expressly designed to prevent avoidance of income tax in the circumstances to which it relates. It seems to me in the circumstances of the present case that the section can and should be applied here to recognise the real substance of the whole transaction. The assignment is accepted to have been genuine. Its effect in

diminishing the extent of the dividend passing through to Shurltrust has to be recognised. Thus the 1 per cent. of the dividend is effectively carried to others. But the effect of the whole transaction was to carry 99 per cent. of the dividend to Shurltrust, by a circuitous route whereby it was not the original dividend but money representing that percentage of the original dividend which ended up in its hands. It seems to me sufficient to resolve the present case by considering the terms of the section and the express recognition therein of the propriety of taking into account the whole succession of steps which lead to the end result. This approach in effect accords with the guidance laid down by Lord Wilberforce in *W.T. Ramsay Ltd. v. Inland Revenue Commissioners* [1982] A.C. 300, 323-324. An assessment in the sum of IR £396,054 is correct. I would allow the appeal to that extent.