welcome readjustment of the FCC's position, which effectively removes one of the major sources of conflict between the FCC and the ECJ. Despite this clarification, at least two problems remain: first, the order did not discuss the scope of the second exception enunciated in *Maastricht*, namely the FCC's alleged competence to review *ultra vires* acts of EC organs. Secondly, on a conceptual level, some may find it difficult to accept that the FCC continues to assert a "reserve competence" over secondary EC legislation. However, it should be said that after the decision in the *Bananas* case, this important conceptual problem is unlikely to become relevant in practice.

CHRISTIAN J. TAMS

THE TAX AVOIDANCE ROLLERCOASTER: YET ANOTHER NEW APPROACH

OVER the last 20 years judicial attitudes to tax avoidance schemes have varied dramatically, especially in the House of Lords. The judicial power to ignore tax avoidance schemes was first recognised in *Ramsay* [1982] A.C. 300 and reached its high-point of principled analysis in *Furniss* v. *Dawson* [1984] A.C. 474. There followed a period of a generally restrictive interpretation of the law, but recently there have been signs of a more interventionist approach, in *McGuckian* [1997] 1 W.L.R. 991 especially. But with the most recent decision in *Macniven* v. *Westmoreland Investments Ltd.* [2001] 2 W.L.R. 377 it is clear that the House of Lords has again sought to curtail its power to deal with tax avoidance schemes.

In *Macniven* a pension fund lent money to a company which the company used to repay interest it owed to the pension fund. The reason for this transaction was that, since the payment of interest constituted a charge on income (within section 338 of the Income and Corporation Taxes Act 1988) which is an allowable deduction in computing profits or losses for the purposes of corporation tax liability, payment of the interest would make the company more attractive to any prospective purchaser. The company paid the pension fund an amount net of tax and accounted to the Revenue for the tax due on the payment. Since the pension fund was exempt from tax liability it sought to reclaim the tax which had been deducted. This was the cause of the dispute in this case, for, if the tax could be recovered, it followed that the company and the pension fund were in exactly the same position as they started, save that the company now had the tax benefit of the charge on income.

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At first sight it would seem that this transaction was caught by the strict application of the *Ramsay* principle, as Lords Nicholls and Hope acknowledged. The parties had entered into a circular pre-ordained transaction into which steps had been inserted for no commercial purpose other than to save tax. But all the judges accepted that the scheme was effective and that the courts could not interfere with it.

Whilst Lord Nicholls bravely sought to justify his decision with reference to the "*Ramsay* aid to construction", as he called it, Lord Hoffmann, with whom all the other members of the House agreed, created a new approach for dealing with tax avoidance schemes, although he purported to do so within the constraints of the existing authorities. The essence of this new approach involves drawing a fundamental distinction between commercial and legal concepts in statutory provisions. Certain concepts may be construed in a broad commercial sense, which means that they should be given a commercial meaning. Legal concepts, however, are confined to their strict legal meaning and are to be interpreted without regard to their commercial context. So, for example, in *Ramsay* itself the crucial issue concerned whether the taxpayer had suffered a loss. Since, as Lord Hoffmann recognised, this could be characterised as a commercial concept, it was possible to consider whether, as a matter of commercial reality, the taxpayer had truly suffered a loss. Since this was not the case, the scheme was not effective. In *Macniven*, however, the crucial question was whether the company had really paid interest to the pension fund. The concept of payment is a legal one and, since the effect in law of the payment was to discharge an actual debt relating to interest, it followed that the interest had indeed been paid and so the scheme was effective. Although the scheme did involve the replacement of one debt for another, the new debt was distinct and so did not undermine the legal validity of the payment of interest.

Two key questions need to be asked concerning the application of this new approach. First, how is it possible to distinguish between legal and commercial concepts? Lord Hoffmann suggested that the proper approach was to ask whether a commercial person would be able to define the concept or would refer the matter to a lawyer. But surely this is too uncertain, particularly in the context of taxation. Why, for example, should it follow that "loss" is treated as a commercial concept whereas "payment" is legal? Also, what is the reason for treating the concept of "disposal", the key word in *Furniss* v. *Dawson*, as a commercial concept, save that such a characterisation meant that the result of the earlier case could be defended? How will other key concepts be characterised? What

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about "distributions" for example? Presumably business people could define such a concept without resorting to a lawyer, whereas lawyers know that the legal definition of distribution is a matter of some complexity. To complicate matters even more, Lord Hoffmann accepted that particular concepts may be characterised in different ways depending upon their statutory context.

Secondly, what is the status of the *Ramsay* principle now? Whilst all the judges sought to emphasise that *Ramsay* does not create any legal principle as such but simply provides an aid to statutory construction, it is clear that the decision as it had been interpreted in subsequent cases did more than this since particular tests involving pre-ordained schemes and commercial purposes had been identified to determine whether a scheme was effective to avoid tax. But, as Lord Hoffmann recognised, these tests can only now be considered where particular concepts are given a commercial meaning. Even then, the *Ramsay* "approach" cannot be applied rigidly but is simply an aid to construction of the statute. Paradoxically, even though the House of Lords purported to reject the *Ramsay* principle, it has created a new principle which is founded on the fundamental distinction between legal and commercial concepts.

Lord Hoffmann's apparent motive for this new approach is laudable. He has sought to reconcile the judicial approach to tax avoidance with constitutional considerations of the appropriate role of Parliament and the courts in tax affairs, by minimising the situations where the courts will intervene, and so to create certainty in a notoriously uncertain area of the law. In fact, he has achieved the opposite effect. We are left with a situation where the efficacy of any tax avoidance scheme turns on the inherently vague distinction between legal and commercial concepts. The judiciary have not been given any adequate guidance as to how this distinction can be drawn and so they will act very much like Humpty Dumpty, for whom words meant what he chose them to mean. The only matter about which we can now be sure is that there is no longer a question of whether we will ever have a General Anti-Avoidance Provision in this country, but when.

GRAHAM VIRGO

ELECTION LATEST

DEPENDING on your point of view, the appeal in *Cerberus Software Ltd.* v. *Rowley* [2001] I.R.L.R. 160 involved either a "troublesome

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