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Scientific Statutory Interpretation and the Franco Scheme

It is remarkable when an enactment considerately intended to avoid a double charge to tax is successfully used by the taxpayer to avoid even a single charge to tax. It is even more remarkable when the court confirms the success of this manoeuvre without offering a word of criticism. Yet such has been the history of the device (one is tempted to say dodge, or even trick) known to CTT avoidance specialists as the newspaper Franco scheme.

The case in question is *Inland Revenue Commissioners v Trustees of Sir John Aird's Settlement*.* {[1982] 2 All ER 929. The decision is awaiting an appeal by the Inland Revenue to the Court of Appeal.} This turned on the meaning of para 6(7) of Schedule 5 to the Finance Act 1975, which was mainly intended to avoid a double charge to capital transfer tax (CTT) in the case of survivorship clauses in wills. The charge to tax was stated not to apply to a person who took (as from the death of the decedent) on surviving the decedent for a specified period. Unfortunately the draftsman omitted to specify that the relief was to be contingent on the existence of a prior CTT charge on the decedent himself.

This omission left the door wide open for tax avoidance. Para 6(7) applied to settlements generally. On a literal construction of it, all that was needed was for trustees to frame a disposition (say an appointment under a discretionary trust) by reference to someone who was known to be at the point of death. He need have no connection with the settlement.

At this time General Franco was on his deathbed. Trustees flocked to write his name into their instruments. His dying was protracted, and this caused inconvenience to some of those intended to benefit by this device. Variants were then thought up. The one used by the Aird Trustees was known as the newspaper Franco scheme. No identified deathbed was required for this. The scheme was simply linked to the deaths column in some newspaper.

In *Aird* the person identified by reference to the deaths column turned out to be a Major Bisgood. He had of course no connection whatever with the Aird trustees, the settlement, the trust property or the possible beneficiaries. He was a total stranger to those who used his death to save them tax.

The Inland Revenue appealed to the Chancery Division against a decision of the Special Commissioners quashing a determination that CTT was payable in the Aird case notwithstanding para 6(7). The Inland Revenue had earlier accepted as a general proposition the efficacy of the original General Franco scheme. They restricted their argument in *Aird* to the question of whether in the newspaper variant there was a genuine contingency.

Nourse J dismissed the Inland Revenue's appeal. The learned judge expressed neither surprise nor concern at a blatant and tasteless avoidance of tax. Could more substantial arguments have been advanced by the Inland Revenue? To answer that question it is proposed to make use of a technique of statutory interpretation which, though it builds on existing methods, is, it is submitted, more scientific. It may be called by the clumsy but nevertheless accurate name of *interpretation by selective comminution and interstitial articulation*.

Comminution and articulation

The following is a summary of this new technique of statutory interpretation, as it would be employed in

any litigation which concerned the interpretation of an enactment. It is shown as applied by one side in the litigation, but the idea is that the other side would use it too, and that the results would be presented to the court in argument. In preparing the case it would be desirable for each side to work out its opponent's likely treatment as well as its own, so as to be prepared. The full nature of the technique will become apparent below, where it is applied to the details of *Aird*.

(1) Prepare a brief outline of the material facts. (If these are in dispute, apply the technique separately in relation to each version.)

(2) Break up the wording of each relevant enactment into its grammatical components. (This process is called *comminution*, from the Latin *comminuere*, to reduce into smaller parts.)

(3) Put the wording together again omitting components that have no relevance to the point at issue in your case. (This is *selective* comminution, and simplifies the argument by removing irrelevant material.)

(4) Work out the construction of the selective comminution that produces the result sought by your side. This involves *articulating* the meaning that you allege lies within the interstices of the express words. It yields a *reconstructed version* of the enactments. (This will be a version the draftsman of the Act might have produced if, on the point at issue in your case, he had decided to express the full meaning rather than leaving part of it to be implied.)

(5) Work out the factors (respectively described as 'positive' and 'negative' factors) which, in the light of the usual interpretative criteria adopted by the courts, tell for or against your reconstructed version.

(6) Prepare arguments by which you can seek to persuade the court of the correctness of your reconstructed version, by convincing it that the positive factors outweigh the negative factors..

*Outline of material facts in Aird**
{*Footnote* In what follows the parties are respectively referred to as 'the Inland Revenue' and 'the Aird Trustees'.}

1. Under a deed of appointment executed on 28 November 1975 by the Aird Trustees, Sir George John Aird, if he survived a 'designated person' (as defined in paragraph 2 of this outline) by one day, became entitled as from the death of the designated person to the 'appointed property' (as defined in pararaph 3 of this outline).

2. The deed of appointment defined the 'designated person' as the person whose death occurred on 29 November 1975 and who was first (in alphabetical order) of the persons dying on that date to be named in the Deaths column on the back page of the earliest edition of *The Times* published in London on 1 December 1975. (If there should be no such person a similar provision was to apply as respects *The Daily Telegraph*.)

3. The 'appointed property' was an interest in possession in part of the property comprised in the settlement, being a part in which no interest in possession subsisted at any material time prior to the time at which Sir George John Aird fell to become entitled under the appointment.

4. The terms of the definition of 'designated person' made it highly probable that some person would turn out to be identified by it, and that he would be a total stranger to everyone concerned with the settlement. This duly happened, the identified decedent being a Major Bisgood. Sir George John Aird duly survived Major Bisgood by the necessary day and took the appointed property.

Selective comminution of Aird enactments

1. CTT shall be charged on a capital distribution which falls within paragraph 2 of this restatement and is not excluded by paragraph 3.* {Finance Act 1975 ss 1(1) and 21; Schedule 5 para 6.}

2. Where a person becomes entitled to an interest in possession in any part of the property comprised in a settlement at a time when no interest in possession subsists in that part, a capital distribution shall be treated as being made out of that part; and the amount of the distribution shall be taken to be equal to the value at that time of that part.* {Finance Act 1975, Schedule 5 para 6(2).}

3. Paragraph 2 of this restatement shall not be taken to apply in the case of a person who, on surviving another person for a specified period, becomes entitled to an interest in possession as from the other person's death.* {Finance Act 1975, Schedule 5 para 6(7).}

Opposing constructions of the selective comminution

The Inland Revenue's version If the Inland Revenue are to succeed they must convince the court that, in relation to facts such as arose in *Aird*, the literal meaning of the enactment included as paragraph 3 of the above restatement is subject to a modification. An articulation of a possible modification appears at the end of the following reconstructed version of paragraph 3 (the modification being the addition of the italicised words)-

'3. Paragraph 2 of this restatement shall not be taken to apply in the case of a person who, on surviving another person for a specified period, becomes entitled to an interest in possession as from the other person's death *in a part of the property comprised in a settlement, being a part an interest in which formed the subject of a chargeable transfer on that person's death*.'*
{A 'chargeable transfer' is one that attracts CTT: Finance Act 1975 s 20(5).

The Aird Trustees' version From the point of view of the Aird Trustees, the actual wording of the enactments is acceptable without the addition of any further term. The gift was within paragraph 2 but on a literal construction fell within the exclusion laid down by paragraph 3, since Sir George John Aird was a person who, on surviving Major Bisgood for the specified period of one day, became entitled to an interest in possession as from Major Bisgood's death.

While the Aird Trustees may well be satisfied to rely on the literal meaning of the enactments as they stand, this can be fortified by a declaratory provision corrresponding to the words added in the Inland Revenue's version. The Trustees' version would then run as follows-

'3. Paragraph 2 of this restatement shall not be taken to apply in the case of a person who, on surviving another person for a specified period, becomes entitled to an interest in possession as from the other person's death in a part of the property comprised in a settlement, *whether or not* being a part an interest in which formed the subject of a chargeable transfer on that person's death.'

The question for the court is which of these versions of paragraph 3 should, in the light of the relevant interpretative criteria, be regarded as expressing the intention of Parliament. As paragraph 3 corresponds to Finance Act 1975, Schedule 5, para 6(7), it is referred to in the following discussion simply as 'para 6(7)'.

Positive and negative factors in Aird

The positive and negative interpretative factors in relation to the Aird Trustees' reconstruction of para 6(7) respectively correspond to the negative and positive factors in relation to the Inland Revenue's reconstruction. The following discussion is carried on from the Inland Revenue viewpoint.

Negative factors The possible negative factors in relation to the Inland Revenue version are: (1) the Aird Trustees' construction is the literal construction; (2) taxing Acts are to be construed strictly; (3) the Inland Revenue had previously accepted the validity of the General Franco scheme.

Positive factors The possible positive factors in relation to the Inland Revenue version are: (1) The purpose of the Finance Act 1975 was clearly to impose CTT in relation to appointments such as arose in this case; (2) it is the court's duty to construe the Act *ut res magis valeat quam pereat*; (3) the mischief at which para 6(7) is directed does not cover cases excluded by the added final words in the Inland Revenue's reconstruction of para 6(7); (4) the newspaper Franco device constitutes a fraud on the Act.

The factors will now be examined in detail.

Negative factor (1): literal construction

Prima facie, the meaning intended by Parliament is taken to be that which corresponds to the literal meaning. As Lord Selborne LC said: 'there is always some presumption in favour of the more simple and literal interpretation of the words of the statute...'* [**Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114, at p 121.] Lord Parker CJ said that 'the intention of Parliament must be deduced from the language used'.* [*Capper v Baldwin* [1965] 2 QB 53 at p 61.]

As with any other legal presumption, that in favour of the literal meaning may be departed from for sufficient cause. Mere speculation however will not justify departure from the literal meaning. Lord Haldane LC expressed this principle in *Lumsden v IRC* [[1914] AC 877 at p 892.]-

'But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used, if they be literally interpreted, is no sufficient reason for departing from the literal construction.'

Speculation being insufficient, it follows that there must be *real doubt* before the question of possible departure from the literal meaning will be entertained by the court. The doubt, in other words, must be substantial and not merely conjectural or fanciful.

Lord Cave LC put the matter in this way: 'no form of words has ever yet been framed ... with regard to which some ingenious counsel could not suggest a difficulty'. [*Pratt v South Eastern Rly* [1897] 1 QB 718 at p 721.] Lord Diplock expressed it by saying that where the meaning is plain and unambiguous 'it is not for the judges to invent fancied ambiguities...' [*Duport Steels v Sirs* [1980] 1 All ER 529 at p 541.] To similar effect was the remark by Lord Simonds that if a judge 'forms his own clear judgment and does not think that the words are "fairly and equally open to divers meanings" he is not entitled to say that there is an ambiguity'. [*Kirkness v John Hudson & Co Ltd* [1955] AC 696, at p 712.]

Negative factor (2): taxing Acts to be construed strictly

It is sometimes said that taxing acts are to be construed, if there is doubt, in favour of the taxpayer. In a famous dictum Rowlatt J said of taxing Acts: 'Nothing is to be read in, nothing is to be implied'. [*Cape Brandy Syndicate v IRC* [1921] 1 KB 64 at p 71.] To the like effect Parke B said-

'It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words.'
[*Re Micklethwait* (1855) 11 Ex. 452 at p 456. See also *Craies on Statute Law* (7th edn, 1971) 112-5.]

Yet in more recent times it has been recognised by the courts that under modern conditions a great part of the national life depends upon money raised by taxation. It is in the public interest therefore that the tax revenue should be sustained. ['With regard to taxation ... it is interesting to contrast the old attitude that

taxation is an interference with the wealth of individuals and that evasions should be benevolently regarded with the modern attitude that takes account of the social need for taxation' - Dias *Jurisprudence* (4th edn, 1976) 273.]
Furthermore it is in the interests of justice that the tax burden should not be increased for the generality of citizens by unjustified avoidance on the part of a minority wealthy enough to employ expert advisers. Viscount Simon LC pointed out in *Latilla v IRC* [[1943] AC 377.] that, while tax dodgers might be within their legal rights,

'...that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is of course to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres.' [P 381.]

It needs also to be remembered that para 6(7), the doubtful provision in *Aird*, is not a taxing enactment but a relieving enactment. The doubt concerns whether the relief is wide enough to include wholly undeserving cases. There can hardly be any *presumption* that it is.

Negative factor (3): previous acceptance of schemes

Nourse J referred to the fact that counsel for the Inland Revenue had informed him in the course of the hearing that-

'the Revenue have accepted that the simple General Franco scheme was within para 6(7); also an intermediate type of scheme where the appointed interest was made contingent on surviving the first to die of a medium- sized identifiable class, e g the members of either or both Houses of Parliament'. [P 937.]

If this acceptance were legally binding, and created some kind of estoppel for future cases, it would prevent the Inland Revenue from basing an argument in the further appeal on purposive construction - or indeed any ground common to the earlier types of scheme. However there can be no doubt that it is not binding. The Inland Revenue have no power to legislate, and cannot of their own accord alter the true meaning of a statute. [See *Vestey v IRC* [1979] 3 All ER 976, *per* Lord Wilberforce at pp 984-6. Cf *Customs and Excise Commissioners v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 All ER 501.] It is submitted that the coorect assesment of this factor is that at most it amounts to a mistaken view of the law taken in the course of administering the Act. Tax law cannot be administered without the taking of a view by the authorities on doubtful points. If the Inland Revenue at any time reach the conclusion that such a ruling is wrong in law it is their duty to reverse it. They cannot be treated as in any way bound by it in future cases. {It may be argued that this in any case is not a true interpretative factor, since it arose after Parliament had expressed its intention by the passing of the Act. This is too restrictive. An Act may be interpreted in the light of events subsequent to its passing, for example the making of rules or regulations (see, e g, *Leung v Garbett* [1980] 2 All ER 436; *R v Uxbridge JJ, ex p Commissioner of Police of the Metropolis* [1981] 3 All ER 129).}

Positive factor (1): the purpose of the Finance Act 1975

The CTT provisions are contained in Part III of the Finance Act 1975. The long title of the Act is of no help in establishing purpose, since it is in common form.

CTT was newly introduced by the Finance Act 1975. By repealing the estate duty provisions, the Act makes it clear that the new tax is intended to replace estate duty. A press release issued by the Inland Revenue on 8 April 1975 explained that the basic concept of CTT was to charge tax on gratuitous transfers of value made during a person's lifetime and on property left at death. A chargeable transfer is defined as

any disposition by which the value of the donor's estate is lessened; and the amount by which it is lessened is treated as the value of the transfer for tax purposes. [Finance Act 1975 s 20.]

Special provisions are made for different types of transfer. The case of settlements is dealt with by provisions clearly designed to achieve in relation to them the general result mentioned above. [Finance Act 1975, s 21 and Schedule 5.] The object of the Act is plainly to charge all transfers of a value above the threshold figure at the specified rate. Only for substantial reasons are any exceptions allowed for. This is only what one would expect.

Positive factor (2): ut res magis valeat quam pereat

It is a rule of law that an Act is to be construed so that its provisions are given force and effect rather than rendered nugatory-

'...if very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively require it, it is the duty of the Court to prefer such a construction that *res majis [sic] valeat, quam pereat*.'
[*The Beta* (1865) III Moore 23, *per* Dr Lushington at p 25. For an example of the application of this principle in a tax case see *Whitney v IRC* [1926] AC 37.]

Positive factor (3): mischief to which para 6(7) is directed

The 'mischief' with which a particular enactment is concerned may have only an indirect connection with the main purpose of the Act in which the enactment is contained. For example in *Wills v Bowley* [[1982] 2 All ER 654.], where the House of Lords declined to give a literal construction to an enactment even though this would have favoured persons accused of crime, a question arose as to the nature and extent of the power of arrest conferred in relation to offences created by the Act. Lord Bridge referred to 'the mischief which Parliament, by conferring the power of arrest in flagrante delicto, intended to cure...' [P 680.]

We see that the concept of the 'mischief' does not only relate to the defect in the existing law which an Act sets out to remedy. It also may relate to an aspect of the remedy itself. Here a particular enactment, such as para 6(7), may have its own 'mischief'. In the case of para 6(7) the mischief is on the face of it likely to be an application of the CTT charging provisions in a way thought by Parliament to be undesirable. Before attempting to identify the 'para 6(7) mischief' more precisely however, we need to understand the significance of this mischief from the viwpoint of interpreting para 6(7).

The resolution in *Heydon's Case* [(1584) 3 Co Rep 7a.] gives the clue. The court is to presume Parliament intended by para 6(7) to *suppress* the limited mischief to which it was directed. It is further to presume that Parliament did not intend to apply a remedy going wider than was necessary for this purpose. [For an example of a case where the court inferred a restriction on these grounds see *Re Coventry (deceased)* [1979] 2 All ER 408.] Such presumptions as to Parliament's intention may help the interpreter where the wording is obscure. The importance of correctly identifying the mischief goes further than this however. We cannot even be sure whether the wording *is* obscure unless we read it with the mischief in mind.
The court does not decide whether or not a doubt exists as to the meaning of an enactment until it has first discerned and considered such matters as may illumine the text and make clear the meaning intended by Parliament in the factual situation of the instant case. This was recognised by Lord Blackburn in his famous judgment in *River Wear Commissioners v Adamson*. [(1877) 2 App Cas 743.] After pointing out that in all cases the object of interpretation is to see what is the intention expressed by the words used, Lord Blackburn adds-

'But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.' [Pp

575-6.]

It is important to notice that *two* decisions are contemplated and not, as is usually supposed, one only. It is not simply a matter of deciding what doubtful words mean. It must first be decided whether or not the words *are* doubtful. As Lord Upjohn said, 'you must look at all the admissible surrounding circumstances before starting to construe the Act'. [*R v Schildkamp* [1971] AC 1, at p 23.]

What then is the precise nature of the para 6(7) mischief? Let us look again at the unreconstructed words, putting in the letters X and Y for the two persons referred to:

> "Sub-paragraph (2) above [paragraph 2 in our restatement] shall not be taken to apply in the case of a person ('X') who, on surviving another person ('Y') for a specified period, becomes entitled to an interest in possession as from Y's death."

This suggests a reference to a *commorientes* clause as used in wills. If X and Y were husband and wife intending to leave their property to each othre, they might each have included such a clause in their respective wills, perhaps naming an interval of one month. Then if say they were killed together in an air crash all their property would not pass to the relatives of the younger (who would be deemed to die last). Without paragraph 6(7) (and disregarding CTT concessions to spouses) there might be double taxation in such cases. Is not this the obvious paragraph 6(7) mischief?

One might assent with more confidence if it were not the fact that a *commorientes* clause does not necessarily provide for the survivor to take as from the other's death. It may equally provide for the survivor to take at the end of the qualifying period. Despite this difficulty, research shows that paragraph 6(7) was indeed inserted to prevent double taxation in the case of *commorientes* clauses, though MPs doubted whether it would be altogether effective.{See Commons *Hansard* Standing Committee A 19 February 1975 cols 1825-1829; 1974-75 Vol. 888 cols 162-177 (Report stage).}

In a press release published after royal assent the Inland Revenue confirmed this. The press release, dated 20 November 1975, is published in a textbook on the Act.{Hallett and Warren, *Settlements, Wills and Capital Transfer Tax* 188.} This textbook also includes the text of a letter sent by the Inland Revenue to a legal journal.{*Ibid.*, p 187.} This letter confirms the purpose of paragraph 6(7) and also announces an extra-statutory concession widening its effect so as to obviate the need for the survivor's interest to date back. While the court would not normally permit *Hansard* to be cited, there seems no reason why the textbook should not be.

With this in mind, let us look again at the reconstructed version of paragraph 6(7) that favours the Inland Revenue. We see that the added words do indeed give effect to the intention of Parliament to avoid a double charge to tax:

> "3. Paragraph 2 the decedent's death in a part of the property comprised in a settlement, being a part of a+of this restatement shall not be taken to apply in the case of a person who, on surviving another person ('the decedent') for a specified period, becomes entitled to an interest in possession as from the decedent's death *in a part of the property comprised in a settlement, being part of an interest in which formed the subject of a chargeable transfer on the decedent's death*."

Positive factor (4): a fraud on the Act

The courts have held that a construction is to be preferred that prevents evasion of the intention evinced by Parliament to provide an effective remedy for the mischief against which the enactment is directed.

Attempts to evade statutory requirements go back to the earliest times. Indeed the early statutes were themselves often enacted to remedy evasions of the common law. These became frequent once its machinery had become fixed. The Year Books are full of cases where legal process was abused for

purposes of fraud or unconscionable delay. Plucknett suggests that these abuses 'gave a strong impetus to the movement for a written statutory law'. [*Statutes & their Interpretation in the First Half of the Fourteenth Century* 166.] He goes on-

'At first, perhaps, it was thought that precise, written, legislation would remove the evil, but the event proved the contrary. No sooner was a statute made, than we find reported in the Year Books numerous ingenious attempts to evade or circumvent the Act. Originally, perhaps, the result of legal chicanery, the new written and published statutes themselves rapidly became the cause of further artifice, and the battle of wits between the legislature and the smart litigant has continued until our own day.' [Ibid.]

So prevalent was evasion that we find a general injunction against it entered on the Statute Roll-

'And every man...shall keep and observe the aforesaid ordinances and statutes...without addition, or fraud, by covin, evasion, art or contrivance, or by interpretation of the words.'
[10 Edw 3 st 3 (1336).]

Part of the resolution in *Heydon's Case* [(1584) 3 Co Rep 7a at p 7b.] stressed that 'the office of all the Judges is always to make such construction as shall...suppress subtle inventions and evasions for continuance of the mischief...*pro privato commodo* (for private advantage)'. [See also *Magdalen College Case* (1616) 11 Co Rep 66b.]

As Blackstone put it, the law will not suffer itself to be trifled with by evasions. [kerr Bl (4th edn, 1876) iv 232.] Or as Abbott CJ said, it is a well-known principle of law that the provisions of an Act of Parliament 'shall not be evaded by shift or contrivance'. [*Fox v Bishop of Chester* (1824) 2 B & C 635, at p 655.] *Quando aliquid prohibetur fieri, prohibitur ex directo et per obliquum* (what is prohibited, is prohibited whether done directly or indirectly). [Co Litt 223.]

Judges have always set their faces against allowing anyone to drive a coach and horses through an Act. The judicial attitude remains the same today, as is illustrated in two cases on the Housing (Homeless Persons) Act 1977. [See *R v Ealing London Borough Council, ex p Sidhu* (1982) *The Times* 16 January and *Lambert v Ealing London Borough Council* [1982] 2 All ER 394.]

To prevent evasion, the court turns away from a construction that would allow the subject (a) to do what Parliament has indicated by the Act it considers mischievous or (b) to refrain from doing what Parliament has indicated it considers desirable.
Either of these constructions may qualify as what is termed a fraud on a statute. In various forms, this expression has been used by judges to describe attempts at the deliberate evasion of statutory requirements. Thus Lord Coleridge spoke of 'a fraud upon an Act of Parliament'. [*Ramsden v Lupton* (1873) LR 9 QB 17, at p 24.] Cockburn CJ said that

'...the courts, from the time of Lord Mansfield, held that if a trader, in contemplation of bankruptcy, with a view to evade the bankruptcy law, preferred a particular creditor to the detriment of the rest, such a preference was a fraud upon the law.'

[*Bills v Smith* (1865) 6 B & S 314, at p 319. See also *Ex p Mackay* (1878) LR 8 Ch 643. Lord Eldon referred to 'a fraud on the law or an insult to an Act of Parliament' (*Fox v Bishop of Chester* (1829) 1 Dow & Cl 416, at p 429.]

The lack of merit in tailor-made tax avoidance schemes has led the House of Lords to modify the well-known *Westminster* principle [*IRC v Duke of Westminster* [1935] All ER Rep 259.] by holding that even though each transaction in the scheme is 'genuine' and not a sham, if the sole object is tax avoidance this will not save it. This was laid down in *W T Ramsey Ltd v IRC* [[1981] 1 All ER 865.], where Lord Wilberforce said that, while a subject was to be taxed only on clear words, this did not confine the courts to literal construction. He went on-

'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...' [P 871.]

Lord Wilberforce went on to lay down the principle that the court should set its face against purely artificial tax-avoidance devices-

'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, inrelation to closely integrated situations, a step by step, dissecting, approach ... would be a denial rather than an affirmation of the true judicial process.' [P 873.]

Purposive construction

The argument relating to positive factor (3), namely the duty to counter the para 6(7) mischief, can be elaborated in the light of recent judicial development of the principles of statutory interpretation. A construction which promotes the remedy provided by Parliament to cure a mischief is now known as a purposive construction.

The purpose or object of Parliament in passing an Act (the legislative purpose) is to provide an appropriate *remedy* to serve as a cure for the *mischief* with which the Act deals. The legislative purpose of a particular enactment contained in the Act is to be arrived at accordingly. In particular, it is deemed to be to remedy the mischief to which that enactment is directed.

It is a rule of law (the purposive construction rule) that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act and the implications arising from those words, should aim to further every aspect of the legislative purpose.

A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose, or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose.

The concept of legislative purpose is not entirely straightforward. In statutory interpretation the unit of enquiry is usually a single proposition (an 'enactment'). As stated above, each enactment has its own limited purpose, to be understood within the larger purpose of the Act containing it. When judges speak of purposive construction in cases where the literal meaning is clear they usually mean to refer to a 'strained and purposive' construction. Thus we find Staughton J referring to 'the power of the courts to disregard the literal meani390;>3<and to give it a purposive construction'. [*A-G of New Zealand v Ortiz* [1982] 3 All ER 432 at p 442.] Lord Diplock speaks of 'competing approaches to the task of statutory construction - the literal and the purposive approach'. [*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at p 879.]

The entry into fashion of the term 'purposive construction' seems to have betokened a swing by the appellate courts away from literal construction. Lord Diplock said in 1975-
'If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.'
[*Carter v Bradbeer* [1975] 3 All ER 158, at p 161.]
The matter was summed up by Lord Diplock in *Jones v Wrotham Park Settled Estates* [[1979] 1 All ER

286, at p 289.]-

'...I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [[1971] AC 850.] provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed.'

[It seems that Lord Diplock's third point may be overstated. In *R v Schildkamp* [1971] AC 1 the House of Lords adopted a strained construction while expressly ruling out any need to formulate the missing words.]

It is often said by judges that taxing Acts are excluded from purposive construction. [See the comments above on negative factor (2).] It is submitted that such dicta are contrary to principle and cannot be relied on today. The paramount rule of construction is that the intention of Parliament must be implemented. [*A-G for Canada v Hallett & Carey Ltd* [1952] 427, *per* Lord Radcliffe at p 449.] That this principle applies to taxing Acts was stated by Lord Russell of Killowen CJ-

'I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or any other subject, *viz.* to give effect to the intention of the legislature...'
[*A-G v Carlton Bank* [1899] 2 QB 158 at p 164. See also *Lord Howard de Walden v IRC* [1942] 1 KB 389, *per* Lord Greene MR at pp 397-8.]

A modern case where the House of Lords gave a strained construction to a taxing Act is *Luke v IRC* [[1963] AC 557, where Lord Reid said-

'To apply the words literally is to defeat the obvious purpose of the legislation and produce awholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words.' [P 577.]

As Oliver LJ said very recently-

'Accepting ... that the subject is not to be taxed except by clear words, the words must, nevertheless, be construed in the context of the provisions in which they appear and of the intention patently discernible on the face of those provisions from the words used.'
[*Wicks v Firth (Inspector of Taxes)* [1982] 2 All ER 9, at p 17.]

Even without recourse to Hansard, it is manifest that Parliament, in enacting para 6(7), could not have intended capital transfers to escape the new tax simply by being tied to the deaths of total strangers who had nothing whatsoever to do with any of the parties or property concerned. The intention of Parliament is clear. Under the purposive construction rule as now applied by the courts there is a strong argument for saying that para 6(7) should have been given a purposive construction in *Aird*, and that the literal meaning should have been departed from.

Envoi

It should be noted for completeness that para 6(7) was found so defective and unsatisfactory that it was repealed and replaced by the Finance Act 1976, s 105. Its defective nature in one way renders it unsuitable as an illustration of the technique of interpretation by selective comminution and interstitial articulation. In`an another way however it is admirably suited, because the technique is not subject to exceptions in difficult cases. It is applicable in all cases, as any technique of statutory interpretation must be. The court can never say *non liquet* and refuse to find a meaning.

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