The RFC case, tax avoidance schemes and statutory interpretation: offside goals, yellow cards and own goals

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Lord Hodge, Justice of The Supreme Court

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It is a great pleasure and an honour to be invited once again to address the Edinburgh Tax Network. This evening I will speak about the Rangers Football Club tax case, tax avoidance schemes and statutory interpretation.

One of the canons, which Adam Smith propounded in his great work, *The Wealth of Nations*, in 1776 was that taxes should be certain and not arbitrary.[1]

One of the principles which I was taught when reading law at Edinburgh University in 1978 was that tax avoidance was legal, while tax evasion was not. Avoidance is obtaining a tax advantage within the rules. Acting in the genuine but mistaken belief that a tax advantage can legally be obtained may be seen as avoidance or at least not criminal evasion. Knowingly acting to evade taxes is often a criminal offence, and, as has been said before, the difference between avoidance and evasion is the thickness of a prison wall. But some forms of evasion, while illegal, are dealt with by civil penalties rather than the criminal law.

[1] The Wealth of Nations, V.2.26: Maxim II: "The tax which each individual is bound to pay ought to be certain, and not arbitrary".

I was taught other things at university, including that the taxpayer was under no obligation to order his or her affairs in such a way that the Revenue could put its spade into his or her coffers to the maximum extent and also that the executive must show that Parliament had authorised a tax charge in clear terms.[2] We were told of Lord Tomlin's dictum in *IRC v Duke of Westminster*,[3] in which he said,

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

Students were also referred to *Lumsden v IRC*, in which Viscount Haldane said that judges were under a duty to adhere to the literal construction in interpreting statutes, unless the context made it plain that the words could not be interpreted in that way. Viscount Haldane added that that rule "is especially important in cases of statutes which impose taxation".[4]

Tax avoidance depends upon the courts sticking to their constitutional role of interpreting the words of a statute in order to ascertain the boundaries of the tax charge which Parliament intended to impose. But since the late 1970s two forces have been at work which have affected the approach of the courts to tax avoidance schemes. First, our exposure to European jurisprudence through our membership of the EEC and later the EU has accustomed judges to adopt a more purposive approach to statutory interpretation. Secondly, the immense intellectual firepower, which has been expended by tax advisers on the development and marketing of sophisticated avoidance schemes comprising a contrived series of transactions which have no

[2] *Att General v Wilts United Dairies Ltd* (1921) 37 TLR 884.
[3] [1936] AC 1, 19-20.
[4] *Lumsden v IRC* [1914] AC 877, 896-897.

purpose other than to save tax, provoked a determined reaction from the Revenue in which they successfully persuaded the courts to look with disfavour on artificial and complex tax avoidance schemes. This disfavour manifested itself in the so-called "Ramsay principle" in the judgments of the House of Lords in *W T Ramsay Ltd v IRC* in 1981.[5]

In *Ramsay*, Lord Wilberforce saw it as the task of the court to ascertain the legal nature of any transaction to which it was sought to attach a tax. The court did not need to consider individually each separate step in a composite transaction which was intended to be carried through as a whole.[6] The courts, he said, were not obliged to stand still in the face of increasingly sophisticated techniques of tax avoidance which either caused loss of tax to the prejudice of other taxpayers or congestion in Parliament through the enactment of measure to counter avoidance, or both.[7] In other words, public policy required the adoption of a new approach in response to sophisticated tax avoidance schemes.

Initially, the courts saw *Ramsay* as a new approach to tax avoidance schemes. It was as if the courts had moved the defenders up the field in order to make the tax payer's shot into the net an offside goal. In *Burmah Oil*, Lord Diplock stated 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 in the approach adopted by this House in its judicial role to a pre-ordained series of transactions … into which there are inserted steps which

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[5] [1982] AC 300.
[6] [1982] AC 300, 324.
[7] [1982] AC 300, 326.

have no commercial purpose apart from the avoidance of a liability to tax" which in the absence of those particular steps would have been payable.[8]

As is well known, in *Furniss v Dawson*,[9] the House of Lords extended the Ramsay principle from "circular" schemes, where as a result of a series of operations which were in aggregate self-cancelling the relevant asset ended back up with the taxpayer, to "linear" cases where the asset ended up elsewhere. The House held that the correct approach to tax-savings schemes, in which there was a pre-ordained series of transactions or a single composite transaction, was to disregard steps that had been inserted which had no business purpose other than to avoid a liability to tax.[10] Lord Bridge went further, drawing a distinction between the substance and the form of a composite transaction.[11]

In 1989 the House of Lords, in *Craven v White*,[12] sought to explain the boundaries of what was then seen as the Ramsay principle, which was designed to counteract tax avoidance schemes. The majority held that in the context of a composite linear transaction it had to be shown (i) that, at the time an intermediate transaction was being entered into, the series of transactions was pre-ordained in order to produce a given result, (ii) that the intermediate transaction had no other purpose than tax mitigation, (iii) that at that time there was no practical likelihood that the pre-planned events would not take place in the pre-ordained order , so that the intermediate transaction was not even contemplated practically as having an independent life, and (iv) that the

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[8] *IRC v Burmah Oil Co Ltd* 1982 SC (HL) 114; [1982] STC 30; 54 TC 200.
[9] [1984] AC 474.
[10] [1984] AC 474, 527C-E.
[11] [1984] AC 474, 517C-D.
[12] [1989] AC 398

pre-ordained events did in fact take place.[13] While there is mention in the speeches in *Craven v White* of the idea that the Ramsay principle was a principle of statutory construction,[14] it was seen as a special approach to undermine sophisticated tax avoidance schemes. As Lord Goff of Chieveley put it:

> "It would be naïve in the extreme to imagine that that principle is not concerned with the outlawing of unacceptable tax avoidance. It plainly is. But it would be equally mistaken to regard the principle as in any sense a moral principle, or having any foundation in morality. It plainly is not."[15]

He went on to say that the courts had established that certain tax avoidance schemes, although not shams, were nevertheless unacceptable because they contained transactions which were not "real" disposals or generate "real" losses or gains. Lord Templeman, characteristically, put the principle which emerged from the authorities and, in particular from *Ramsay*, *Burmah Oil* and *Furniss v Dawson*, more starkly. He stated:

> "The principle is that an artificial tax avoidance scheme does not alter the incidence of tax".

This idea that there was a special judge-made rule to counter tax avoidance schemes, had its critics who regarded the judges as going beyond the bounds of their constitutional remit by legislating and would have awarded them a yellow card.[16] Indeed, there are those who would award a second yellow card to the judiciary now for similar reasons, notwithstanding the shift in

[13] Ibid 514F-G, per Lord Oliver of Aylmerton.
[14] Eg 479E-F per Lord Keith, 503F-G per Lord Oliver, 520C per Lord Goff, and 535B per Lord Jauncey.
[15] Ibid 519E.
[16] See for example R T Bartlett [1985] BTR 338.

judicial understanding of the basis on which the courts approach tax avoidance schemes.[17] I turn now to that shift.

In 2001 in *MacNiven*, Lord Hoffmann, with characteristic originality, presented the innovation in *Ramsay* as a specific technique of statutory construction. The overarching principle of statutory construction was to ascertain what Parliament meant by using the language of the statute. The innovation in *Ramsay* was to give the relevant statutory words a commercial meaning, treating words like "disposal" and "loss" as commercial concepts which were not necessarily confined by the categories of juristic analysis.[18]

But the classic statement of the current approach to the interpretation of tax statutes, which is not confined to but extends to the context of tax avoidance schemes, is found in 2004 in *Barclays Mercantile Business Finance Ltd v Mawson*.[19] In that case Lord Nicholls of Birkenhead drew on the analysis of Lord Steyn in the 1998 case of *IRC v McGuckian*,[20] in stating the modern approach to the interpretation of taxing statutes. In so doing he responded to the request of Graham Aaronson, the taxpayers' counsel, who on behalf of the profession had invited the House of Lords to give definitive guidance on the principles of construction applied in the *Ramsay* case because the courts' repeated attempts at clarification of that issue had simply raised further doubts and encouraged more appeals.

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[17] See for example, Rebecca Murray, "Tax Avoidance" (3rd ed 2016), paras 1.012 and 1.015-1.016, in which she criticises both the initial *Ramsay* principle and the later analysis of the approach of the court to statutory construction in the *UBS* case, which I discuss below.
[18] *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311, [ ].
[19] [2005] 1 AC 684.
[20] [1997] 1 WLR 991, 999.

First, the modern approach to statutory construction is, he said, "to have regard to the purpose of the particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose".[21] Tax avoidance schemes had flourished because of two features, namely the literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately. The significance of the Ramsay case was that it had "liberated the construction of revenue statutes from being both literal and blinkered".[22]

Secondly, the new approach involved giving a statutory provision "a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve the overall effect of a number of elements intended to operate together) answered to the statutory description.[23] As I shall seek to show, this second proposition featured significantly in the *Rangers* case.

Thirdly, against the background of this approach, Lord Nicholls explained the cases, such as *IRC v Burmah Oil*, *Furniss v Dawson* and *Carreras Group v Stamp Commissioner*,[24] where the court appeared to disregard elements inserted into a transaction without any commercial purpose. They did not establish a general rule that in interpreting any taxing statute the courts were to disregard transactions or elements of transactions which had no commercial purpose. Rather, in each case the court had looked at the overall effect of a composite transaction and, on the true construction of the relevant statutory provisions, had decided that those commercially purposeless elements had no significance.[25]

[21] [2005] 1 AC 684, para 28.
[22] Ibid para 29.
[23] Ibid para 32.
[24] [2004] STC 1377.
[25] Ibid paras 35 & 36.

There were therefore two steps in the application of any statutory provision. The court had to decide first "on a purposive construction, exactly what transaction will answer to the statutory description" and, secondly, "whether the transaction in question does so".[26]

In 2016 the Supreme Court addressed the jurisprudence underlying the *Ramsay* approach in *UBS AG v HMRC*,[27] when it considered tax avoidance schemes which involved composite transactions and which were designed to avoid payment of income tax on bankers' bonuses. In that case Lord Reed wrote the judgment of the court, in which between paras 61 and 71 he elegantly and skilfully analysed the case law. From his exposition I think one may derive three important points:

First, the *Ramsay* case did not develop a special rule for tax avoidance schemes; instead it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law.

Secondly, *Ramsay* established that the analysis of the facts depended upon the purposive construction of the statute. Thus in that case it was held that the words "loss" or "gain" used in CGT legislation referred to losses and gains which had a commercial reality.

Thirdly, while the new approach, which was clarified in the *Barclays Mercantile* case, was not a special rule for tax avoidance cases, that approach had proved particularly important in such

[26] Ibid para 36.
[27] [2016] 1 WLR 1005.

cases because of two factors. First, tax is generally imposed by reference to economic activities or transactions which exist in the real world; and, secondly, tax avoidance schemes often include elements which have been inserted without any business purpose but which are intended to remove the transaction from the scope of the tax charge. Thus where on a purposive construction of the relevant tax provision the charge is imposed on "real world transactions with real world effects", the court is likely to disregard for fiscal purposes intermediate transactions inserted solely to avoid tax, and decide that the composite transaction falls within the tax charge.

But, as Lord Reed emphasised, that is not always the case. The court must construe the particular taxing provision and some provisions confer relief from taxation even when the relevant transaction forms part of a wider arrangement undertaken solely in order to obtain the relief. He pointed out that the decisions in *MacNiven* and *Barclays Mercantile* were examples of such cases.

Lord Reed also referred to another case, *IRC v Scottish Provident Institution*,[28] for the proposition that where a statutory provision, which allowed a loss for tax purposes, was properly construed as being concerned with a real and practical entitlement to an asset (in that case gilts), it did not apply to a legal entitlement which was intended and expected to be cancelled by an equal and opposite obligation, even if there was a risk that the arrangement might not work as intended. The case established that the insertion into an arrangement of a commercially irrelevant contingency to create an acceptable risk that the scheme might not work as planned was ineffective as "an anti-Ramsay device" because the court considered the composite effect of the

[28] [2004] 1 WLR 3172, para 23.

scheme as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.

It was against the background of those developments in our tax law that the Supreme Court earlier this year came to consider the Rangers case, *RFC 2012 Plc (in liquidation) v Advocate General for Scotland*.[29]

Rangers along with certain other companies in the Murray group adopted a marketed tax avoidance scheme which involved the redirection of highly-paid employees' earnings into a remuneration trust in order to reduce their liability for income tax and national insurance contributions. The scheme operated in this way: the employing company made a cash payment to the remuneration trust in respect of an employee and recommended to the trustees of the remuneration trust to resettle the sum on a sub-trust. The employing company asked that the income and capital of the sub-trust be applied in accordance with the wishes of the employee. The remuneration trust trustees had a discretion whether to comply with those requests but without exception, they did so. In total 108 sub-trusts were created including 81 for Rangers employees, who were either footballers or executives. The appeal which was argued in the Supreme Court concerned only the sums which Rangers paid into the remuneration trust.

That the remuneration trust was aptly named was clear from the way in which Rangers negotiated some of the contracts between it and its footballers. The negotiations would focus on the sum net of tax which would be made available to the footballer. A senior executive of Rangers would explain to the footballer or his agent how the trust and sub-trust would work.

[29] [2017] 1 WLR 2767; 2017 SLT 799; [2017] UKSC 45.

He would explain that the footballer would receive a loan of the sum paid into the sub-trust, which would be larger than the payment net of tax if he were to be paid wholly on the payroll and face deductions through PAYE.

The loan was repayable after 10 years on a discounted basis. In other words the employee would not pay the annual interest on the loan but it would be accrued and become repayable with the principal sum at the date of repayment. Both Rangers and the footballer expected that the loan would not be repaid at the 10-year term but would be extended or renewed. The senior executive explained to the footballer or his agent that the arrangement had the additional tax advantage that the loans would be repayable out of the footballer's estate on his death, and so would reduce his estate for the purposes of inheritance tax. The senior executive also explained that the footballer would be appointed "protector" of the sub-trust and would thus have powers to change both the trustee and also the beneficiaries of the sub-trust.

The footballer was given a standardised letter of wishes to sign, in which he asked that the income and capital of the sub-trust be held and applied according to his wishes and that on his death the trust fund be held for a specified member of his family. The footballer in all but one case also signed a loan application, requesting that the trustee of the sub-trust lend the trust fund to him. Rangers passed the letter of wishes and the loan application to the trustee of the remuneration trust when requesting the establishment of each sub-trust. Thus if, as was envisaged, the loans remained outstanding at the date of death of the footballer, his surviving family would receive the repaid loans and accrued interest from his estate without a charge to inheritance tax.

While the trust did not confer an absolute beneficial right to the trust funds on the employee himself, there was a mechanism available by which the footballer could bring the sub-trust to an end and obtain ownership of the sub-trust funds. The footballer as protector of the trust had power also to replace himself with someone else as protector. The replacement protector could then without any self-dealing alter the beneficiaries of the trust by nominating the player as the beneficiary and in cooperation with the trustee bring both the loan and the sub-trust to an end. There was evidence before the First-tier Tribunal that suggested that several foreign players on leaving the United Kingdom on completion of their contracts may have used such devices to gain absolute control over the funds of their sub-trust.

While the loans carried a commercial rate of interest, the practice of lending the entire trust fund to the footballer without taking security from him in order to protect the trust fund was perhaps surprising. When the regulator of the trustee, the Jersey Financial Services Commission, raised questions as to whether the loans were on commercial terms, the trustee started to request security and delayed giving the loans. The trustee's belated caution resulted in its being replaced by a trustee who adopted a more lax attitude.

On recruitment of the footballer, Rangers created two contracts to record the terms of his engagement. The first was a contract of employment which set out his terms and his remuneration which would be paid subject to the deduction of PAYE and national insurance contributions. The second was a side letter in which a senior executive undertook that Rangers would, firstly, recommend to the trustee of the remuneration trust that a sub-trust be created for the footballer's family and, secondly, fund the trustee of the remuneration trust to enable the sub-trust to be created.

Rangers disclosed the contracts of employment to the Scottish Football Association but did not disclose the side-letters. There was also evidence that Rangers did not disclose the side-letters to HMRC.

Rangers also used the same trust mechanisms to make termination payments and to pay guaranteed bonuses. Other companies in the Murray group used such mechanisms to pay discretionary annual bonuses to senior executives.

After learning of the arrangements, HMRC assessed Rangers and the other employing companies to income tax and NICs on the sums paid into the trusts. They appealed against those assessments. The First-tier Tribunal, while recognising that the scheme was an aggressive tax-avoidance scheme, held that it was effective in avoiding liability to income tax and NICs. By majority the FTT held that the steps of the scheme were not shams and that the employees received only a loan of the moneys which the employing companies had paid to the trusts. Dr Heidi Poon wrote a powerful dissent and made further findings of fact, which were not adopted by the majority. The Upper Tribunal found no error in the majority's decision and dismissed HMRC's appeal. But when HMRC appealed to the Inner House of the Court of Session, they succeeded. The Inner House, in a judgment written by Lord Drummond Young, held that income which was derived from an employee's work as an employee was an "emolument", or in more modern statutory language, "earnings" and was assessable to income tax, even although the employee requests or agrees that the income be redirected to a third party such as a trustee.

Rangers appealed to the Supreme Court. They argued that it was not sufficient that the payment of money arose from the performance of the duties of an employment. Unless the employee

had had a right to receive the money and had redirected its payment to a third party, the money could not be treated as his earnings. It was argued that the employee had never had the right to receive the money paid into the trusts and that he had received only a loan from the trustee of the relevant sub-trust. That loan did not fall within the PAYE system and accordingly the assessments were bad.

The Supreme Court in a unanimous judgment dismissed the appeal, essentially for the reasons which the Inner House had articulated.

The central issue in the appeal was whether it was necessary that the employee should receive, or at least be entitled to receive, the remuneration for his work in order for the reward to amount to taxable earnings.

The court adopted a purposive interpretation of the relevant provisions of the tax legislation. Because of the timing of the payments, the court had to consider the provisions of the Taxes Act 1988 and also those of the Income Tax (Earnings and Pensions) Act 2003. For the sake of simplicity and looking to the future, I will refer only to the provisions of the latter statute, because whatever was an emolument under the Taxes Act was earnings under the ITEPA.

The issue in this appeal differed from some of the earlier appeals. We were not concerned with circular schemes or linear schemes in which steps which had no commercial justification had been inserted in an attempt to exclude the payments from the scope of the taxing provision. The focus instead was on the payment of money as remuneration and its receipt by the trustee. What happened to the money once it became an asset of a sub-trust was not the principal issue.

The question was whether the recipient of the remuneration had to be the employee, unless he voluntarily redirected his entitlement to another person. The fatal flaw, or own goal, of the scheme was the assumption that the answer to that question was "yes".

As is well known, the Court answered the question in the negative. The legislation, both in the statute and in subordinate legislation did not require that the employee have an entitlement to receive the money paid as a reward for his work as an employee. The case law on which the taxpayers had relied was not addressing that issue and did not limit the meaning of the statutory words.

The building blocks of the Supreme Court's reasoning were as follows. First, and this was not in dispute, what was taxable as income tax is the remuneration or reward for services: *Brumby v Milner*[30] vouches that proposition. Secondly, section 13 of the ITEPA provides that the taxable person is "the person to whose employment the earnings relate", not the recipient of the money. Thirdly, the only relevant restriction on earnings in primary legislation which specifies a particular recipient is section 62(2)(b) of the ITEPA which speaks of a gratuity or incidental benefit "obtained by the employee". But the court was not concerned with gratuities or incidental benefits. Fourthly, while the current PAYE Regulations speak of making "a relevant payment to an employee" other provisions in the regulations allow for receipt by an "other payee"[31] and treat such other payees as employees.[32] Fifthly, looking at the legislation purposively, the Court could detect nothing to support the view for which Rangers argued. I said:

[30] [1976] 1 WLR 29, 35; [1976] 1 WLR 1096, 1098-1099.
[31] Income Tax (Pay As You Earn) regulations 2003 (2003/2682), reg 2.
[32] Ibid. reg 12.

> "[I]f an employee enters into a contract or contracts with an employer which provide that he will receive a salary of £X and that as part of his remuneration the employer will also pay £Y to the employee's spouse or aunt Agatha, I can ascertain no statutory purpose for taxing the former and not the latter. … Both sums involve the payment of remuneration for the employee's work as an employee."[33]

The debate before the Supreme Court and in the hearings below had involved considering cases such as *Tennant v Smith*, which was the case about the bank manager occupying bank premises in Montrose, *Abbott v Philbin*, which concerned an option to purchase shares, and *Heaton v Bell*, which concerned a car loan scheme. But those cases, which concerned the question whether the benefit was money or money's worth and so was a taxable perquisite, focussed on the source or nature of the right which the employee received. These cases have now been put into statutory wording in section 62(2)(b) of the ITEPA. They were not concerned with the identity of the recipient.

The court repeated the warnings about the importance of having regard to the words of the statute and of not building arguments based on judicial glosses, which the House of Lords emphasised in the classic income tax cases of *Hochstrasser v Mayes*[34] and in *Laidler v Perry*.[35] In this case, a gloss or interpretation which Walton J placed on the word "payment" in the PAYE system in *Garforth v Newsmith Stainless Ltd*,[36] which was practical and sensible in the circumstances of that case, had been erected by the Special Commissioners in later case, *Sempra Metals*,[37] into a

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[33] *RFC 2012 Plc v HMRC*, para 39.
[34] [1960] AC 376, 391.
[35] [1966] AC 16, 30.
[36] [1979] 1 WLR 409.
[37] *Sempra Metals Ltd v HMRC* [2008] STC (SCD) 1062.

principle that payment is made for the purposes of PAYE only if the money is paid to or at least placed unreservedly at the disposal of the employee. The Supreme Court stated that *Sempra Metals* had been wrongly decided.

The Supreme Court stated that as a general rule the charge to tax on employment income extended to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party. The court recognised exceptions to the rule, being the taxation of gratuities etc under the ITEPA, which I have mentioned already, the use of money by the employer to give a benefit in kind which is not earnings, and an arrangement by which the employer's payment of money to a third party gives the intended recipient, whether employee or another third party, only a contingent interest, as in the case of *Edwards v Roberts*.[38] It is not appropriate that I address in this lecture the scope of those exceptions beyond what has been said in the judgment.

The *RFC 2012* judgment is in my view consistent with the more recent case law on the interpretation of taxing statutes. In addition to considering the purpose of the taxing provisions, the court also adopted the approach of Lord Nicholls in *Scottish Provident Institution*[39] in discounting the chance that the trustee of the remuneration trust might not have agreed to set up the sub-trust or that the trustee of the sub-trust (which was the same company) might not have made the loan. I stated:

> "The footballers, when accepting the offer of higher net remuneration through the trust scheme which the side letters envisaged, were prepared to take the risk that the scheme

[38] (1935) 19 TC 618.
[39] [2004] 1 WLR 3172, para 23.

> might not operate as planned. The fact that the risk existed does not alter the nature of the payment to the trustee of the Principal Trust".[40]

I hope that this has assisted you by setting the RFC 2012 judgment in its context within the developing case law on the interpretation of taxing statutes. The modern judicial approach, the adoption of which was articulated clearly in the *Barclays Mercantile* case,[41] combined with the enactment of GAAR, the General Anti-Abuse Rule, has created a difficult environment for the taxpayer to litigate to uphold the effectiveness of a tax avoidance scheme. In August 2017 Accountancy Age recorded that HMRC had won 22 out of 26 tax avoidance cases in 2016/17 and that they had won 23 out of 26 in 2015/16, without having to rely on GAAR. Researches of case law on tax avoidance schemes in the current tax year, which my judicial assistant, Ewan McCaig conducted for me, suggest that HMRC have continued to have substantial success in persuading courts and tribunals that many tax avoidance schemes fail to achieve their objectives.

The tendency is not confined to these shores, if Advocate General Bobek's opinion in the CJEU case *Cussens and others v Brosnan (Case C-251/16)*[42] which concerned application of the VAT anti-abuse principle established in *Halifax* reflects a trend. In *Halifax*,[43] it was established that for an abusive practice to exist, the practice had to result in a tax advantage that was contrary to the purpose of the Sixth VAT Directive (77/388) which, viewed objectively, had the essential aim of obtaining a tax advantage.[44]

[40] Para 65.
[41] [2005] 1 AC 684.
[42] EU:C:2017:648.
[43] *Halifax plc v CCE* (Case C-255/02), [2006] ECR I – 01609, EU:C: 2006:121.
[44] The principles in *Halifax* were applied by the UK Supreme Court in *HMRC V Pendragon plc* [2015] UKSC 37.

In *Cussens,* no VAT was payable in Irish domestic tax legislation on sales of 15 Irish holiday homes because VAT was only payable on an earlier disposal by way of long lease by the owner to a related undertaking. No national measure in Irish law gave effect to the *Halifax* principle and the transactions had taken place before the Court's decision in *Halifax*. But the Advocate General in *Cussens* found that this did not restrict the application of *Halifax*. The Advocate General, having observed that "tax authorities do not fall in love easily", noted in his opinion that the *Halifax* judgment "appears to have been embraced with a passion by tax authorities across the member states."[45]

The Court of Justice of the European Union in its judgment of 22 November 2017,[46] reached the same view: the prohibition of abusive practices was a principle of a general and comprehensive character which could be relied on to deprive a taxpayer of a tax advantage in the absence of any provision of domestic tax law which provided for such a refusal and notwithstanding that the transaction in question preceded the *Halifax* judgment.[47]

I end with a question: does this approach by our European cousins represent the *Zeitgeist*?

Thank you.

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[45] Para 1.
[46] EU:C:2017:881.
[47] Paras 31, 41 and ruling at para 42.