WHAT IS THE DOCTRINE OF FISCAL NULLITY? AN ATTEMPT TO RECONCILE THE HOUSE OF LORDS DECISIONS IN MACNIVEN V WESTMORELAND AND FURNISS V DAWSON

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Abstract

This paper examines the House of Lords decision in *Macniven v Westmoreland* and its impact on the doctrine of fiscal nullity, with emphasis on the judgment of Lord Hoffmann. It determines the conceptual basis of Lord Hoffmann’s judgment and argues that it is inconsistent with Lord Brightman’s formulation of the doctrine in the previous House of Lords judgment in *Furniss v Dawson*. The paper concludes with a brief comment about the potential impact of Lord Hoffmann’s judgment in New Zealand.

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Lord Hoffman’s statement in *Norglen Ltd v Reeds Raines Prudential Ltd* is here to stay, at least for a while. This has nothing to do with the importance or otherwise of the decision in *Norglen Ltd v Reeds Raines Prudential Ltd*, a case involving an application for legal aid that is bound itself to fall into obscurity. The statement is important because it evidences Lord Hoffman’s view of the conceptual basis and scope of the doctrine of fiscal nullity, which is found in his judgment in the latest House of Lords decision in *Macniven (Inspector of Taxes) v Westmoreland Investments Ltd* ("Westmoreland").

The decision in Westmoreland and in particular Lord Hoffman’s powerful judgment, is likely to generate a significant amount of discussion in the coming months, even years. Cynical observers are likely to classify Westmoreland as just another swing of the pendulum in judicial attitudes towards tax avoidance that have influenced the development of the doctrine of fiscal nullity during the last twenty years. However, Lord Hoffman’s judgment represents more than an example of the constant periodic change in attitude to tax avoidance schemes. It is the most comprehensive attempt to date to provide a conceptual framework for the
INTRODUCTION

If the question is whether a given transaction is such as to attract a statutory benefit...or burden, such as income tax, I do not think it promotes clarity of thought to use terms like stratagem or device. The question is simply whether upon its true construction the statute applies to the transaction. Tax avoidance schemes are perhaps the best example. They either work...or they do not. If they do not work, the reason is simply that, upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes. **There is no need for such spooky judisprudence.**

Lord Hoffmann's statement in *Norglen Ltd v Reeds Rains Prudential Ltd*[^1] is here to stay, at least for a while. This has nothing to do with the importance or otherwise of the decision in *Norglen Ltd v Reeds Rains Prudential Ltd*, a case involving an application for legal aid that is bound itself to fall into obscurity. The statement is important because it evidences Lord Hoffmann's view of the conceptual basis and scope of the doctrine of fiscal nullity, which is found in his judgment in the latest House of Lords decision in *Macniven (Inspector of Taxes) v Westmoreland Investments Ltd*[^3] ("Westmoreland").

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[^1]: *Norglen Ltd v Reeds Rains Prudential Ltd* [1997] 3 WLR 1177,1186 (HL) Lord Hoffmann.
[^3]: *Macniven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL/6 865 par 27 (HL).
operation of the doctrine of fiscal nullity that overcomes the criticisms of uncertainty and unconstitutionality which have belied its development.

The most controversial aspect of Westmoreland is likely to be the apparent ease with which Lord Hoffmann reconciles the previous fiscal nullity cases with his approach. Lord Hoffmann’s view of the doctrine of fiscal nullity appears to be a significant change from Lord Brightman’s formulation in Furniss v Dawson (“Furniss”). This paper focuses on interpreting Lord Hoffmann’s judgment and attempts to reconcile it with the decisions in Furniss and IRC v McGuckian (“McGuckian”). The conclusion is that while it may be possible to reconcile the decisions in Westmoreland and McGuckian (at least on their result), it is impossible to do the same in respect of Westmoreland and Furniss. The simple reason for this is that the approaches in Furniss and Westmoreland are fundamentally divergent.

The starting and ending point of this exercise is the statement above. It is important to note that when citing himself in Westmoreland, Lord Hoffmann omits the last sentence of the quotation. An explanation of why the omission is significant is inappropriate at this point. It is instead reserved for the conclusion, along with a brief comment addressing the potential impact of Lord Hoffmann’s judgment on the interpretation of section BG 1.

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4 John Tiley wryly observes that "The House was concerned to establish the legitimacy of the Ramsay approach, but this lay in its being one of statutory interpretation and application. This meant that Lord Hoffmann was simply explaining what judges had been doing for the last 20 years, whether or not those judges actually knew it. M. Jourdan's surprise at discovering he had been speaking prose springs easily to mind." See John Tiley "First Thoughts on Westmoreland" [2001] 3 BTR 153, 154.


7 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 par 62 (Lord Hoffmann).
II BACKGROUND

A The Problem

While it is difficult to define exhaustively what constitutes tax avoidance,\(^8\) it is even more challenging to draft effective legislation to prevent it. Attempts to draft provisions that are completely resistant to taxpayer abuse have generally been unsuccessful. There are several reasons: first, the practical need to restrict the volume of tax legislation, second, the ectopic nature of income tax law\(^9\) and third, the fact that tax legislation does not have only a revenue-raising function.\(^10\) Two features of the United Kingdom tax system exacerbate this problem. The first characteristic, applicable to all laws, is "[the] English tendency to think of law as formal rules rather than principles, and to insist on judicial restraint, relying more on Parliament than on the courts as the dominant source of law."\(^11\) This tendency finds its expression in a literal approach to statutory interpretation that focuses on the wording of particular statutory provisions and generally precludes the use of statutory purpose to interpret a statute, with some exceptions.\(^12\) The second feature is peculiar to the interpretation of tax statutes. It is alternately referred to as the Duke of Westminster

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\(^8\) It is generally agreed that tax avoidance arises where a taxpayer reduces a liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in that liability. IRC v Willoughby [1997] STC 995, 1003-1004, cited in John Tiley Revenue Law (4ed, Hart Publishing, Oxford, 2000) 86.

\(^9\) Income tax law is "ectopic" - that means, it is dislocated from its subject matter. This poses problems in combating tax avoidance. For an explanation of the ectopic nature of tax law and these problems, see John Prebble "Ectopia, Formalism and Anti - Avoidance Rules in Income Tax Law" in W Krawietz, N MacCormick and GH von Wright (eds) Prescriptive Formality and Normative Rationality in Modern Legal Systems, Festschrift for Robert S. Summers (Duncker and Humblot, Berlin, 1994) 367 - 383; John Prebble "Should Tax Legislation be Written from a Principles and Purpose Point of View or a Precise and Detailed Point of View?" [1998] 2 BTR 112.


\(^12\) There are three exceptions. The first is the "Golden Rule", which means that judges reject "absurd" literary meanings. In applying this Rule, judges will speculate about plausible legislative purposes. See F Bennion Statutory Interpretation (1984) 331-332. Second, judges recognise that the text may be unclear and that statutory purpose can be used to resolve doubts. Third, emphasis on the text is compatible with relying on the entire text rather than a few words. This expansive view of the relevant text calls attention to a type of statutory purpose, derived from the overall structure of the statutory test.
principle and the form over substance doctrine, and originates from Lord Tomlin’s dictum in the House of Lords decision in *IRC v Duke of Westminster*:13

... it is said that in Revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called the “substance of the matter”... Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds so as to secure this 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.

Lord Tomlin’s statement has traditionally been cited as an authority for the proposition that in applying the relevant taxing statute to a transaction, the Court must consider the form, and not the substance, of the transaction. Therefore, “a transaction which, on its true construction, is of a kind that would escape tax is not taxable on the ground that the same result could have been brought about by a transaction in another form which would attract tax.”14

### B The Development of the Doctrine of Fiscal Nullity15

Various solutions to the problem of tax avoidance have been suggested.16 An answer for some common law jurisdictions, such as New Zealand, has been to enact a general anti-avoidance rule. The United Kingdom has not yet enacted such a rule, although there is continuing debate about whether it should do so.17 Instead, initially in response to a proliferation of artificial

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13 *IRC v Duke of Westminster* [1936] AC 1, 19 (HL) Lord Tomlin.
15 This paper focuses on the key House of Lords decisions that it examines (*Furniss*, *McGuckian* and *Westmoreland*) and does not attempt an exhaustive exposition of the other fiscal nullity cases. For a good description of the development of the doctrine, see John Tiley *Revenue Law* (4ed, Hart Publishing, Oxford, 2000) Ch 4. There are also numerous articles in the British Tax Review that deal with individual decisions. Some of these articles are listed in the bibliography to this paper.
16 For a list of these solutions, see John Tiley *Revenue Law* (4ed, Hart Publishing, 2000, Oxford) 87-89.
17 For example, see IFS Tax Law Review Committee (TLRC) *Report on Avoidance* (November 1).
tax avoidance schemes in the 1970s,\textsuperscript{18} the House of Lords has taken an active approach in striking down artificial tax avoidance schemes during the last twenty years by developing and applying a common law anti-avoidance rule that has been termed the "doctrine of fiscal nullity."

The birth of the doctrine of fiscal nullity, initially referred to as “the principle in \textit{Ramsay}” and “the doctrine in \textit{Ramsay}”, occurred in \textit{WT Ramsay v Inland Revenue Commissioners} (“\textit{Ramsay}”).\textsuperscript{19} The principle was subsequently expanded in \textit{Commrs of Inland Revenue v Burmah Oil Co}\textsuperscript{20} and \textit{Furniss v Dawson} (“\textit{Furniss}”),\textsuperscript{21} where Lord Brightman laid down a formulation for the application of the doctrine. Although Lord Brightman’s formulation was applied in subsequent cases, the conceptual basis and scope of the doctrine have remained controversial. Some of the reasons for this controversy were explored in the judgment of the majority of the House of Lords in \textit{Craven (HMIT) v White} (“\textit{Craven v White}”).\textsuperscript{22}

Judgments in several of the recent fiscal nullity cases have purported to clarify its conceptual basis. In \textit{Craven v White}, Lord Oliver, who delivered the leading judgment for the majority, described the doctrine as “a principle of statutory construction”.\textsuperscript{23} In \textit{McGuickian}, Lord Steyn and Lord Cooke referred to doctrine as “an example of the purposive approach to construction”.\textsuperscript{24} Lord Hoffmann’s judgment in \textit{Westmoreland} supports Lord Cooke’s view of the conceptual basis of the doctrine.

\textsuperscript{19} \textit{WT Ramsay v Inland Revenue Commrs} [1982] AC 300, 332 (HL).
\textsuperscript{20} \textit{Commrs of Inland Revenue v Burmah Oil} [1982] TR 535 (HL).
\textsuperscript{21} \textit{Furniss (HMIT) v Dawson} [1984] AC 474, 486 (HL) Lord Brightman.
\textsuperscript{22} \textit{Craven (HMIT) v White} [1988] BTC 268, 285 (HL).
\textsuperscript{23} \textit{Craven (HMIT) v White} [1988] BTC 268,295 (HL) Lord Oliver.
\textsuperscript{24} \textit{IRC v McGuickian} [1997] 1 WLR 991,1005 (HL) Lord Cooke, 998 Lord Steyn.
Before embarking on an examination of Westmoreland and attempting to reconcile it with Furniss and McGuckian, it is appropriate to revisit these decisions.

A Ramsay - the Fountainhead

Ramsay involved a circular scheme, whose only purpose was the production of a tax advantage for the taxpayer. A number of transactions were executed in close succession. At the conclusion of the scheme, the taxpayer was in the same net financial position as he had been at the beginning, having established both an allowable capital loss and a tax exempt capital gain for the purposes of the legislation. The process is best described by Lord Wilberforce’s atom metaphor:25

In each case two assets appear, like “particles” in a gas chamber with opposite charges, one of which is used to create the loss, the other of which gives rise to an equivalent gain which prevents the taxpayer from supporting any real loss, and which gain is intended not to be taxable. Like the particles, these assets have a very short life. Having served their purpose they cancel each other out and disappear.

The House of Lords held that the capital loss did not fall within the definition of “loss” in the legislation.26 As a result, the taxpayer was not allowed to offset the loss against the gain

1 Significance of the decision

In his judgment, Lord Wilberforce listed several features of "schemes of this character" which one commentator describes as including the following:

1) That the scheme is to be carried out with model documents according to a timetable, so that the only differences between what one taxpayer does and what another taxpayer does are the figures and timings put in the pre-drafted documents.

2) That the scheme brings about no change in the financial position of the taxpayer, except that he pays a fee and expenses to the promoter.

3) That there is, at the least, an overriding intention that the scheme is to be carried through to the end.

4) That there is no "real money" involved in the transaction.

5) That the "whole and only purpose" of the scheme was the avoidance of tax.

The decision in Ramsay was the first successful attempt to strike down a wholly artificial tax scheme. Some commentators hailed the decision as signifying an end to all artificial retail tax avoidance schemes and perceived Lord Wilberforce's five features as a litmus test to be applied to all subsequent tax avoidance schemes.

This view is incorrect. Lord Wilberforce's list was simply a description of the typical scheme designed to avoid capital gains tax at that time (of which the scheme in Ramsay was an example). Lord Wilberforce

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29 Unsuccessful attempts were made in earlier cases; for example, in Floor v Davis [1980] AC 695 (HL) and IRC v Plummer [1979] AC 896 (HL).
30 For example, see David Goldberg "Mete wands: How Gold and Straight?" (1982) BTR 233.
31 Peter Millett notes that due to the property boom in the early 1970s, large profits were made, which in turn gave rise to liability for capital gains tax. Schemes such as the one in Ramsay were designed to create an artificial loss to set off against the already crystallised liability. Such schemes usually had two attributes - first, they had to give rise to a substantial loss for capital gains tax purposes, and
examined the meaning of the word "loss" as used in the legislation and concluded that an actual economic loss was necessary in order for the provision to apply. Given this interpretation, he held that there was no loss in accordance with the statutory provision, construing each transaction in the context of the others.

2 Form over substance, or substance over form?

Some commentators argue that Lord Wilberforce's judgment "exploded" the Duke of Westminster principle, because he applied the statutory provision to the net effect of the arrangement, and therefore examined its substance, rather than its form. This view is inconsistent with Lord Wilberforce's express statements and his approach. Counsel for the taxpayer had argued that, in accordance with the Duke of Westminster principle, the legal effect of each step in the arrangement had to be separately examined for the purpose of applying the statutory provisions. Lord Wilberforce rejected their reasoning on the grounds that:

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 from 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.

second, the loss had to be an "unreal" loss in commercial terms. See Peter Millett "A New Approach to Tax Avoidance Schemes" (1982) 98 LQR 209, 211-213.

32 "The capital gains tax...is a tax on gains...not a tax on arithmetical differences." WT Ramsay v Inland Revenue Commrs [1982] AC 300, 326 (HL) Lord Wilberforce.


34 For example, see Peter Millett "A New Approach to Tax Avoidance Schemes" (1982) 98 LQR 209,218. Millett argues that Lord Wilberforce accepted the Crown's contention that the individual transactions should be ignored and the only legal consequences are those that flowed from the series of transactions taken as an indivisible whole. See also H Monroe "Fiscal Finesse: Tax Avoidance and the Duke of Westminster" [1982] BTR 200.

Lord Wilberforce then stated that examining the steps of the arrangement as a whole did not involve looking at the “substance” of the arrangement, and thus breaching the Duke of Westminster principle. Did examining the effect of the composite scheme as a whole in fact involve looking at the substance, and not at the form, of the arrangement? It is misleading to suggest (as some have) that the statute was applied to the net effect of the arrangement by comparing the starting and ending result. All of the steps of the arrangement were given their full and independent legal effect. Lord Wilberforce simply construed each transaction in the context of the others in applying the legislation, and determined that:

The capital gains tax was created to operate in the real world, not that of make believe...To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function.

It is a well accepted principle of income tax law that when applying the statutory provisions to an arrangement, the courts are entitled to have regard to transactions in their context. Lord Wilberforce’s approach in Ramsay is also mirrored by his judgment in CIR v Europa Oil (NZ) Ltd, where he applied section 111 of the Land and Income Tax Act 1954 to the net effect of an arrangement containing a series of preordained steps.

B Furniss v Dawson

Unlike Ramsay, Furniss involved a linear transaction with enduring consequences and a clear commercial purpose. The taxpayer was potentially liable for capital gains tax on the sale of shares he owned in a

private family company to another company - Wood Bastow Holdings Ltd ("Wood Bastow"). To avoid paying capital gains tax, he entered into a scheme with two steps. First, he exchanged his shares for shares in a specially incorporated holding company - Greenjacket Investments Ltd ("Greenjacket"). Then, Greenjacket sold the shares to Wood Bastow. The transaction prima facie fell under a rollover provision (Paragraph 6 of Schedule 7 of the Finance Act 1965) which made the disposal of shares by one company in return for shares in another company non-taxable where the second company acquired control of the first company. On the technical wording of the provision, the taxpayer had made a "disposal" of his shares to Greenjacket in exchange for shares from Greenjacket. Had the scheme been successful, the taxpayer would have deferred his tax liability until he sold the shares in Greenjacket.

Lord Brightman delivered the leading judgment. He saw the principle developed in Ramsay as an "important new development."42 Later courts as have accepted his formulation of the doctrine of fiscal nullity as the authoritative test for its application:43

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 these 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 test requires the court to find as a fact that there is a pre-ordained series of transactions containing steps inserted without any commercial or business purpose apart from a tax advantage.44 The steps inserted purely to

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44 Furniss (HMIT) v Dawson [1984] AC 474, 527 (HL) Lord Brightman.
gain a tax advantage are ignored for the purpose of applying the statutory provision - in other words, they are treated as fiscally, a nullity. The "end result" is found by stripping the steps out of the transaction. The words of the statute are then interpreted and applied to the "end result".

Lord Brightman applied the test, ignoring the transfer of shares to Greenjacket, which he held was motivated solely by tax considerations. He found that the "end result" was a disposal by the taxpayer in favour of Wood Bastow (the ultimate purchaser). The statutory rollover provision clearly did not apply to the "end result".

C  IRC v McGuckian

McGuckian involved a tax avoidance scheme which was clearly caught under the approach in Furniss. The two shareholders of a company, Ballinamore, wished to avoid paying tax on dividends paid by the company. To achieve this objective, they sold their shares in Ballinamore to Shurltrust, a trustee company. The taxpayers were the beneficiaries of the trust. Shurltrust then assigned to another company, Mallardchoice, the right to any dividends paid by Ballinamore in return for a consideration which mirrored the dividend eventually distributed by Ballinamore that year. The consideration was then paid to one of the original shareholders of Ballinamore in the shareholder's capacity as a beneficiary of the trust. The issue was whether the amount received by Shurltrust for the assignment of the right to dividends was "income" of a non-resident for the purposes of section 478 of the Income and Corporation Taxes Act 1970. A payment received for the assignment of the right to receive dividends is usually treated as a capital receipt.

The House of Lords held that the assignment of the dividend income to Mallardchoice could be disregarded. The majority of the Law Lords

\[45\] Furniss (HMIT) v Dawson [1984] AC 474, 527 (HL) Lord Brightman.
\[46\] Furniss (HMIT) v Dawson [1984] AC 474, 528 (HL) Lord Brightman.
\[47\] Furniss (HMIT) v Dawson [1984] AC 474, 528 (HL) Lord Brightman.
applied the test in *Furniss* to reach that result. The true transaction was held to be the payment of a dividend by Ballinamore to its original shareholders, which fell within the definition of "income" in section 478.

The decision is most significant for the comments made by Lord Steyn and Lord Cooke, who attempted to justify the doctrine of fiscal nullity by describing it as a doctrine of statutory construction. Lord Steyn noted that:

> The principle was developed as a matter of statutory construction... The new development was 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...

Lord Cooke stated that, in his view, the basis of the doctrine lies in a purposive approach to statutory construction.

The principle which your Lordships have been developing...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.

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*Furniss (HMIT) v Dawson* [1984] AC 474, 527-528 (HL) Lord Brightman.


*IRC v McGuckian* [1997] 1 WLR 991, 1000 (HL) Lord Steyn.

III THE HOUSE OF LORDS JUDGMENT IN MACNIVEN v WESTMORELAND

A The Facts

Westmoreland involved a scheme entered into to set off a commercial loss. Westmoreland Investments Ltd ("WIL") was a property investment company owned by an approved superannuation scheme (the "scheme") which was exempt from income tax. In the 1970s, WIL made property investments financed by the scheme, which led to huge losses. After the final liquidation of its properties in 1988, WIL had no assets and a large indebtedness to the scheme, including $40 million in interest arrears.

As a loss company, WIL had some potential value on disposal due to its accrued interest liability. Under section 338(1) of the Income and Corporation Taxes Act 1988, “charges on income”, which include “payments of yearly interest” under section 338(3), may be set off against profits, and any unused excess may be carried forward. Crucially, under section 338, an interest debt only creates an allowable loss when it is actually paid. WIL entered into an arrangement to turn the interest arrears into an allowable loss. Under the arrangement (which was repeated several times), the scheme lent WIL money, which WIL used to immediately repay the interest, owed to the scheme. Tax was automatically deducted from the interest repayments. The trustees, as the trustees of a tax exempt superannuation scheme, reclaimed this tax from the Inland Revenue.

The Crown argued that the loans and payments had a purely tax avoidance purpose and should therefore be disregarded. Therefore, they did not fall within the term “payments of yearly interest” in section 338(3) and did not constitute “charges on income” under section 338(1).

53 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 27 (HL) Lord Hoffmann.
Crown also sought to rely upon several specific anti-avoidance provisions.54

B The Court of Appeal Judgment

The Court of Appeal held that the tax consequences of the arrangement were those argued for by the taxpayers. Peter Gibson LJ, who delivered the leading judgment, concluded that the arrangement was also motivated by a commercial objective because WIL achieved refinancing on more favourable terms. The fact that it could have been achieved by the terms of the existing loan did not mean it should be ignored.55 He held that the parties were entitled to adopt whichever course of action was more advantageous to them, although a tax consideration also influenced their choice.56 The fact that the scheme was able to reclaim the tax paid on the interest was irrelevant, given that was the advantage Parliament intended such schemes to have.57

C The House of Lords Judgment

The House of Lords upheld the decision of the Court of Appeal. Lord Hoffmann delivered the leading judgment containing the most detailed discussion of the doctrine of fiscal nullity. The most obvious principle that emerges from Lord Hoffmann’s decision is the distinction between the interpretation of legislative provisions based on economic concepts and those based on juristic concepts (the "legal/commercial concept distinction"). It forms part of a new formulation for analysing tax avoidance arrangements to determine whether they are caught by the fiscal nullity doctrine.

54 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 70 (HL) Lord Hoffmann.
55 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 65 (HL) Lord Hoffmann.
56 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 65 (HL) Lord Hoffmann.
57 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 65 (HL) Lord Hoffmann.
The new test is applied in the following manner. First, the statutory provision which results in a tax advantage on the face of the arrangement is analysed. If the court finds that the provision refers to a legal (or “juristie”) concept and the arrangement falls within the legal definition, the arrangement is not invalidated under the doctrine even if it has no business (or commercial) purpose.\(^5\) If it is held that the provision refers to a business or economic concept, the court examines the “business substance” of the arrangement in order to determine whether it comes within the statutory language. At this point, closely linked parts of a transaction can be aggregated.\(^5\) An arrangement whose “business substance” falls within the statutory language cannot be disregarded simply on the ground that it was entered into solely for tax reasons.\(^6\) The distinction was applied to the facts in the following way:\(^6\)

1) that construing the relevant legislation in its context, the question to be decided was whether there had been a payment; 2) that in the present context one had to distinguish terms which should be construed juristically from those which should be interpreted commercially; 3) that the term payment was to be construed juristically as opposed to commercially and 4) in this case the juristic meaning was that there was a payment if the legal obligation to pay interest had been discharged.

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\(^5\) ~ Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 58 (HL) Lord Hoffmann.

\(^5\) ~ Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 34/35/59 (HL) Lord Hoffmann.

\(^6\) The example Lord Hoffmann uses is that where a transaction produces capital in ordinary commercial sense of the word and has been structured to do so, it cannot be recharacterised. See Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 59/60 (HL) Lord Hoffmann.

IV WHAT WAS LORD HOFFMANN REALLY TRYING TO SAY?

A  The Crudity of the Legal/Commercial Concept Distinction

The most problematic aspect of Lord Hoffmann's approach is that the legal/commercial concept distinction seems very simplistic. This gives rise to a danger that later courts may apply the formulation literally. A blind application of the distinction could give rise to numerous problems. The most significant problem is the potential for greater uncertainty. One commentator has noted that there will be a “prolonged period of uncertainty” as judges decide which statutory provisions are to be construed with reference to business concepts, and which statutory provisions are to be construed with reference to commercial concepts. This argument is supported by the very nature of income tax legislation. Given that income tax law is ectopic a simple distinction between purely legal and purely commercial concepts may be difficult to draw. Thomas J also makes this criticism in his decision in *C of IR v BNZ Investments Ltd* (“BNZI”), noting that even income, the most fundamental concept in tax legislation, could be said to be imposed by reference to a legal concept or a commercial concept. The fact that much income tax legislation is now detailed and complex exacerbates this problem. This means that there may not be room for anything but a juristic approach to its interpretation.

B  A Purposive Approach to Statutory Interpretation

The answer is that in applying the distinction, Lord Hoffmann is merely reasoning by labels. What, then, is the real principle behind the decision?

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63 John Tiley “First Thoughts on Westmoreland” [2001] 3 BTR 153, 156.
64 *C of IR v BNZ Investments Ltd* (2001) 20 NZTC 17,103 (CA).
65 *C of IR v BNZ Investments Ltd* (2001) 20 NZTC 17,103, par 109 (CA) Thomas J.
1 Lord Hoffmann's approach

The starting point is to acknowledge that Lord Hoffmann's judgment is an attempt to justify the existence of the doctrine of fiscal nullity in terms of an existing legal and conceptual framework. Hence, as he embarks on his reasoning, Lord Hoffmann asserts that "everyone agrees that the Ramsay case is a principle of construction." Who "everyone" is, and whether everyone shares Lord Hoffmann's view of the conceptual basis of the doctrine, is uncertain. In the concluding sentence of the first paragraph of his reasoning, Lord Hoffmann (while dismissing the wide argument put forward for the Commissioner) emphasizes that "the courts have no constitutional authority to impose such an overlay upon the tax legislation and, as I hope to demonstrate, they have not attempted to do so." The remainder of his judgment focuses on demonstrating that the doctrine of fiscal nullity is a principle of statutory construction.

The use of the commercial/legal concept distinction, combined with Lord Hoffmann's express approval of the statements made by Lord Steyn and Lord Cooke in McGuckian, point towards the conclusion that he views the doctrine of fiscal nullity as an example of a rule-based approach to statutory interpretation, that relies primarily on the text. According to this approach, a provision that refers to a tax concept signifies that Parliament must have intended for taxpayers that fall within the literal words of the provision to be able to take advantage of it. This conclusion is also supported by Lord Hoffmann's statement in Norglen and his comment that the limitations of the doctrine of fiscal nullity "arise out of the paramount necessity of giving effect to the statutory language." He

66 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 865 par 28 (HL) Lord Hoffmann.
67 As will be proved later, "everyone" does not include the House of Lords in Furniss.
68 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 865 par 29 (HL) Lord Hoffmann.
69 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 865 par 51-59 (HL) Lord Hoffmann.
70 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 865 par 58 (HL) Lord Hoffmann.
expressly rejects the view that a tax avoidance purpose is relevant in construing the tax statute, stating that:71

Even if a statutory expression refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons...Likewise the use of business concepts like "income" and "capital" may give the taxpayer a choice of structuring a commercial transaction so as to come within one concept or the other...It follows that a transaction which, for the avoidance of tax, has been structured to produce, say, capital, and does produce capital in the ordinary commercial sense of that concept (unlike the payment in IRC v McGuckian) cannot be 'recharacterised' as producing income.

There is a move towards a rules - based purposive approach to statutory interpretation in law generally.72 Lord Hoffmann's approach in Westmoreland reflects his view that tax law should not be interpreted differently from any other laws.

2 Support in the other House of Lords judgments

Support for Lord Hoffmann's narrow, rules - based approach can be found in the speeches of some of the other Law Lords in Westmoreland. Lord Nicholls agrees with the comments of Lord Steyn in McGuckian that the doctrine of fiscal nullity "is an exemplification of the established

71 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 59-61 (HL)
Lord Hoffmann.
72 Lord Hoffmann's judgments in contract law cases exemplify the same approach to interpretation. For example, see Charter Reinsurance Co Ltd v Fagan [1997] AC 313 (HL).
purposive approach to the interpretation of statutes". He also expressly
endorses Lord Wilberforce's view in Ramsay that:

The need to consider a document or transaction in its proper context,
and the need to adopt a purposive approach when construing taxation
legislation, are principles of general application.

The only difference between the approaches of Lord Nicholls and Lord
Hoffmann in arises in the tests they apply. Lord Nicholls' test focuses on
determining the legal nature of the transaction before interpreting the
statutory language and applying it to the facts. Although Lord Nicholls'
formulation seems more logical, both approaches ought to lead to the same
results in a particular case, given Lord Hoffmann's statement that if a
statutory provision refers to a business concept, the court is entitled to
apply the provision to the composite transaction as a whole.

3 Is this what Lord Wilberforce intended in Ramsay?

Is Lord Wilberforce's judgment in Ramsay also an application of the
purposive approach to interpreting tax legislation? In Lord Hoffmann's
view, it clearly is:

The innovation in the Ramsay case was to give the statutory concepts of
"disposal" and "loss" a commercial meaning. The new principle of
construction was a recognition that the statutory language was intended to
refer to commercial concepts, so that in the case of a concept such as a
'disposal', the court was required to take a view of the facts which
transcended the juristic individuality of the various parts of a series of
preplanned transactions.

73 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 6 (HL)
Lord Nicholls.
74 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 8 (HL)
Lord Nicholls.
75 This approach makes more sense than Lord Hoffmann's "cart before the horse" approach.
76 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 32 (HL)
Lord Hoffmann.
This view is consistent with Lord Wilberforce’s decision. As noted in Part III, he examined the meaning of the word “loss” as used in the legislation and concluded that an actual economic loss was necessary in order for the provision to apply.\textsuperscript{77} He held that a loss that fell within the terms of the legislation had not occurred, because, looking at the step in the arrangement that gave rise to the loss in the context of the other arrangements, the loss that occurred was offset by an equivalent gain by a later step in the arrangement.\textsuperscript{78} He also rejected the argument of counsel for the taxpayer, who had argued that striking down the scheme would be tantamount to the creation of a judicial anti-avoidance principle, stating that his approach:\textsuperscript{79}

\begin{quote}
...does not introduce a new principle: it would be to apply to new and sophisticated devices the undoubted power and duty of the courts to determine their nature in law and to relate them to existing legislation.
\end{quote}

Coupled with his comments about the interpretation of what constitutes a "loss" for the purposes of capital gains tax, Lord Wilberforce’s statement strongly suggests that his judgment was an application of the purposive approach to statutory interpretation.

\section{V FORM OVER SUBSTANCE - LORD HOFFMANN’S APPROACH}

\subsection{A The Duke of Westminster Principle Survives}

Lord Hoffmann attempts to reconcile his formulation of the doctrine of fiscal nullity with the \textit{Duke of Westminster} principle. According to his test,

\begin{quote}
\textsuperscript{77} “The capital gains tax...is a tax on gains...not a tax on arithmetical differences.” \textit{WT Ramsay v Inland Revenue Commrs} [1982] AC 300, 326 (HL) Lord Wilberforce.
\textsuperscript{78} \textit{WT Ramsay v Inland Revenue Commrs} [1982] AC 300,326 (HL) Lord Wilberforce.
\textsuperscript{79} \textit{WT Ramsay v Inland Revenue Commrs} [1982] AC 300, 327 (HL) Lord Wilberforce.
\end{quote}
the “legal position” varies in accordance with the statutory concept that is applied. Hence:

...if the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business "substance" of the matter is not to ignore the legal position but to give effect to it.

Does this approach limit the application of the Duke of Westminster principle? The answer depends on how the Duke of Westminster principle is defined. Lord Hoffmann argues that it is impossible to view form and substance as abstract concepts, and to distinguish them without using a point of reference. Hence, "something may be real for one purpose but not for another". The appropriate point of reference for distinguishing between form and substance in tax cases (in the absence of a general anti-avoidance provision) is the statutory provision sought to be applied. If the statutory provision refers to a business concept, then it is appropriate to examine the "business substance" of the transaction.

Lord Hoffmann’s approach is not inconsistent with the Duke of Westminster principle, because the principle stands for the proposition that the taxpayer must be taxed by reference to what he or she has actually done - in other words, by the legal results of the transaction entered into by the taxpayer. Examining the business substance of a transaction is not synonymous with ignoring what the taxpayer has done. It is only a means of determining whether what the taxpayer has done falls within the statutory provision at issue, if the provision is based on a commercial concept. Put more simply, the distinction between form and substance is

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80 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 39 (HL) Lord Hoffmann.
81 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 40 (HL) Lord Hoffmann.
82 This is, for example, how John Tiley defines the Duke of Westminster principle. See John Tiley Revenue Law (4ed, Hart Publishing, Oxford, 2000) 93.
83 And Lord Hoffmann expressly confirms this, stating that "If the 'legal position' is that the tax is imposed by reference to a legally defined concept, such as stamp duty payable on a document which constitutes a conveyance on sale, the court cannot tax a transaction which uses no such document on the ground that it achieves the same economic effect". See Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 39 (HL) Lord Hoffmann.
a conclusion arising from the interpretation of the statutory provision at issue, not a test in itself.

Lord Hoffmann’s attempt to resolve the form/substance debate in a logical manner is very similar to Joseph Isenbergh’s view of the issue, which is contained in an article criticising the substance over form approach employed by the United States courts in examining tax avoidance arrangements. In Isenbergh’s view:

The most important inquiry at the threshold is whether a statutory provision draws its meaning from the terms of the statute itself or (and to what extent) from outside. When we are dealing with statutory terms of art, the form/substance dichotomy is a false one. “Substance” can only be derived from forms created by the statute itself. Here substance is form and little else... The harder problem is measuring transactions against statutory provisions that draw their content from life. The ultimate question here is what it is that taxpayers have actually done. This is a difficult sort of inquiry, which requires a grasp of transactions in their complete setting.

The distinction that Isenbergh makes between statutory terms of art and statutory provisions that draw their content from life mirrors Lord Hoffmann’s distinction between juristic concepts and business concepts. The last sentence of the above quotation encapsulates Lord Wilberforce’s approach in examining the composite transaction in Ramsay to ascertain whether a “loss” had occurred within the meaning of the capital gains tax legislation.

B  Can the Business Substance of a Transaction Differ from its "True Substance"?

Thomas J questions Lord Hoffmann’s use of the notion of business substance in his judgment in *BNZI*, noting that it may differ from the “true substance of a transaction”. He states that:

…the implication is that there may be a business substance to a transaction which may not reflect the tax avoidance effect of that transaction.

Thomas J’s criticism is not entirely justified. The true substance of a transaction may differ according to the statutory provision by reference to which a transaction is examined and whether the transaction is “real” for the purposes of that provision. When Thomas J talks about the true substance of the transaction, his point of reference is unclear. If he is examining the true substance of a transaction with reference to the intent of the particular statutory provision, then the business substance of the transaction must necessarily equate with its true substance. This is because, pursuant to Lord Hoffmann’s reasoning, if a provision does allow the taxpayer to manipulate it to his advantage, that is because Parliament intended that this should be the case. However, if Thomas J is referring to the true substance of the transaction intending to assess it against some wider, underlying fundamental principle of the income tax legislation in question, the business substance of the transaction may well not equate with its true substance.

Lord Hoffmann’s explanation of the *Duke of Westminster* principle as it applies to the doctrine of fiscal nullity is supported by the very nature of the doctrine of fiscal nullity as a common law anti-avoidance rule. The doctrine in not an express statutory anti-avoidance provision and must therefore be firmly based on statutory interpretation in order to be

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86C of IR v *BNZ Investments Ltd* (2001) 20 NZTC 17,103 (CA) par 111 Thomas J.
87C of IR v *BNZ Investments Ltd* (2001) 20 NZTC 17,103 (CA) par 111 Thomas J.
Looking at what Thomas J describes as the true substance of the transaction and asking if Parliament intended such particular transactions to be covered, involves looking for a deeper purpose in the income tax legislation and is only a legitimate exercise if this purpose is found in a statutory anti-avoidance provision.

Thomas J’s comment that the business substance of a transaction may differ from its tax avoidance effect is therefore correct. This is an inescapable conclusion given the conceptual foundation of the doctrine of fiscal nullity and the absence of a statutory general anti-avoidance provision.

VI RECONCILING Furniss AND WESTMORELAND

A Lord Hoffmann’s Attempt

On the surface, Lord Hoffmann’s approach is a cardinal change from Lord Brightman’s formulation in Furniss. Lord Hoffmann’s test involves determining how the relevant statutory provision is to be constructed, and then applying it to the arrangement. In contrast, under the test in Furniss, the arrangement is first recharacterised by removing steps motivated solely by a tax avoidance purpose before the statutory provision is interpreted and applied.

Yet, Lord Hoffmann reconciles the two approaches in his decision in Westmoreland. He states that the decision in Furniss was merely an application of commercial/legal concept distinction88 and describes Lord Brightman’s formulation in Furniss as "a statement of the consequences of giving a commercial construction to a fiscal concept." He notes that "if the statutory language is construed as referring to a commercial concept, then it follows that steps which have no commercial purpose but which

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88 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 48 (HL) Lord Hoffmann.
have been artificially inserted for tax purposes into a composite transaction will not affect the answer to the statutory question.\(^9\) Hence, in *Furniss*, the House of Lords had decided that the "relevant concept" was a commercial concept. While the question in *Ramsay* had been whether there was a disposal giving rise to a loss, the issue in *Furniss* was whether the disposal had been to one person rather than another. Greenjacket was an artificially introduced intermediate party, which was never intended to own the shares permanently. Commercially, therefore, the transaction was a transfer by the Dawsons to Wood Bastow in exchange for a payment to Greenjacket.\(^9\)

**B  Is Lord Hoffmann’s interpretation correct?**

This and the next Part conclude that Lord Hoffmann’s interpretation is incorrect. The alternative formulations of the doctrine of fiscal nullity in *Westmoreland* and *Furniss* cannot be reconciled, because they are based on fundamentally different approaches of the conceptual foundation and role of the doctrine. Contrary to Lord Hoffmann’s view, the result in *Furniss* is also inconsistent with his approach to the conceptual foundation and scope of the doctrine of fiscal nullity.

**C  Is the result in Furniss actually consistent with Lord Hoffmann’s formulation?**

The Law Lords in *Furniss* unanimously interpret the arrangement as involving a tripartite contract involving a disposal by the taxpayers of the shares to Wood Bastow in consideration of a sum of money paid to Greenjacket with the concurrence of the taxpayers.\(^9\) This is clearly a

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\(^8\) Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 49 (HL) Lord Hoffmann.

\(^9\) Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 48 (HL) Lord Hoffmann.

\(^9\) Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 46 (HL) Lord Hoffmann.

recharacterisation of the transaction because it ignores what the taxpayers actually did, and ignores its enduring legal consequences.

Is the recharacterisation consistent with Lord Hoffmann’s formulation of the doctrine of fiscal nullity? The two formulations would probably lead to different results on the facts of Furniss. In Furniss, the House of Lords held that there had been no "disposal" of the shares by the taxpayers to Greenjacket. However, this result cannot be reached without recharacterising the transaction as the House of Lords did in Furniss, because the taxpayers clearly did dispose of the shares to Greenjacket, at least according to the ordinary meaning of the word "disposal", which connotes passing the legal title to property to another person. It is difficult to envisage a commercial concept of disposal that is different from its ordinary meaning. Lord Nicholls’ comment in Westmoreland that the meaning of "payment" cannot vary according to the purpose for which the payment is made could aptly be described as determining what constitutes a "disposal".

The above analysis leads to the conclusion that Lord Hoffmann wrongly identified the issue in Furniss as being whether the disposal of shares was in favour of Wood Bastow and not in favour of Greenjacket. As John Tiley notes, this is the correct issue if the test in Furniss is used to analyse the arrangement. However, if Lord Hoffmann’s test was applied, there is clearly a disposal within the terms of the statute. The true issue would be whether the share exchange ever came within the relevant statutory provision - Paragraph 6 of Schedule 7 of the Finance Act 1965. Paragraph 6 provides exceptions from the general liability to tax in respect of capital gains accruing to a person on the disposal of assets which arises.

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94 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 14 (HL) Lord Nicholls.
95 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 46 (HL) Lord Hoffmann.
96 John Tiley “First Thoughts on Westmoreland” [2001] 3 BTR 153, 156.
out of section 19 of the Finance Act 1965. The relevant exception applies to the transfer of shares in a company to another company, which thereby acquires control of the shares of the transferor, in exchange for shares in the transferee company. Pursuant to Lord Hoffmann’s test in Macniven, the real issue may be whether Greenjacket ever acquired control of the shares in the private holding company. The answer would depend on the construction of the term “control” as it is used in the statutory provision, more exactly, whether it refers to a commercial concept or to a legal concept. Given that the Dawsons, who controlled the private holding company, also had total control over Greenjacket throughout, Greenjacket may never have acquired “control” within the meaning of the provision if the term “control” was held to refer to a commercial concept. A final answer to the question whether the arrangement falls within the statutory exception would also hinge on the interpretation of other terms in provision providing the statutory exception.

D Furniss is based on a lack of business purpose

The concept of "disposal" does not possess a commercial meaning over and above its ordinary, everyday meaning. Why, then, did Lord Brightman in Furniss hold that there had been no "disposal" by the taxpayers to Greenjacket within the meaning of the relevant statutory provision? The answer is simple: he applied the formulation that he propounded in Furniss. This formulation, according to Lord Hoffmann, is "a statement of the consequences of giving a commercial construction to a fiscal concept."97 Lord Hoffmann's statement is clearly incorrect because it is based on the incorrect assumption that "disposal" is a commercial concept.

The conclusion of the House of Lords in Furniss that the taxpayers did not dispose of their shares to Greenjacket was based on the fact that the disposal to Greenjacket had no commercial purpose other than the

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97 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 49 (HL) Lord Hoffmann.
avoidance of tax. Hence, it was disregarded and the statute was applied to the "end result." Alternatively, as Peter Millett argues: 98

It is a convenient, but potentially misleading, use of language to say that in *Furniss v Dawson* the House of Lords "disregarded" the first step in the transaction, i.e. the disposal to Greenjacket. They did not "disregard" it in the sense of treating it as if it never happened. They "disregarded" it because it was not the relevant transaction. The true analysis was that the taxpayer disposed of his shares to the ultimate purchasers, but by two steps instead of one; that the first step was not the relevant transaction but only part of it; that it had no commercial purpose; and accordingly did not come within the relevant statutory provision.

According to Millett's analysis, the House of Lords approach in *Furniss* can be justified as an approach to statutory construction which incorporates an implied requirement in the statutory provision at issue that in order come within its purview, a "disposal" must have some business purpose other than a tax avoidance purpose. Lord Brightman's formulation imbues every statutory provision with an implied business purpose requirement.

In order to really understand the conceptual basis of Lord Brightman's formulation, it is necessary to take a "world tour" through some of the common law doctrines that the United States courts have developed to combat tax avoidance. The next Part provides a brief overview of these doctrines and concludes that Lord Brightman's formulation in *Furniss* is a combination of several of these approaches.

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V THE BASIS OF FURNISS: AN AMALGAMATION OF UNITED STATES DOCTRINES

A Purposive Approach to Statutory Construction

The United States courts employ a broad purposive approach to statutory interpretation and are far more willing than English courts to speculate about statutory purpose to interpret a statute, without lingering too much on the constraints apparently imposed by the text. The marked difference between the British and United States courts’ approach to statutory interpretation is due to a number of factors.99 One reason for the divergence is that the United States Constitution forces courts to identify a statute’s purpose.100 In practice, the courts seldom refuse to consider extrinsic aids, regardless of whether the statutory language is plain or ambiguous.101 There are no formal restrictions on the material that may be taken into account in interpreting the statutory language.102 This approach is sometimes characterized by the maxim “Look at the Code only if the committee reports are unambiguous.”103

B Gregory v Helvering

The starting point of the United States courts’ attitude to tax avoidance is Learned Hand J’s judgment in the New York Court of Appeals in Gregory v Helvering,104 (“Gregory”) which was delivered in the same year as the House of Lords decision in Duke of Westminster. Gregory involved a transaction very similar to the arrangement in Furniss. The taxpayer

99 For a brief description of the differences that have led to the divergent approaches, see William Popkin “Judicial Anti-Avoidance Doctrine in England: A United States Perspective” (1991) BTR 283, 284-286.
owned shares, held by a wholly owned company, that had appreciated in value. If the taxpayer had simply disposed of the shares and realised a gain, she would have been liable to pay capital gains tax. In order to avoid paying tax, the taxpayer implemented a simple scheme. She formed another wholly owned company. The first company transferred some of its shares to the second company in return for shares in the second company. The second company then immediately sold the shares at their market value and thus realised the gain. The issue was whether the first step of the arrangement (the share exchange between the first and second company) was within the statutory exemption. Taken literally, the taxpayer's transaction was a tax-free corporate reorganization. The trial court held that "a statute so meticulously drafted must be interpreted as a literal expression of the taxing policy", and the second corporation was entitled to recognition, despite its transitory life as a vehicle to transfer the securities from the first corporation to its sole shareholder. 105

The Court of Appeals held that the transaction did not qualify as a "reorganization" when the purpose of the statutory definition of that term was taken into account. Judge Learned Hand (as he then was) stated that: 106

The purpose of the section is plain enough; men engaged in enterprises - industrial, commercial, financial, or any other - might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not to be considered as "realizing" any profit, because the collective interests still remained in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations."

105 Gregory v CIR (1932) 27 BTA 223,225.
106 Helvering v Gregory (1934) 69 F 2d 809, 811 (2d Cir) Judge Learned Hand.
The Supreme Court expressly endorsed this reasoning.107 Gregory can be seen as a case that turned on a wide, purposive approach to the interpretation of the term "reorganization".108 However, the language in Gregory has received a broader interpretation: it has spawned three doctrines that enable the courts to strike down tax avoidance arrangements.109 The doctrines have at times been described as uncertain and illogical.110 There are conflicting views about whether they should be introduced into United Kingdom law.111 The analysis of the doctrines below is substantially taken from Bittker's tax law commentary.112

C The United States Anti-Avoidance Doctrines

I The doctrine of form over substance

Learned Hand J once famously described the doctrine of substance over form as an anodyne for the pains of reasoning.113 The substance-over-form principle has, however, also been called "the cornerstone of sound taxation."114 The crux of the principle is that in deciding federal tax cases, the courts are usually willing to take account of the substance behind the form.115 Bittker notes that "unfortunately, it is almost impossible to distil...

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108 According to Joseph Isenbergh, this is questionable because "reorganisation" is a legal, not a commercial, concept. See Joseph Isenbergh "Musings on Form and Substance in Taxation" (1982) U Chi Law Rev 859, 868.
109 It is often cited in support of the business purpose and substance-over-form doctrines, but could be equally viewed as a step transaction case. Boris Bittker Federal Taxation of Income, Estates and Gifts (Warren, Gorham and Lamont, Boston, 1981) 4-22, 4-51 - 4-52.
111 John Tiley is against their introduction into UK law, "since both the intellectual structure of the United States tax system and the administrative structure that underpins it are very different from ours." See John Tiley "Judicial Anti-Avoidance Doctrines: The US Alternatives" (1987) BTR 180, 180. Peter Millett, on the other hand, describes the approach of the US courts as "perfectly respectable." See Peter Millett "Artificial Tax Avoidance: the English and American Approach" (1987) BTR 327,328.
113 Commissioner of Internal Revenue v Sansome (1932) 60 F 2d 931,933 (2d Cir).
114 Weinert's Estate v CIR (1961) 294 F 2d 750,755 (Sth Cir).
useful generalizations from the welter of substance-over-form cases.\textsuperscript{116}
An example of a decision based on the form over substance approach is 
\textit{Knetsch v United States},\textsuperscript{117} where the Supreme Court held that a 
transaction (the purchase of ten 30-year deferred annuity savings bonds, 
financed by a down payment and funds borrowed from the issuer against 
their cash surrender value) was a "sham", devoid of economic results, 
because "there was nothing in substance to be realized beyond a tax 
deduction."\textsuperscript{118} Eisenberg's criticisms of a wide doctrine of form over 
substance and Lord Hoffmann's approval of these criticisms, were noted 
earlier.\textsuperscript{119}

2 \textbf{The Business Purpose Doctrine}

The business purpose doctrine originated in \textit{Gregory}. Subsequent to 
\textit{Gregory}, it proliferated as an implied requirement of other statutory 
provisions\textsuperscript{120} and became an independent canon of construction reflecting 
the view that:\textsuperscript{121}

Tax cases can't be solved by an abstract, intellectual analysis of the 
language used in the statute, divorced from practical 
considerations...Tax is imposed, and exemptions from tax are granted 
by Congress in respect of commercial or financial transactions. The 
words of a taxing statute are therefore to be taken to refer only to 
transactions entered into for some commercial or financial purpose.

Under the doctrine, in certain circumstances the benefit of a business tax 
rule will be withheld if the taxpayer is unable to establish a business 
purpose for the transaction which, he claims, brings him within the rule. 
This can be widened to include the exclusion of any tax rule on the ground

\textsuperscript{116} Boris Bittker \textit{Federal Taxation of Income, Estates and Gifts} (Warren, Gorham and Lamont, Boston, 
1981) 4-37.
\textsuperscript{117} \textit{Knetsch v United States} (1960) 364 US 361.
\textsuperscript{118} \textit{Knetsch v United States} (1960) 364 US 361, 366.
\textsuperscript{119} See Part VA of this paper.
\textsuperscript{120} Boris Bittker \textit{Federal Taxation of Income, Estates and Gifts} (Warren, Gorham and Lamont, Boston, 
1981) 4-45.
\textsuperscript{121} Peter Millett "Artificial Tax Avoidance - The English and American Approach" (1987) BTR 327, 
331.
that there is no purpose to the transaction other than the attempt to save tax provided the facts show no alteration to the beneficial interests on the taxpayer. This formulation is usually credited to *Knetsch v US*. The Supreme Court in *Gregory* expressly rejected the idea that a tax advantage can be withheld solely because of the absence of a non-tax motive. Bittker notes that *Knetsch v US* comes close to saying in general terms that the absence of a non-tax motive may disentitle the taxpayer from a tax advantage.

3 The step transaction doctrine

The step transaction doctrine requires the interrelated steps of an integrated transaction to be taken as a whole rather than treated separately. A series of formally separate steps may be amalgamated and treated as a single transaction if they are in substance integrated, interdependent, and focused on a particular end result. There exists authority for linking several prearranged or contemplated steps, even in the absence of a contractual obligation or financial compulsion to follow them through.

Step transaction cases are usually concerned with whether a particular step with significant legal or business consequences should be treated as part of a larger single transaction. There are also cases in which particular steps in an integrated transaction are disregarded as transitory events, and

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123 "The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction on its face lies outside the plain intent of the statute," *Gregory v Helvering* (1935) 293 US 465, 470.
126 The test for applying the doctrine is "were the steps taken so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series?" *Manhattan Building Co v CIR* (1957) 27 TC 1032, 1042, citing *American Bantam Car Co v CIR* (1948) 11 TC 397, affirmed per curiam, (1949) 177 F 2d 513 (3d Cir).
the transaction is taxed as though the unnecessary step has not occurred.\textsuperscript{128} When the step transaction doctrine is employed to eliminate transitory or unnecessary steps, it overlaps and becomes almost indistinguishable from the business purpose doctrine (under which the unnecessary step is disregarded because lacking in business purpose) and the substance-over-form principle (nullifying the unnecessary step as a formality that merely obscures the substance of the transaction).\textsuperscript{129}

\subsection*{4 The sham transaction doctrine}

The sham transaction doctrine has little scope in United Kingdom law.\textsuperscript{130} It usually means nothing more than that the label given by the parties to a transaction is not conclusive in determining the legal rights created by the parties.\textsuperscript{131} In contrast, it is difficult to work out what a "sham" means in the United States.\textsuperscript{132} The doctrine is believed to stem from Judge Learned Hand's description of the transactions in Gregory:\textsuperscript{133}

\begin{quote}
[T]heir only defect was that they were not what the [statute] means by a "reorganization", because the transactions were not part of the conduct of the business of either or both companies; so viewed they were a sham...
\end{quote}

Bittker does not treat the sham transaction doctrine as a doctrine in its own right as he does with step transactions, substance over form and business purpose. John Tiley's view is that:\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{128} The classic formulation of this variation of the step transaction doctrine is in \textit{Minnesota Tea Co v Helvering} (1938) 302 US 609, 613: "A given result at the end of a straight path is not made a different result because reached by following a devious path."
\item \textsuperscript{129} Boris Bittker \textit{Federal Taxation of Income, Estates and Gifts} (Warren, Gorham and Lamont, Boston, 1981) 4-51.
\item \textsuperscript{130} John Tiley "Judicial Anti - Avoidance Doctrines: The US Alternatives" (1987) BTR 180, 195.
\item \textsuperscript{131} A transaction is a sham if the acts done were intended to give the appearance of creating legal rights different from those which were actually created. See \textit{Snook v London and West Riding Investments Ltd} [1967] 1 All ER 518,520 (CA) Diplock LJ and \textit{Campbell Discount Ltd v Bridge} [1962] 1 All ER 385,402 (HL) Lord Devlin, cited in John Tiley \textit{Revenue Law} (4ed, Hart Publishing, Oxford, 2000) 95.
\item \textsuperscript{132} John Tiley "Judicial Anti - Avoidance Doctrines: The US Alternatives" (1987) BTR 180, 196.
\item \textsuperscript{133} \textit{Helvering v Gregory} (1934) 69 F 2d 809, 811(2d Circ) Judge Learned Hand.
\item \textsuperscript{134} John Tiley "Judicial Anti - Avoidance Doctrines: The US Alternatives" (1987) BTR 180, 196-197.
\end{itemize}
When the United States lawyer concludes that a transaction is a sham he usually means that the form of the transaction is to be disregarded because it is a sham as compared with the underlying substance; the use of the term in this way seems to be nothing more than a rhetorical device of disapprobation to support a conclusion reached on other grounds - usually one of the general doctrines.

D Where Does Lord Brightman's Formulation Fit In?

If it is perceived as an exhaustive test for the application of the doctrine of fiscal nullity, Lord Brightman's formulation (described by Lord Brightman himself as "the rationale of the new approach")\textsuperscript{135} is a combination of the step transaction doctrine and the business purpose test.\textsuperscript{136} If the court finds as a fact that there is a pre-ordained series of transactions, it is entitled to amalgamate them into a single composite transaction. The business purpose test enables steps in a transaction that have no commercial purpose other than tax avoidance to be "disregarded" when applying the statutory provision (or, in Lord Brightman's words, "for fiscal purposes")\textsuperscript{137} to the arrangement.

Lord Brightman's formulation is an amalgam of two common law anti-avoidance rules imposed on statute that have their origin in another jurisdiction. It is not an approach to statutory construction, or a statement of the consequences of giving a commercial construction to a fiscal concept.

Is Lord Brightman's formulation inconsistent with the Duke of Westminster principle? The two concepts are clearly irreconcilable. The Furniss test purports to remove steps in a transaction with a tax avoidance effect and look at the "end result". The transaction is recharacterised as a route that the taxpayer could have chosen to take, but did not in fact take. It is difficult to see how this is anything other than the application of an

\textsuperscript{135} Furniss (HMIR) v Dawson [1984] AC 474, (HL) Lord Brightman.

\textsuperscript{136} This is how John Tiley views the doctrine. See John Tiley "Judicial Anti - Avoidance Doctrines: The US Alternatives - Part II" (1987) BTR 220, 244.
economic substance approach to the transaction. Although Lord Brightman did not directly comment on the impact of his judgment on the Duke of Westminster principle he overruled the Court of Appeal's decision that the doctrine of fiscal nullity should only apply to circular, self-canceling transactions with no enduring legal consequences and stated that:  

It is difficult to escape the impression that the High Court and the Court of Appeal were determined at all costs to confine the Ramsay principle to the sort of self-canceling arrangement which existed in that case, and to resist what they conceived to be a deplorable inroad into the sacred principles of the Westminster case. It is also difficult to escape the impression that in framing the rationale of his new approach after this comment, Lord Brightman impliedly overrules the Duke of Westminster principle in respect of arrangements that contain a tax avoidance purpose.

E Are the Other Judgments in Furniss consistent with this view?

The judgments in Furniss do not attempt to define the conceptual basis of the doctrine. In fact, several of the Law Lords expressly indicate that the judgments in Furniss are not an exhaustive exposition of the scope of the doctrine. This unwillingness to definitively determine the scope of the doctrine is more consistent with the view of the doctrine as an application of the purposive approach to statutory interpretation, than the view that it is a common law anti-avoidance rule similar to the business purpose test. Conversely, interpreting judgments is much like interpreting the Bible, in that statements made in the same judgment may support competing interpretations. Whether there is support in the judgments for the step transaction doctrine and the business purpose doctrine depends on how the

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139 See, for example, Lord Scarman's comment that "the law in this area is in an early stage of development. Speeches in your Lordships' House and the judgments in the appellate courts of the United Kingdom are concerned more to chart a way forward between principles accepted and not to be rejected than to attempt anything so ambitious as to determine finally the limit beyond which the safe channel of acceptable tax avoidance shelves into the dangerous shallows of unacceptable tax evasion." Furniss (HMIT) v Dawson [1984] AC 474, (HL) Lord Scarman.
Law Lord treat the issue of substance over form, because the step transaction doctrine and the business purpose doctrine are fundamentally inconsistent with the Duke of Westminster principle.

Ultimately, the Law Lords' statements that the doctrine will continue to develop must be read in the context of their continuous references to artificiality and examining the substance, rather than the form, of the transaction. All of the judgments are couched in terms of artificiality. Lord Roskill refers to exorcising the ghost of the Duke of Westminster. In similarly strong words, Lord Bridge, while noting that "one must never lose sight of the important Duke of Westminster dictum, seems to advocate the application of the substance over form doctrine to composite transactions.

E Is Lord Hoffmann’s Judgment in Westmoreland an approval of the business purpose test?

In his comment on Westmoreland, John Tiley observes that: In his comment on Westmoreland, John Tiley observes that:

...if we are going to have American interpretation, can we please have an American code to go with it? In fact, if we had the American code as well, we would then have to stop learning two systems of tax and could learn just one.

He also asserts that Lord Hoffmann "appears to endorse the American approach to interpreting tax statutes." This accusation is unfair and, more importantly, it is incorrect. First, while Lord Hoffmann refers to the judgments of Learned Hand J in Gregory and Gilbert v Comr of Internal Revenue, he does so in the context of discussing Lord Wilberforce's approval of the authorities in Ramsay and explains Judge Learned Hand's decision in Gregory as having its basis in statutory construction. Second,
Lord Hoffmann views the doctrine of fiscal nullity as an application to tax statutes of a narrow, textual purposive approach to statutory interpretation. It is a very different approach from the wide purposive approach that the United States courts employ in construing legislation. It is an approach that focuses on analyzing the statutory concept at issue and does not attempt to find some underlying Parliamentary intention. Lord Hoffmann makes this clear by warning that "even if a statutory exception refers to a business or economic concept, one cannot disregard a transaction which comes within the statutory language, construed in the correct commercial sense, simply on the ground that it was entered into solely for tax reasons."145

VI ATTEMPTING A RECONCILIATION OF FURNISS AND WESTMORELAND

A Reconciling the Two Approaches - Lord Hoffmann’s Test

Lord Hoffmann’s reconciliation of Lord Brightman’s approach in Furniss with his test in Westmoreland is unpersuasive. It simply fails when one is faced with a series of transactions, at least one of which has only a tax avoidance purpose and falls within the terms of a statutory provision that is based on a legal (juristic) concept. This is, in fact, an accurate summary of the facts of Westmoreland. In this scenario, the test in Furniss (assuming that all of the requirements for its application were satisfied) would apply to strike down the transactions having only a tax avoidance purpose and apply the statute to the "end result." Because the arrangement in Westmoreland was admittedly circular, the House of Lords in Furniss would probably hold that the arrangement had failed to result in a payment of interest to the scheme, because the transactions in the arrangement had no commercial purpose other than the gaining of a tax advantage. This is a

145 Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 59 (HL) Lord Hoffmann.
summary of the Crown’s argument in Westmoreland,\textsuperscript{146} which Lord Hoffmann rejected. Even more ironic is the fact that Lord Hoffmann expressly rejected the Crown’s summary of the doctrine of fiscal nullity,\textsuperscript{147} which was basically a summary of the test in Furniss widened to include any steps that give rise only to a tax advantage.

**B Lord Hoffmann Does not Address the Problem**

Lord Oliver’s judgment in \textit{Craven v White} addresses the fundamental problem in attempting to reconcile Lord Brightman’s formulation of the doctrine of fiscal nullity in \textit{Furniss} with the view that the doctrine is a principle of statutory construction.

\textit{I The House of Lords Decision in Craven v White}

\textit{Craven v White} involved a scheme similar to that in \textit{Furniss}. The decision is notable for the split between the majority and the minority of the House of Lords. The majority held that the doctrine does not apply if there is no "composite" transaction.\textsuperscript{148} That is, in viewing the transaction as a whole, the Court must be able to conclude that a step or steps were inserted for no commercial purpose. Accordingly, if the arrangement comprises of a number of unique and independent steps, which cannot be regarded as part of a composite whole, then the doctrine does not apply. Lord Oliver, who delivered the leading majority judgment, confirmed that \textit{Burmah} and \textit{Furniss} would not invalidate any transaction that had no purpose apart from the avoidance of tax. \textit{Furniss} was explained on the ground that the sequence of events was so closely linked that it could legitimately be regarded as one single transaction - one single transfer by the taxpayer to the ultimate purchaser. In \textit{Craven}, the transaction was not preordained. The initial transfer to the holding company and the subsequent sale to the

\textsuperscript{146} Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 27 (HL) Lord Hoffmann.

\textsuperscript{147} Macniven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL/6 865 par 28 (HL) Lord Hoffmann.

\textsuperscript{148} Craven (HMIT) v White [1988] BTC 268, 288 (HL) Lord Oliver, 278 Lord Keith, 324 Lord Jauncey.
ultimate purchaser took place at two different points in time and could not be regarded as one transaction. Lord Oliver set out the conditions that must exist if transactions were to be merged as they had been in *Furniss*:  

1) The series of the transactions must be preordained at the time the intermediate transaction was entered into;  
2) The transaction must have had no other purpose than tax mitigation;  
3) There must have been no practical likelihood that the preplanned events would not take place in the order ordained so that the intermediate transaction was not even contemplated practically as having no independent life;  
4) The preordained events must have in fact taken place.

The other significant aspect of Lord Oliver's judgment is his assertion that the doctrine is "a principle of construction". This is the first attempt to ascertain the doctrine's conceptual basis. Unfortunately, the majority's attempt to narrow its scope focused on limiting the test in *Furniss* by adding in extra requirements. This approach is more consistent with the doctrine being an anti-avoidance rule than with his assertion about its scope.

2  Lord Oliver's judgment

Lord Oliver outlined two competing views of the ratio of *Furniss*. On the first view, *Furniss* decided that any transaction one of whose purposes it to avoid or minimise tax on another transaction which was then in contemplation and which subsequently takes place, is to be ignored. On the other view, *Furniss* decided only that:

the approach to the construction of interdependent transactions sanctioned by the *Ramsay* case is properly to be applied to what has been described as a "linear" transaction as well as to a circular self-cancelling transaction if the necessary conditions exist enabling the

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149 Craven (HMIT) v White [1988] BTC 268, 298 (HL) Lord Oliver.  
151 Craven (HMIT) v White [1988] BTC 268, 288 (HL) Lord Oliver.
court realistically to regard the two transactions together as constituting one single composite and indivisible whole involving only a single disposal for tax purposes.

Lord Oliver accepted that Furniss was an extension of the principle in Ramsay, because it recharacterised the transactions, attributing to the parties a result that they did not actually intend and applying the statute to that unintended result. According to Lord Oliver, the critical question was to identify the circumstances in which the principle in Ramsay permits this recharacterisation.\(^{153}\) He refused to accept the wide view of the scope of Furniss\(^ {154}\) and viewed the doctrine as a principle of statutory construction. He held that therefore, the ratio in Furniss was based on the premise that the transfer of shares by the taxpayer to Greenjacket did not, on the true construction of the statute, constitute a “disposal.”\(^ {155}\) He asked the question “when is a disposal not a disposal within the terms of the statute?”\(^ {156}\) In his view:\(^ {157}\)

To give to that question the answer “when, on an analysis of the facts, it is seen in reality to be a different transaction altogether” is well within the accepted canons of construction. To answer it “when it is effected with a view to avoiding tax on another contemplated transaction” is to do more than simply to place a gloss on the words of the statute. It is to add a limitation or qualification which the legislature itself has not sought to express and for which there is no context in the statute.

He indicated that therefore, the elements of Lord Brightman’s formulation and the concept of a tripartite contract between the taxpayer, Greenjacket and Wood Bastow, are “not merely exemplary of the wider doctrine of Ramsay”,\(^ {158}\) but were essential to the decision in Furniss. The tripartite contract concept was the only way in which the House of Lords was justified in reaching its conclusion in Furniss, because there had to be

\(^{152}\) Craven (HMIT) v White [1988] BTC 268, 288 (HL) Lord Oliver.
\(^{153}\) Craven (HMIT) v White [1988] BTC 268, 288 (HL) Lord Oliver.
\(^{154}\) Craven (HMIT) v White [1988] BTC 268, 289 (HL) Lord Oliver.
\(^{155}\) Craven (HMIT) v White [1988] BTC 268, 295 (HL) Lord Oliver.
\(^{156}\) Craven (HMIT) v White [1988] BTC 268, 295 (HL) Lord Oliver.
\(^{157}\) Craven (HMIT) v White [1988] BTC 268, 295 (HL) Lord Oliver.
shown that there was no “disposal” of the shares from the taxpayers to Greenjacket within the terms of the legislation.\(^{159}\) If the shares were treated as Greenjacket’s shares with no subsisting arrangement for their onward transmission to Wood Bastow, then it would be impossible not to conclude that they had been “disposed of” to Greenjacket. He then presented four criteria necessary for the approach in *Furniss* to apply.

Lord Oliver’s attempts to limit the application of Lord Brightman’s test are based on an acknowledgment that if the doctrine is expanded beyond that narrow formulation, it effectively becomes a statutory anti-avoidance provision. Hence, he wishes to confine *Furniss* to cases where “when the intermediate transaction takes place, the end result which in fact occurs is so certain of fulfilment that it is intellectually and practically possible to conclude that there has indeed taken place one single and indivisible process.”\(^{160}\)

Lord Oliver’s attempt to reconcile Lord Brightman’s formulation with the view that the doctrine of fiscal nullity is a principle of statutory construction is inconsistent with Lord Hoffmann’s approach. If the legal/commercial concept distinction is applied, “disposal” is clearly a legal concept. According to Lord Hoffmann’s test, it is therefore beyond the scope of the doctrine of fiscal nullity to aggregate the transactions and to employ a tripartite contract approach to hold that there is no disposal within the terms of the statute. Lord Oliver’s judgment is important because it describes the problems inherent in construing Lord Brightman’s formulation widely. Lord Hoffmann does not acknowledge the existence of these problems, and does not even refer to the House of Lords decision in *Craven v White* in his judgment.

**VII WESTMORELAND AND MCGUCKIAN**

\(^{158}\) *Craven (HMIT) v White* [1988] BTC 268, 298 (HL) Lord Oliver.
\(^{159}\) The relevant legislation was Schedule 6 of the Finance Act 1965.
\(^{160}\) *Craven (HMIT) v White* [1988] BTC 268, 298 (HL) Lord Oliver.
Lord Hoffmann approves of the result in *McGuckian* and expressly concurs with Lord Steyn and Lord Cooke’s comments that the doctrine of fiscal nullity is "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." He also notes that particular attention should be paid to Lord Cooke’s rejection of Lord Brightman’s test in *Furniss* as an exhaustive exposition of the circumstances in which the doctrine will apply.

It is not surprising that Lord Hoffmann expressly approves of Lord Cooke’s view of the doctrine of fiscal nullity, as it is exactly the same as his own. It is also unsurprising that he does not refer to Lord Browne-Wilkinson’s judgment at all, given that Lord Browne-Wilkinson used the test in *Furniss*, framed widely to enable the court to strike down any transaction whose purpose is to produce a tax advantage for the taxpayer, to reach his conclusion. Lord Hoffmann’s formulation is also inconsistent with Lord Steyn’s view that the doctrine "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." Lord Steyn’s approach looks like the purposive approach to statutory interpretation that is adopted by the United States courts, and he applies the formulation in *Furniss* to reach his conclusion. Lord Cooke is the only Law Lord whose reasoning is at least consistent with Lord Hoffmann’s approach.

Unlike *Furniss*, however, the result in *McGuckian* can still be reconciled with Lord Hoffmann’s judgment in *Westmoreland*. In that sense, the cases are not inconsistent. It also helps to explain Lord Steyn’s approach in the context of the facts. The explanation hinges on the statutory provision that was at issue in the case - section 478 of the Income and Corporation Taxes.

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161 *IRC v McGuckian* [1997] 1 WLR 991, 1002 (HL) Lord Cooke.
Act 1970 - expressly stated that it was enacted for the purpose of preventing tax avoidance. The existence of a specific anti-avoidance provision justified applying the approach in *Furniss*.

**VIII THE IMPLICATIONS OF WESTMORELAND FOR SECTION BG 1**

It has not yet been authoritatively determined by a New Zealand court whether the doctrine of fiscal nullity has any application in New Zealand. The most recent pronouncement on its potential impact is in the Privy Council’s decision in *C of IR v Auckland Harbour Board*. The decision concerned the application of a specific anti-avoidance rule contained in the accrual rules. Lord Hoffmann compared section BG 1 to the specific anti-avoidance provision at issue and concluded that both provisions are aimed at transactions which, in commercial terms, are within the charge to tax but which have been structured so that on a purely juristic analysis they are not. He also commented on the relationship between statutory anti-avoidance provisions (both specific and general) and the doctrine of fiscal nullity:

Some of the work such provisions used to do has nowadays been taken over by the more realistic approach to the construction of taxing acts exemplified by *WT Ramsay v IR Commrs...* although their Lordships should not be taken as casting any doubt upon the usefulness of such tax avoidance provisions as a long stop for the Revenue.

Lord Hoffmann seems to suggest that the doctrine of fiscal nullity should be applied as the primary tool in striking down anti-avoidance schemes. Section BG 1 is a backstop designed to come into operation in situations where the doctrine does not apply. This view is not incorrect if

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165 *C of IR v Auckland Harbour Board* (2001) 20 NZTC 17,008 (PC).
167 *C of IR v Auckland Harbour Board* (2001) 20 NZTC 17,008, 17,012 (PC) Lord Hoffmann.
the doctrine of fiscal nullity is an example of the purposive approach to statutory interpretation.

This gives rise to the question of how section BG 1 should be interpreted in the wake of Westmoreland. The distinction between tax mitigation and tax avoidance that arose out of Lord Templeman’s judgment in the Privy Council decision in Challenge Corporation v CIR\(^{168}\) was abolished by the Privy Council in O’Neil & Ors v CIR.\(^{169}\) Lord Hoffmann rejected the distinction as "unhelpful".\(^{170}\) If section BG 1 is interpreted narrowly, consistent with Richardson J’s (as he then was) approach in the Court of Appeal in Challenge Corporation v CIR, the application of Lord Hoffmann’s doctrine of fiscal nullity leaves no scope for its operation because Richardson J’s decision closely mirrors Lord Hoffmann’s categorization in Westmoreland.\(^{171}\) However, this is clearly not the result that Lord Hoffmann intends when he refers to section BG 1 as “a long stop for the Revenue.”\(^{172}\)

**IX  CONCLUSION**

Lord Hoffmann’s attempt to reconcile his judgment with the decision in Furniss is unconvincing. This is not surprising, because the two judgments are clearly different in terms of their approach and result. Which approach is to be preferred? Lord Hoffmann’s description of the doctrine of fiscal nullity as an example of the purposive approach to statutory construction will probably quell those critics who, especially after the decision in Furniss, described the doctrine as unconstitutional. It now occupies an acceptable place within the existing legal framework. However, his failure to acknowledge and deal with the difficulties inherent in the Furniss formulation of the doctrine is crucial. It means that Westmoreland is just

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\(^{168}\) Challenge Corporation v CIR [1986] 2 NZLR 556 (HL) 561 Lord Templeman.

\(^{169}\) O’Neil & Ors v CIR (2001) 20 NZTC 17,051 (PC).

\(^{170}\) O’Neil & Ors v CIR (2001) 20 NZTC 17,051, 17,057 (PC) Lord Hoffmann.

\(^{171}\) Richardson J distinguishes between tax concepts and economic concepts. If the transaction sought to be struck down by section BG 1 is an artificial transaction that takes advantage of an economic concept, section BG 1 applies.

\(^{172}\) C of IR v Auckland Harbour Board (2001) 20 NZTC 17,008, 17,012 (PC) Lord Hoffmann.
another swing of the pendulum which has, in spite of Lord Hoffmann’s efforts to instigate certainty, created yet more uncertainty in this already difficult area. It is appropriate at this point to return to Lord Hoffmann’s quotation in *Norglen v Reeds Rains Prudential Ltd* and to consider the meaning of its last sentence, which he strangely omits when he cites himself in *Westmoreland*. It is submitted that the last sentence encapsulates Lord Hoffmann’s disapproval of the approach inherent in *Furniss*; and its basis in the United States anti-avoidance doctrines.


John Prebble "Should Tax Legislation be Written from a Principles and Purpose Point of View or a Precise and Detailed Point of View?" [1998] 2 BTR 112.

John Tiley "First Thoughts on Westmoreland" [2001] 3 BTR 153.


* Cases and legislation are cited in the footnotes.
Cases and legislation are cited in the footnotes.