eJournal of Tax Research

Volume 7, Number 1 June 2009

CONTENTS

5 An Examination of the Influence of Inheritance Tax upon Business Succession - Lessons for Germany
Michael Haug, Luise Hölscher and Tim Vollans

37 Impact of Adoption of IFRS on the Thinly Capitalised Position of Australian Companies
Grantley Taylor and Greg Tower

54 Tax Advantages for Bungling Trustees
Monica Bhandari

72 Tax Reform: A Matter of Principle? An Integrated Framework for the Review of Australian Taxes
Nicole Wilson-Rogers and Dale Pinto

Atax
UNSW
Faculty of Law

© Atax, The University of New South Wales
ISSN 1448-2398

eJournal of Tax Research (2009) vol. 7, no. 1, pp. 54-71

Tax Advantages for Bungling Trustees

Monica Bhandari*

Abstract
Where property is transferred and the manner in which the transaction is carried out results in an unforeseen or unwanted tax liability, what can be done? For individuals, there are some remedies, but for the main part, where the only error was as to the tax liability, claims cannot be brought to undo the transaction or the tax liability. Trustees on the other hand seem to have an alternative avenue, using the principle in *Hastings-Bass*. This article considers the *Hastings-Bass* principle and its development and contrasts the position for trustees with the position for individuals. It will be seen that trustees can negate a tax liability in a very advantageous manner and so any justifications for this difference in treatment as between trustees and individuals will be considered along with the steps that should be taken in the absence of any good justification.

1. INTRODUCTION

On the occasion of any transaction, it is important to consider whether or not a tax consequence might ensue. Where someone (an individual) does not consider the tax consequences, or receives bad tax advice in relation to the tax consequences, or receives good advice on minimising the tax but fails to implement the advice correctly, there is no tax relief. In these circumstances the tax which is triggered by the transaction is nonetheless payable to the Revenue. The taxpayer may try to argue that had he known that the tax would be payable he either would not have entered into the transaction, or he would have structured it differently. However, this argument will not succeed – the tax liability has crystallised, it did so at the time of the transaction. The taxpayer cannot retrospectively "undo" the transaction so as to make the tax liability disappear. However, in the UK, in these circumstances, a trustee would be able to claim exactly what an individual could not claim – the trustee will be able to say he did not realise the tax consequences of the transaction and had he appreciated them, he would not have made the transfer and the transfer can be undone. This is the controversial rule in *Re Hastings-Bass*[1] that was established in England, and has been applied elsewhere.[2]

---

* Senior Lecturer, School of Law, King's College London. The author would like to thank Professor Charles Mitchell for his helpful comments during the preparation of this article. Any errors or omissions remain the author's own. The presentation of this article was funded by The British Academy.

[1] [1975] Ch 25.

[2] For example, it has been discussed in Ireland, (*Irish pensions Trust Ltd. v Central Remedial Clinic* (Unreported, High Court, 18th March, 2005) and *Boliden Tara Mines Limited v Cosgrove & Ors* [2007] IEHC 60). Also applied in Jersey (*Re the Green GLG Trust* (2002) 5 ITELR 590; *re representation Friedman and Asiatrust Ltd* [2006] JRC 187 (Royal Ct(Jer)) and in the Cayman Islands (*A v Rothschild Trust Cayman Ltd* [2006] WTLR 1129; *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* [2007] WTLR 1697). However, the principle is not used in Scotland (see D. Francis "*Hastings Bass* and his Scottish friends" [2008] S.L.T. 161).

This article first considers the *Hastings-Bass* principle, which stems from case law, and the way in which it is evolving as a tool for trustees to escape from transactions where there are unwelcome tax consequences. Then it will explore the extent to which this goes further than the remedies available to individuals. Finally, it will consider for whose benefit the *Hastings-Bass* principle operates and whether there can be any justification for the difference in treatment between individuals and trusts.

Three observations are worth mentioning from the outset. First, the focus of this article is on unilateral, or gratuitous, transactions.[3] Different rules can apply where there is a bilateral transaction, or transaction for value, at issue. This article will discuss only the former type of transfer. This is because *Hastings-Bass* cases relate to dispositions by trustees, and the best comparator is a unilateral transfer made by an individual.[4] Secondly, these issues are not dealt with in the tax legislation. Thus far, tax legislation relating to mistakes made by the taxpayer relate to mistakes made in paying the tax – if an overpayment of tax is made by mistake, then it can be recovered using statutory mechanisms in place for the recovery of that overpayment.[5] A common law claim in unjust enrichment could also (or alternatively) aid the taxpayer in recovering tax paid by mistake.[6] The cases at issue in this article do not argue that the tax has been paid by mistake. Rather, they argue that the mistake is the transfer of funds which has been made to another party. That transfer triggered a tax liability, but if the transfer is undone, the basis of the tax liability disappears and so the tax should be recovered from the Revenue. These cases are therefore of a different species to those where the tax itself is paid as a result of a mistake. Finally, it is worth noting that the cases discussed in this article mainly concern the UK taxes Capital Gains Tax (“CGT”)[7] and Inheritance Tax (“IHT”)[8]. This is not to say that the principle does not apply to other taxes, it is simply that in the UK, the cases that have been brought to court on this issue concern trustees failing to appreciate the CGT or IHT consequences of their transactions. Thus, this principle should be considered in a wider context as applicable to any taxes in relation to which trustees might make errors.

---

[3] For a more fulsome discussion see B. Hacker “Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines” (2008) 19 KLJ 293.

[4] Note that there is a difference between a unilateral transfer and unilateral mistake and this article will not discuss rectification for unilateral mistake, only unilateral transfer.

[5] E.g. ss.33 and 42 of the Taxes Management Act 1970 (UK) and s.80 of the Value Added Tax Act 1994 (UK).

[6] There is some controversy over the interaction between the common law and legislative regimes where the legislation does not specifically exclude a common law claim. For more discussion see J. Beatson “Restitution of Taxes, Levies and Other Imposts” (1993) 109 LQR 405 at p.420; M. Bhandari and C. Mitchell “Lessons of the *Metallgesellschaft* litigation” [2008] RLR 1 at pp.15-17. See s.80(7) of the Value Added Tax Act 1994 (UK) for an example of legislation which specifically excludes a common law claim.

[7] See Taxation of Chargeable Gains Act 1992 (UK).

[8] See Inheritance Tax Act 1984 (UK).

2. THE *HASTINGS-BASS* PRINCIPLE

Whilst the decision in *Hastings-Bass* itself was made in 1975, the principle has, even recently, been described as "emerging" and "developing".[9] In fact, the principle in its current form was not even applied in *Hastings-Bass,* rather it is the principle as explained in *Mettoy Pension Trustees v Evans*[10] that is used in later cases.[11] It is interesting to note that *Hastings-Bass* concerned the Revenue seeking to have a transaction set aside but it did not succeed. Yet in the more recent cases, the principle has been used successfully to avoid tax liabilities and so the Revenue contributed to creating the very principle which has come to haunt them.[12]

Re Hastings-Bass[13] related to a tax avoidance scheme. On the death of the beneficiary of the trust, Captain Hastings Bass, his interest was to pass to his son, which would trigger estate duty. In order to minimise this tax charge, in 1958 the trustees of the settlement advanced a fund valued at £50,000 to another trust set up in 1957 by Captain Hastings-Bass' sister, under which the son had a life interest. This would have the effect of removing the funds from his estate before his death and so they would not be subject to estate duty. The scheme would have been successful were it not for the Revenue's appeal of *Re: Pilkington's Will Trusts*[14] in relation to the rule against perpetuities. The decision of the House of Lords[15] in that case meant that the trust of the fund declared by reference to the 1957 trust was void for perpetuity. Therefore, the Revenue claimed that no life interest had vested in the son and the fund remained part of the original trust. As Captain Hastings-Bass had died in 1964, estate duty should be payable on the transfer of his life interest.

At first instance it was held that the transfer had not been effective on the basis that the actual transaction in 1958 was substantially or essentially different from the intentions of the transferring trustees. This decision was taken following the principle set out in *Re Abrahams Will Trust.*[16] However, the Court of Appeal overturned the first instance decision. The court considered that this case could be distinguished from *Re Abrahams Will Trust*. In that case, the transaction actually carried out could be regarded as being substantially different to the intended transfer because it was possible to say that the actual transfer was not for the benefit of the intended recipient. Here, however, there was still a benefit to the son even though some parts of the trust were void for perpetuities. The court held that it would not interfere with the exercise of a trustee's discretion, even if the transaction did not achieve the full effect that was attended, unless

> " (2) it is clear that he [the trustee] would not have acted as he did
>
> > (a) had he not taken into account considerations which he should not have taken into account, or

---

[9] *Breadner v Granville-Grossman's Settlement* [2000] EWHC Ch 224 at [46] and [58]; *Sieff v Fox* [2005] EWHC 1312 (Ch) at [118]; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at [163].

[10] [1990] 1 WLR 1587 at 1621.

[11] E.g. *Breander,* above, fn.9 at [59]; *AMP (UK) Ltd v Barker* [2000] EWHC Ch 42 at [85]; *Sieff*, above, fn.9 at [114]; *Burrell v Burrell* [2005] EWHC 245 (Ch) at [15] and [16].

[12] See M. Gunn "Turning the Clock Back" (2002) 148 Taxation 634.

[13] Above, fn.1.

[14] [1959] 1 Ch. 699.

[15] [1964] AC 612.

[16] [1969] 1 Ch. 463.

> (b) had he not failed to take into account considerations which he ought to have taken into account."[17]

This is the quotation which has proved fundamental to the development of the principle.[18] The basis is that where the trustee has acted properly within his power, there is no reason for the court to interfere. The court set out clearly in its summary that unless the provisions of its condition were satisfied, a decision taken by a trustee could not be set aside. However, the quotation has often been described as being in a negative form,[19] and it was in the case of *Mettoy* that it was put in the positive form that:

> "where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account."[20]

Whilst many commentators and the case law have seen this to be a mere positive form of what was said in *Hastings-Bass* it is submitted that this is in fact a development of the principle. In *Hastings-Bass* the court merely set out when it would not interfere. It certainly did not state that where the conditions were satisfied there was an obligation for the court to step in, nor that the court *should* step in.[21] Thus, *Mettoy* was the first development of and move away from the original statement in *Hastings-Bass*. There is no reason for the court to interfere in every situation where a trustee takes into account irrelevant considerations and nor when relevant considerations are not taken into account. Often there is no harm to anyone and such cases will not even come to the attention of the courts. Just because a case does come to court, that is not to say that the court should always interfere, even where there is no party to object to the transaction being set aside and especially where the only supposed harm is a tax liability. In the tax cases it is common for both parties to a case to seek the remedy[22], because they will both benefit from a reduced tax bill, as will be seen from the discussion of the cases below.

It is not in the interests of certainty that the courts can merely set aside transactions on the basis that the parties want to do so. Normally the cases come to court because to do so will benefit one party, but generally there is also a detriment to someone. In the cases of interest here, generally the Revenue will be affected.[23] In such circumstances, *Mettoy* suggests that the courts are compelled to interfere, and this is a move away from *Hastings-Bass*. A problem with the development of the principle is that the Court of Appeal has not had the chance to revisit this issue further to the developments in the

[17] *Hastings-Bass*, above, fn.1 at 41.

[18] There have been differing views between judges as to whether this is a principle or a rule. In this article, "principle" is used due to the preference of the view that it is not mandatory for the courts to apply this, rather they retain some discretion.

[19] *Sieff*, above, fn.9 at [46]; *Burrell,* above, fn.11 at [16]; *Breadner*, above, fn.9 at [59]; *AMP*, above fn.11 at [84]; *Mettoy* above, fn.10 at 1621.

[20] *Mettoy*, above, fn.100 at 1621.

[21] See also "HMRC and the Hastings Bass Principle" Revenue Tax Bulletin 83 (June 2006), also released as Revenue Interpretation 278, available at http://www.hmrc.gov.uk/bulletins/tb83.htm#2.

[22] E.g. both the trustee and the beneficiary

[23] Other cases have used the principle in a different context, for example, in relation to pensions, which are outside the scope of this article. For more detail see for example *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071 and *Stannard v Fisons Pension Trust* [1991] PLR 224.

lower courts. One reason for this is that often there is no party contesting the setting aside of the transaction and therefore no party to appeal. The only party with an objection is the Revenue, yet, thus far, it has not appeared in the cases following *Hastings-Bass*.

3. The Revenue's Reluctance to Participate in *Hastings-Bass* Cases

In many cases, an offer was made to the Revenue to be joined as a party, however it has always refused,[24] although in some cases it has additionally asked for certain authorities to be brought to the attention of the court.[25] Where the court makes an order, only the parties to that order are bound by it. Therefore, it seems possible that the Revenue hopes not be bound by the orders if it does not participate in any way and so does not have to refund (or waive a right to) any tax.[26] In rectification cases, in which the Revenue has also been reluctant to participate,[27] the Revenue has indicated that as long as it was asked to be joined as parties, it will accept the retrospective effect of the order for tax purposes.[28]

Whilst it appears that the reluctance to be joined as a party stems from the Revenue's desire to escape from being bound by the court order, there have not been any cases in which the parties have requested that the court orders be enforced as against the Revenue or that a court order is issued against the Revenue. Therefore, there must be other reasons for the reluctance of the Revenue to be involved thus far. One possible further reason is perhaps that the Revenue does not have the resources to fight each of these claims. In recent cases, the reluctance of the Revenue to be involved in the court proceedings has been criticised[29] and therefore, the Revenue issued Revenue Interpretation 278[30] which indicates that the Revenue will be more likely to participate in such cases in the future. This is in part due to the criticism received in the case of *Sieff v Fox* and also because the Revenue considers that the principle has been formulated far too widely.

Additionally, the recent case of *Ogden v Trustees of the RHS Griffiths 2003 Settlement*[31] is likely to persuade the Revenue to be much more actively involved in such cases. This was a mistake case and related to IHT. The deceased carried out transfers in order to minimise IHT, but the scheme would only work if he survived for 7 years. In fact, he only survived for 2 years because he had an aggressive form of cancer, which he did not know about when he made the transfer. If the transactions

---

[24] E.g. *Sieff,* above, fn.9 at [29]; *Burrell,* above, fn.11 at [13]; *Abacus Trust Company v Barr* [2003] EWHC 114 (Ch) at [12]; *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344 at [2].

[25] E.g. *Burrell,* above, fn.11 at [13]. The same has been done in relation to mistake and rectification cases. See for example *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch) at [6]; *Farmer v Sloan* [2004] EWHC 606 (Ch) at [8].

[26] Gunn, above, fn.122 at p.636. See also *NSPCC*, above, fn.24 at [2] where the Revenue refused to agree to be bound by the decision of the court.

[27] E.g. *Farmer*, above, fn.25 at [8]; *Racal Group Services Ltd v Ashmore* [1995] STC 1151 at 1154.

[28] See C. Gothard *Breaches of trust* – "Recent Developments, Pitfalls and Ways out for the UK and Offshore Trustees" (2002) 8 Trusts and Trustees 9 at p.14, where he mentions the statement by P. Trevett QC in a lecture that this is confirmed in the CTO Trust manual at para.1865.

[29] E.g. *Sieff*, above, fn.9 at [83], although Lloyd LJ recognised there might be policy reasons for this stance by the Revenue. For problems stemming from Revenue's reluctance to be joined as a party see C. Mitchell "Reining in the Rule in *Re Hastings-Bass"* (2006) 122 LQR 35 at p.36; *Breadner,* above, fn.5 at [61]; R Walker, "The Limits of the Principle in *Re Hastings-Bass* " (2002) 13 KCLJ 173 at p.183.

[30] Above, fn.21.

[31] *Ogden,* above, fn.25.

had not been carried out, the estate would have passed to the deceased's wife tax free[32] but in the event attracted IHT of over £1million.[33] Lewison J. allowed a transaction to be undone on the basis that the deceased had made a mistake as to his health. However, he also said it was difficult to say for certain that the deceased did indeed have cancer at the relevant date and had the facts been contested, it would have been difficult to make the finding of cancer existing at the time of the transaction.[34] Thus, if the Revenue had not refused to participate in the proceedings,[35] adversarial argument, even just regarding the significance of doctor's reports and the weight that could be attached to vague statements, might have made all the difference.

The fact that the Revenue insists on a court order for the transaction to be set aside before it adjusts any tax consequences is entirely appropriate based on the fact that the parties involved will normally agree to set aside the transaction, as it will be to their benefit. The Revenue should not be forced to accept a reduction in tax with no legal force – the tax liability arose lawfully and so in the absence of any reason to negate the liability, it has no obligation to waive it. The parties' claim of "because we want to," can not be sufficient. However, without the presentation of argument by the Revenue, it is difficult to get a real sense of what the contrary arguments to the application of the *Hastings-Bass* principle actually are. It should be noted, however, that judges have praised parties in the cases for presenting both sides of the argument even where they both seek to have the transaction set aside.[36] The Revenue's position of non-interference may stem from the reluctance to have binding authority against them, which parties would then be able to use as a precedent without going to court. If the Revenue does intervene in a case, it is likely to be one which is very much in its favour, rather than a case strongly based on precedent to have the transaction set aside.

4. HASTINGS-BASS IN AN EARLY TAX CASE

An example of the *Hastings-Bass* principle being successfully applied in the tax context is *Green v Cobham*,[37] one of the first significant tax cases in which the trustees were able to set aside the transaction. The case opened the doors for trustees to escape from unwanted tax consequences. A will trust was set up in the British Virgin Islands and its assets included ownership of a holding company, which held shares in companies established by the testator. The beneficiaries of the trust included the grandchildren of the testator. In 1990, the holding company had a large reserve of retained profits and the trustees wished to distribute these to the grandchildren. As three of them were minors, their shares were distributed through two accumulation and maintenance trusts ("A&M trusts)."[38]

---

[32] S.18 of the IHTA 1984.

[33] *Ogden,* above, fn.25 at para.5. However, had the scheme worked correctly a great deal more tax would have been saved.

[34] ibid, at [18].

[35] ibid, at [6].

[36] *Gallaher*, above, fn.9 at [162]; *NSPCC,* above, fn. 24 at [2].

[37] [2002] STC 820 (judgment given January 2000).

[38] An accumulation and maintenance trust is one in which most of the income is accumulated in the trust until a later date. Income is only paid out to the extent that it is necessary for the maintenance of the beneficiary (e.g. for education, living expenses). This type of trust is common to provide a benefit at a later date, for example, to provide for infants or children, whose need during childhood is simply to have education and/or living expenses paid for. The accumulated income and capital portion of the trust is retained for their benefit in the future after the age of perhaps 18, 21 or 25. The tax consequences of

The will trust and the A&M trusts were treated as one single settlement for CGT purposes. In order to prevent tax from being paid in the UK, the trust had to be non-resident in the UK. In order achieve this, a sufficient number of the trustees had to be non-resident. On setting up the will trust and the A&M trusts, this requirement was satisfied. Some of the trustees were non-resident by virtue of the rule at the time in s69(2) of the Taxation of Chargeable Gains Act 1992 (UK) (TCGA) which set out that if a trustee carried on the business of managing trusts, and was the trustee of a will trust, he was treated as non-resident wherever he actually resided.[39] The A&M trusts were established in November 1990. In December 1990 one of the trustees of the A&M trust retired from practice. Therefore, he no longer fulfilled the condition in s69(2) and was now a UK resident trustee. There were no longer sufficient non-resident trustees for the settlement to be treated as non-UK resident. Thus UK tax rules applied to the settlement and CGT would be payable on all disposals by both the holding company and the will trust. The shares held by the holding company had approximately £35million unrealised gains.

The trustees sought to have the declaration of the A&M trusts set aside, so that the retirement of the trustee from a law firm had no effect on the residency of the will trust and so UK CGT would not be payable. They sought to have the declaration set aside on the basis that they did not take into account the CGT consequences of the declaration and had they realised the CGT consequences, they would not have made it. It was clear that the trustees had not thought about the CGT consequences at all[40] and nor had they been advised to do so by lawyers advising them on the transaction. This was essentially because no one had considered that the A&M trusts would be treated as part of the same settlement as the will trust. Both parties here sought an order from the court to set aside the declaration, but the defendants put forward the opposing arguments, in the absence of an opposing party. However, as has been mentioned, this is not the same as the Revenue putting forward their own arguments.

Jonathan Parker J. accepted that such matters were those that the trustees should have taken into account and that the trustees would not have made the declaration if they had taken into account the CGT consequences.[41] The problem is that the only reason the trust became resident in the UK was because one trustee ceased to practice at a law firm, but Jonathan Parker J. rejected this argument against setting aside the declaration. He stated that the tax consequences flowed from the trust deed itself, even though they did not flow immediately. The error was making the residence of the will trust dependent on the make up of trustees of the A&M trusts, which was out of the control of the will trust trustees.

However, this reasoning is problematic. Had the trustee not retired, there would have been no cause to have the declaration set aside – the declaration of trusts only became "defective" due to a later event, unrelated to the declaration itself. Whilst it may be that this falls within the strict letter of the *Hastings-Bass* principle, it is doubtful

---

these trusts was changed considerably by the Finance Act 2006 (UK) and in many cases, it is no longer as tax efficient to defer the benefit of the trust any later than the age of 18.

[39] This legislation was changed by s.88 and Sch. 12 of the Finance Act 2006 (UK) and the reference to residence related to managing trusts abroad has been removed. Therefore, the trustees in this case would no longer be able to escape from being UK resident for CGT purposes in the same way any longer.

[40] *Green*, above, fn.37 at 824.

[41] ibid, at 828.

whether this is actually a deserving case. As will be seen below, outside the context of a trust, if you regret arranging your affairs in a certain way so as to attract an unwanted tax liability, it is unlikely the affairs can be changed or the transactions enacted set aside. Jonathan Parker J. suggested that if the declaration were effective, the CGT effects would be "catastrophic."[42] Whilst it is true that a substantial tax liability would have ensued, this description of a tax liability on a £35million gain is questionable.[43] What is clear from the application of the *Hastings-Bass* principle in this case is that where an error is made in relation to the tax consequences of a transaction by a trustee, it can be set aside.

5. Remedies for Individuals: Rescission and Rectification

In order to compare the treatment of trusts and individuals, the extent to which an individual might be able to set aside, or modify, a transaction where there are unwelcome tax consequences which flow from the transaction must be considered. There are two means of changing transactions available to individuals and trustees which are seen more commonly in the courts than the *Hastings-Bass* principle, and which are far less controversial:[44] rescission due to a mistake and rectification. Both of these are equitable remedies and it has been said that in fact rectification is just one aspect of a wider equitable jurisdiction to relieve parties from the consequences of mistake[45] and so rescission and rectification are different remedies for mistakes.[46] Rescission undoes the transaction and so the situation is treated as if the transaction never occurred. This is because rescission is the remedy for a situation where a mistake has been made such that consent to the transaction is negated. Where such a mistake is established it can be said that the transaction never actually happened. Rectification on the other hand is the remedy where a mistake has been made such that the intention of the transferor is not borne out. Therefore, this remedy allows the transferor to rectify the documentation so that it accurately reflects his intention.

A full consideration of these two remedies is outside the scope of this article.[47] However, two observations are worthy of note. First, in cases involving tax, these remedies are rarely available[48] and in particular, they are not usually available where the only mistake relates to tax consequences. For example, in relation to rescission for mistake the line drawn in *Gibbon v Mitchell*[49] is most often used, where Millet J. stated that the mistake must relate to the legal effects of the transaction and not merely the consequences or advantages to be gained by entering into it.[50] This distinction between the effects and the consequences of the transaction has been used to deny relief in cases where the mistake made relates purely to the tax (or commercial)

[42] ibid, at 824.
[43] See Walker, above, fn.29 at p.178.
[44] Cf. J. Hilliard "*Re Hastings-Bass*: too good to be true?" (2002) 16 TLI 202 at pp.203-204.
[45] *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch D) at 1307.
[46] ibid. See also Häcker, above, fn.3 at p.320.
[47] For more detail see J. Hilliard "*Gibbon v Mitchell* reconsidered: mistakes as to effects and mistakes as to consequences: part 1" [2004] PCB 357; J. Hilliard "*Gibbon v Mitchell* reconsidered: mistakes as to effects and mistakes as to consequences: part 2" [2005] PCB 31; Häcker, above, fn.46.
[48] E.g. remedies refused in *Racal*, above, fn.27; *Whiteside v Whiteside* [1950] Ch. 56; *Allnutt v Wilding* [2007] EWCA Civ. 412.
[49] Above, fn.45.
[50] ibid at 1309.

consequences of the mistake. Whilst, this distinction is not without its critics,[51] it is still the key test used in the case law.

Second, and more importantly for the current purposes, it has only been in cases where rescission for mistake and rectification are *not* available as remedies that the *Hastings-Bass* principle has been used. Either the other remedies have been argued and discounted or it has been assumed that the other remedies are not available and so the *Hastings-Bass* principle can be used.

Therefore it is clear that whilst individuals do have remedies available to them in order to undo a mistake, they cannot usually escape from the tax consequences of a transaction. The *Hastings-Bass* principle allows a transaction to be undone in cases where an individual would have no success. Thus, there is a difference in the extent to which trustees and individuals can undo transactions for tax purposes.

6. Types of Mistake Relating to Tax

One further issue to consider is whether the type of error relating to taxation should make any difference. A range of tax errors can be at issue when a taxpayer wishes to undo a transaction. The taxpayer may simply be unaware of a tax charge at the time of entering into the transaction, the taxpayer may have received incorrect tax advice relating to the transaction or the taxpayer may have implemented the tax advice incorrectly. In the first circumstance, where the taxpayer is simply unaware of the tax charge, this should not be a sufficient reason to undo the transaction. Many tax consequences can attach to transactions and taxpayers have an obligation to inform themselves of the tax liabilities which flow from a transaction. Therefore the fact that the charge was "unknown" at the time of entering into the transaction cannot be a sufficient mistake to undo the transaction.[52] Certainly if an individual claims he would not have entered into a transaction if he had known the tax consequences of it, there would be no basis for setting aside the transaction. However, in the case of trustees, this issue becomes more complicated, because the trustees have not informed themselves of a factor relevant to the transaction and therefore, they can invoke *Hastings-Bass*.

An example of this is *Burrell v Burrell*[53] which concerned an IHT liability that the trustees had failed to appreciate. The settlor wished to pass some of the substantial shareholding in a company, of which he was chairman, to his family. These shares were of the type that attracted Business Property Relief for IHT purposes,[54] which should have meant that the shares were IHT-exempt on transfer. An A&M trust of the shares was set up in favour of the settlor's son.[55] However, when the son reached the age of majority, the settlor thought the dividends on the shares were too high for someone of such a young age to receive. Therefore, the trustees decided to end the

[51] E.g. J. Hilliard "Limiting *Re Hastings-Bass*" [2004] *Conveyancer* 208 at p.217.

[52] Note, in *Barclays Private Bank*, above, fn.2 the trustees did not take into account a change in the law relating to CGT and this was sufficient to set aside the transaction on the basis that a relevant consideration was not taken into account. If such a rule is allowed to stand, there is no motivation for trustees to inform themselves of the law and keep up to date with it. Further, knowledge of the law and changes in it are imputed to individuals and yet trustees seem to be sheltered from the same.

[53] Above, fn.11.

[54] See ss.l05(1)(bb) and 122 of the IHTA 1984.

[55] s.71 of the IHTA 1984. The rules relating to the beneficial IHT treatment of these trusts have changed since the Finance Act 2006 (UK), which undertook a major overhaul of the IHT treatment of trusts.

interest in possession and create two new trusts. The shares mentioned previously were transferred into a discretionary trust. Although the shares were eligible for business property relief, which relieves a lifetime charge to IHT on entry into the trust, the shares had to be owned for two years before the transfer to attract the relief.[56] The interest in the shares for IHT purposes only vested in the son when he gained an interest in possession of the trust,[57] which was at the age of 18. The transfer took place when he was 19 and so he had not owned the shares for the requisite period. Thus the transfer into the trust attracted an IHT liability of up to £1.47million. Mann J. suggested that this would be "a very serious loss to the trust estate."[58] Mann J. stated that trustees must consider the tax consequences of their decisions and that failure to do so can trigger the *Hastings-Bass* principle.[59] The trustees had tax consequences in their mind, but they did not give them proper attention.[60]

However, another way of looking at this is to say that the trustees have not done something which it is their duty to do; they should take into account the tax consequences of a transaction, in the same manner that an individual must. If trustees do not, they have acted in a manner that is negligent and thus a negligence claim or breach of duty claim can be pursued. It is not right to undo the transaction in order to make the tax liability disappear. In fact, in *Burrell* it can be said that the trustee gave the tax issues as much thought as he was able. He then relied on the legal advisers to give him proper advice about the tax consequences. The solicitors were negligent in failing to give the trustees the full picture in relation to tax consequences.[61] Mann J. granted the declaration of invalidity of this trust despite the fact that both the legal advisers and the trustees were clearly negligent. This means they both escaped any liability for their negligence and were able simply to escape from the transaction altogether.[62] Furthermore, the trustees had put in place another deed of appointment on the basis that the original creation of the discretionary trust was invalid. Therefore, it was not actually sufficient to set aside the transaction, another transaction had to be carried out and so this should really have been a case for rectification.[63]

This leads us to other types of mistake. Where tax advice has been received but the advice is incorrect or flawed in some way, giving rise to a tax liability, this is also an error which should be insufficient to set aside the transaction, but has been sufficient in *Hastings-Bass* cases.[64] For example, in *Sieff* the assets of a settlement included Woburn Abbey and a number of chattels of high value. Of significance is that there was a discretionary trust which contained the chattels. On the 10 year anniversary of the trust (2001), there was a very high 10-year IHT charge.[65] The trustees sought a

---

[56] s.106 of the IHTA 1984.
[57] s.49 of the IHTA 1984.
[58] Above, fn.11 at [10].
[59] ibid at [19].
[60] ibid at [20].
[61] ibid at [11].
[62] Note that Hilliard suggests this might in fact be positive, so that the long term relationship between the trustee and the beneficiary can be maintained. See Hilliard, above, fn.44 at p.212.
[63] Rectification was not mentioned in this case, but note *Smithson v Hamilton* [2007] EWHC 2900 (Ch) at [60]-[80], Park J. suggests that rectification should not be allowed through the back door by using a *Hastings-Bass* claim.
[64] ibid at [104].
[65] s.64 of the IHTA 1984. This is a charge that arises on each 10 year anniversary of some types of trust, including discretionary trusts.

way to minimise this charge in future. One option given by the advisers was to transfer the property from the original settlement to Lord Howland, the primary beneficiary, contingent on his being alive on a future date. At that time, Lord Howland would resettle the property in a more flexible trust. The trustees were advised that a CGT charge would arise on the transfer of the assets from one trust to the other,[66] but that hold-over relief[67] would be available and so there would be no tax payable at that time. Further, no IHT exit charge[68] on the transfer out of the discretionary trust would be payable as long as the transfer occurred within three months of the 10 year charge.[69] This advice was incorrect because this type of hold-over relief for CGT can only operate where there is an IHT charge. Here, there was no IHT charge, as the transfer was made within three months of the 10 year charge (if this had not been the case, an IHT exit charge would have been payable). Thus no hold over relief was available and the CGT charge of approximately £1million was triggered.[70] (If there had been an IHT exit charge, hold-over relief would have been available).

The other problem with the transfer to the second trust arose in relation to IHT. Lord Howland, as had been planned for some time, moved into an apartment at Woburn Abbey, where the chattels were kept. When the chattels were transferred an IHT charge was triggered as it was an assignment of a contingent interest. However, once Lord Howland was enjoying some benefit from his gift, this would be seen as a gift with reservation of benefit[71] and so the chattels would be treated as part of Lord Howland's estate on his death unless he paid market value for the use of the assets. This was approximately £40,000 a year.[72] Thus Lloyd L.J.[73] pointed out that there was either a high IHT charge on his death, or a high annual sum to be paid from taxed income.[74] Quite why it is offensive for a taxpayer to have to pay a charge that anyone else in similar circumstances would have to pay from taxed income is unclear. However Lloyd L.J. found that if the trustees had appreciated the tax consequences of the appointment, they would not have made it. Yet the trustees did not overlook the tax consequences – this was a case where the legal advisers were erroneous in their advice. Despite this, the Revenue lost the tax which became payable due to the transaction, rather than the erring legal adviser bearing the burden of incorrect advice.

If tax advice is taken and it is incorrect, then this is not a reason for having the transaction set aside altogether. Rather it is a reason for saying that tax advice given was incorrect and remedies against the tax adviser should be sought.[75] This is a case where a negligence action should be pursued, rather than undoing the transaction

---

[66] s.71(1) of the TCGA 1994.
[67] s.260 of the TCGA 1994.
[68] s.65 of the IHTA 1994. This is a charge which arises when assets leave certain types of trust, including discretionary trusts.
[69] s.65 IHTA
[70] *Sieff,* above, fn.9 at [25]
[71] s.102 of the Finance Act 1986 (UK).
[72] *Sieff,* above, fn.99 at [225].
[73] Lloyd J. heard the case in the High Court but by the time he gave judgment, he had become Lloyd L.J. However, the judgment is still treated as stemming from the High Court and not the Court of Appeal.
[74] *Sieff,* above, fn.99 at [25].
[75] See T.H. Wu "Rationalising *Re Hastings-Bass:* a duty to act on proper bases" [2007] TLI 62 and also Revenue Interpretation 271, above, fn.21 at [6].

itself.[76] The transaction itself has achieved in legal terms what it was supposed to - the only problem is that it did not have the tax consequences that were hoped for. Where tax advice is sought, there is always a danger that it might not be correct – this is true for any instance of professional advice. The law has mechanisms to deal with such a problem, namely the action of negligence. There is no reason to give added protection to certain groups of people from the effects of such advice. If the advice were in fact correct, then the benefit would have been achieved from the tax avoidance. If there is a corresponding loss, that is simply the risk/reward balance that has to be taken into account when seeking advice.

Where tax advice is taken and is correctly given, but the taxpayer does not effect the transaction in accordance with the advice, then this is also not an error that warrants the transaction being set aside. Yet, again, the *Hastings-Bass* principle has aided trustees in this situation. One example is *Abacus Trust Co (Isle of Man) Ltd v NSPCC*,[77] which actually gave rise to other cases brought by the same trust company.[78] This shows how decisions in this area can open the "floodgates." In *NSPCC*, a CGT liability of approximately £1.2million was successfully avoided. The trustees entered into a "flip flop" scheme to avoid CGT when a loan note matured. For the tax avoidance scheme to succeed, two trusts had to be set up in the tax year ending 5th April 1998 and an appointment to charity had to be undertaken after 6th April 1998: the transactions had to be in different tax years. Counsel advised the trustee company of this fact, but the lawyer drafting the documents suggested the appointment be made on 3rd April and the director of the trustee company agreed without referring to his notes from his meeting with Counsel. Patten J. held the trustees had an obligation to consider if an appointment would result in a significant tax charge for the beneficiaries or the fund and failure to do so could bring the *Hastings-Bass* principle into play.[79]

The problem is that the trustees received good tax advice which they did not follow, yet they were able to escape from the tax consequences and any liability. This seems at odds with the way one would expect the law to consider those who follow accurate advice in an inaccurate manner. The fault lies with the trustees alone - why should the burden of their error be passed to anyone else?[80] By not taking care in effecting the transaction, the transferor has taken the risk of falling outside the parameters of the advice. If an individual does this, then there is no recourse to anyone, because this is the fault of the individual himself. If a trustee makes the same mistake and there is a resulting loss to the beneficiary, the beneficiary could seek compensation from the trustee. Where, the trustee has acted negligently, action against the trustee is the correct means for redress.

7. THE BENEFICIARY OF THE *HASTINGS-BASS* PRINCIPLE

As the use of the *Hastings-Bass* principle is available to trustees but not individuals, it is essential to consider who this differential treatment actually benefits so that any justifications for the difference in treatment can be explored. In most cases it will seem that the beneficiary will benefit from being able to set aside the transaction in tax

[76] In discussion of *Sieff,* above, fn.9 Mitchell, above, fn.29 at p.36 mentions that there must have been a sigh of relief from the legal advisers when the claim was permitted.
[77] Above, fn.24.
[78] *Barr*, above, fn.24.
[79] *NSPCC,* above, fn.24 at [16].
[80] Discussed further below. See also Wu, above fn.75 at p.76.

cases. This is because setting aside the transaction will either alleviate a tax burden on the beneficiary himself or on the trust. If the beneficiary's own tax burden is relieved, the benefit to the beneficiary is easy to see. If the trust is relieved of a tax burden, the beneficiary still benefits because there will be more assets in the trust in which they have an interest.[81] However, whilst on the face of it the beneficiary benefits in these cases, in fact it is the trustee who benefits. This is because in overlooking a relevant consideration, the trustee has generally acted either in breach of trust[82] or negligently. Therefore, usually there is a remedy for the beneficiary against the trustee, which would give them compensation for the lost tax.[83] Therefore, whilst the law gives protection to the beneficiary through other action, the *Hastings-Bass* principle in fact protects the trustee from an action being brought against them. In cases where the trustee has simply not recognised that there is a tax liability, he has not fulfilled his obligation to consider all aspects of the transaction. Where the trustee obtains legal advice but does not follow it, again the trustee has made the error and so the remedy sought should be against the trustee. Where the trustee has obtained legal advice but the advice has been given negligently, then the action should lie against the professional adviser and no one else. As stated by Wu,[84] it is a burden on society to undo the transaction where there are other remedies available.[85]

Hilliard has argued that the trustee is not in fact protected by the principle. One reason he gives is that trustees will be protected by a wealth of exemption clauses in the trust documents and so it will be very difficult for beneficiaries to pursue them.[86] However, as Wu points out[87] this is an issue better dealt with by considering the rules relating to exemption clauses. If exemption clauses are available in such a wide range of situations that beneficiaries have no protection as against trustees, perhaps the rules for exemption clauses need to be reconsidered – this is not a reason to provide another legal remedy depriving a different person.[88] On the other hand, if there is a sound basis for the exemption clause rules then the trustees receive protection for sound reasons and the beneficiary should have no claim. The settlor has granted the right to the trustee to be protected against such claims from the beneficiary. Equally, the settlor acknowledges that if the trustee acts in a manner which is outside the bounds of his duty, the beneficiary will receive no protection. Thus, if exemption clauses protect the trustee from liability, the beneficiary has no remedy and this is the extent of the right the settlor has given the beneficiary and which the law allows. No further remedy need be available to protect the beneficiary, yet the *Hastings-Bass* principle means that the

[81] cf. *NSPCC,* above, fn.24 where the undoing the transaction would result in the removal of a gift to a charity but this was not contested by the charity and nor was it by the Attorney General on behalf of the charity, who was invited to make representations in the case.

[82] In *Barr*, above, fn.24, it was said that the *Hastings-Bass* principle could only be used where there was a breach of trust in place. However later cases have said such a limitation is not necessary, e.g. *Sieff,* above, fn.9, although it is usually present. See also R. Nolan and M. Conaglen "Trustee (in)discretion" [2006] CLJ 15 at pp.16-17; M Thomas and B Dowrick "The Odd Couple? *Hastings Bass* and mistake" [2006] Conveyancer and Property Lawyer 91 at p.95.

[83] See I. Ferrier "When trustees err" [2002] Conveyancer and Property Lawyer 199 at p.200 who argues the *Hastings-Bass* principle needs revisiting by the House of Lords, for policy reasons.

[84] Above, fn.75 at p.76.

[85] See also I. Dawson "The effect of an unthinking trustees' action" [2002] Conveyancer and Property Lawyer 67at pp.71-72; R. Nolan and M. Conaglen "*Hastings-Bass* and third parties" [2006] CLJ 499; *Donaldson v Smith* [2006] EWHC 1290 (Ch).

[86] See Hilliard, above, fn.51 at p. 212. See also *Breadner*, above, fn.9 at [57].

[87] Wu, above, fn.75 at pp.69-70 and fn.45.

[88] In the current discussion, that is the Revenue.

burden of the trustee's error moves to the Revenue because no avenue is available against the trustee.

Hilliard also argues that it is the beneficiary who is being protected because using the *Hastings-Bass* principle means that beneficiaries do not have to become entangled in a hostile negligence claim and they do not have to spend their own money to achieve the remedy. The trustee will often have to pay costs for a case involving the *Hastings-Bass* principle.[89] However, this argument is also weak because in other areas those pursuing a negligence action, for example against a legal adviser, will have to enter into a hostile claim and also pay for this action. There is no reason for which a beneficiary should be sheltered from these consequences.[90] In cases where the trustee has not acted in breach of trust and has not been negligent, and neither has an adviser to the trustee, there is no reason to protect the beneficiary at all and so there is no reason to allow the *Hastings-Bass* principle at all. Whilst the use of it here will not protect the trustee, it should not be available, as there is no policy motivation for allowing a claim in such circumstances.

It has also been argued that to the extent that no third party loses out, the beneficiary should be able to retain this extra level of protection.[91] However, in tax cases there *is* a third party to consider – namely the Revenue.[92] The point in these cases is that a tax liability has arisen. In order to say that the tax liability has, in fact, not arisen, requires a sound basis upon which the legitimate liability can be reversed. The Revenue should be considered as a third party which needs protection because its right to receive the money has arisen and wiping out that right to payment should be treated with the same reverence as in relation to the holder of any other right.[93] The fact that the parties wish it had not arisen simply cannot be sufficient, just as it would not be sufficient if an individual tried to change the tax consequences of a transaction on the basis that they wished a tax liability had not arisen. In so far as third parties should be considered,[94] the right of the Revenue should be equal against trustees as it is against individuals. This issue is related to a public policy argument.[95] If the transaction is set aside and the tax is not payable, society as a whole loses out in order to protect the trustee from a claim against him. The benefit of society as a whole should be put before the protection of a trustee, particularly trustees of the type in these cases who are remunerated for providing a service. There can be no justification for protecting them to the detriment of society as a whole.[96]

[89] Hilliard, above, fn.51 at pp.207 and 212-213. cf. Dawson, above, fn.85 at p.76.
[90] See Wu, above, fn.75 at pp. 69-70.
[91] Hilliard, above, fn.51 at p.213.
[92] Walker, above, fn.29 at p.240 considers that this might be an option, but that the question is open to debate.
[93] It could be argued that the Revenue is merely a "volunteer" and therefore should not receive protection. However, the better view is that the Revenue's right is triggered by legislation and as such is at least as strong as that of a purchaser and so the right should be protected as a purchaser's right would be.
[94] Hilliard, above, fn.51 at p.213 and also Wu, above, fn.75.
[95] See Ferrier, above, fn.83.
[96] It is possible in some cases there might be different public policy issues at play which justify the operation of the principle, for example in the case of pensions, where the beneficiaries have purchased an interest and where the policy motivation is very different. There, the issue is not whether or not a tax charge is triggered, but rather whether other decisions taken by the trustees should stand. It has been recognised that pension cases are different, for example by the fact that it only be established that

8. DIFFERENCE IN TREATMENT BETWEEN AN INDIVIDUAL AND A TRUSTEE

It is clear that trustees are protected from tax errors in a way that individuals are not protected. Furthermore, a professional adviser giving advice to a trustee has more protection than one advising an individual because if they give negligent advice, in the former case the transaction can be overturned, but in the latter case a negligence claim may be possible.[97] The question is then whether there is any justification for this beneficial treatment of trustees. One possible reason why this issue has not been explored in detail in the past (alongside other issues stemming from the *Hastings-Bass* case) could be that it is mainly trust lawyers who have contributed to the discussion in this area, whose whole concern is the relationship between the trustee and beneficiary. From a tax point of view, on the other hand, equity as between taxpayers is a cornerstone of tax policy which should be maintained.[98] This is a very different aim and when considered, a serious unfairness can be seen.

In *Sieff v Fox* Lloyd L.J. recognised the difference in treatment between individuals and trustees[99] and said that such a difference was justified for two reasons: first because trustees are dealing with property which is not their own and secondly because trust taxation is more complex. In *Ogden* Lewison J. echoed the first reason by saying that a higher test should apply when an individual disposes of his own property.[100] However, in neither case were these "justifications" explained and, with respect, it is doubtful that these factors are really any justification for the differential treatment.[101] In relation to the first, it is difficult to see why there is better protection as between those who are both legal owners. The trustee as a legal owner may hold the assets for the benefit of others, but this does not justify better treatment than for an individual holding property for his own benefit. It may be right that a beneficial owner should get protection against the actions of the legal owner, but that is a separate issue to whether a trustee as legal owner should have a privileged position relative to an absolute legal owner.

The complexity of trust taxation is not a sound reason for the difference either. Taxation can be complicated at any level and whilst the affairs of some individuals are straightforward, those of others are more complicated. As between individuals there is not more favourable treatment in terms of being able to undo the transaction based on the difficulty of the tax rules at issue and so this is not a good reason to justify difference in treatment as between trustees and individuals. Furthermore, whilst taxation of trusts can be complex, the parties have voluntarily put themselves within this complex regime. It is their choice to have the taxation regime of trusts apply to them from the outset and so the parties should not then be able to escape from the transaction when they volunteered to be subject to the complexity. Parties often use

---

trustees might have acted differently had they taken into account the relevant considerations. *Kerr*, above, fn.23 and *Stannard*, above, fn.23.

[97] Wu, above, fn.755 at p.68 argues that if the *Hastings-Bass* principle is sound, there is no reason to limit it to trustees, rather why not extend it to other professional advisers?

[98] This principle, that taxpayers in a similar position should pay a similar amount of tax was recognised in A. Smith *Wealth of Nations* Book V Ch II Part II "Of Taxes"

[99] *Sieff,* above, fn.9 at [85] and see also Thomas and Dowrick, above, fn.82 at 101.

[100] *Ogden*, above, fn.25 at [27].

[101] Mitchell, above, fn.29 at p.41.

trusts in order to avoid tax.[102] In this context the parties have chosen a more complicated regime of taxation in order to pay less. If that fails and they in fact have to pay as much as, or even more, than if they had not entered into the transaction, then that is again of their own volition – in the desire to minimise the tax, the risk of a more complicated taxation regime was taken.

Further, and related to the tax avoidance issue, whilst there is no obligation to set up affairs so as to incur the most amount of tax possible,[103] there is also no right to pay the minimum tax possible. Thus, the Revenue is an interested party in a transaction resulting in a tax liability, whether or not it was intentional. If an individual arranges his affairs, but fails to take advantage of a scheme which could reduce his tax, this last fact is insignificant. The tax liability crystallises as soon as he arranges his affairs in an legitimate manner and the tax legislation triggers the liability. This also deals with a point made in some cases that the Revenue is merely receiving a "windfall" in cases where a legitimate tax avoidance scheme is improperly implemented.[104] It may be true that the scheme would have avoided the tax if properly implemented, but the point is that once a transaction has been carried out and the scheme does not work, a tax liability crystallises. To say that this is a windfall to the Revenue would indicate that on any occasion where someone sets up their affairs so that there is a higher tax liability than there might have been, there is a windfall to the Revenue. This would mean that when setting up a transaction, there would be no incentive to be certain of the structure as any excess paid to the Revenue due to structure would merely be a windfall in the Revenue's hands. The fact is, many taxes can be mitigated or avoided with good tax advice, but to allow taxpayers to go back and revisit transactions after seeking out better tax advice is reprehensible – it would give taxpayers no incentive to set out their affairs in a sensible manner from the outset and essentially gives tax advisers the benefit of hindsight and carte blanche to change transactions so as to minimise tax liability.[105] As long as the tax is a legitimate one in the first place, the liability to the Revenue cannot be classified as a windfall.[106]

Clearly the purpose of setting aside transactions with unforeseen tax consequences is to avoid a tax charge, but it is also interesting to consider that the transaction itself is often part of a tax avoidance scheme. The approach of the courts in dealing with such cases can be contrasted to the approach to tax avoidance. One of the starting points in such cases is the fact that there is no obligation to pay the most amount of tax possible. However, the courts have acknowledged that if transactions have no commercial purpose other than to avoid tax, such transactions can be ignored for tax purposes and thus the transaction can be taxed as if artificial steps were not included.[107] Whilst there can be legitimate tax avoidance, and tax avoidance schemes have not always been

---

[102] Although it should be noted that the use of trusts in tax planning has become less attractive in recent years further to the more punitive taxation of domestic trusts and those with offshore features.
[103] *IRC v Duke of Westminster* [1936] AC 1, *Ensign Tankers v Stokes* [1992] STC 617.
[104] *Re Slocock* [1979] 1 All E.R. 358 at 363.
[105] Cf. Hilliard, above, fn.47 at p.36.
[106] This is quite different from cases which arise in unjust enrichment where the tax paid to the Revenue can truly be seen as a windfall. Those are cases where the tax levied was not legitimate and therefore should never have been paid. If the Revenue is not required to refund the tax in those cases, the Revenue receives a windfall.
[107] *Furniss v Dawson* [1984] AC 474; *WT Ramsay Ltd v IRC* [1982] AC 300; *IRC v Burmah Oil* [1982[STC 30.

struck down,[108] the courts are wary of tax avoidance and recognise the need to separate transactions with a true commercial nature from those with the sole aim of avoiding tax.[109] Here we see a contrast with the approach in the *Hastings-Bass* cases, where the courts turn a blind eye to the fact that the transaction is related to tax avoidance and allowed trustees to escape from the tax consequences flowing from a tax avoidance scheme which has been improperly implemented. This is in particular contrast to the tax avoidance cases where the transaction entered into is extremely artificial.[110] In fact, had the Revenue participated in such cases it would be surprising if it did not try to prevent the transaction from being set aside on the basis of tax avoidance. If courts can ignore artificial transactions where they have a tax avoidance purpose, then there is no reason to set aside a transaction which does not achieve its avoidance purpose. This is because, even if the transaction were put in place in the proper manner, the courts would be able to see through the transaction.

The courts need not strike down every tax avoidance scheme, but there is a vast difference between this and aiding taxpayers in their desire to escape tax by helping them to set aside the unwanted consequences of the transaction. Even though tax avoidance can be legitimate, this is not to say it should be actively encouraged by the courts and if the courts are to maintain control over tax avoidance, they cannot send conflicting messages. Thus, it is important that the courts continue to treat tax cases separately, as they do for individuals, and prevent parties from altering or undoing transactions simply due to unwanted tax consequences flowing from transactions.

There is also a pragmatic reason for preventing the unravelling of transactions which have tax consequences in that the potential tax consequences of unravelling a transaction are extremely difficult. A simple example would be that of a discretionary trust which makes an appointment of assets to a beneficiary. At the time of the appointment, there will be a CGT charge on the difference between the market value at the time of the appointment and the previous acquisition cost. Then the beneficiary will be directly taxed on any income which is received from the assets.[111] If the trustees, for some reason, realise that there are consequences of the transaction which are unpalatable, and wish to have the transaction set aside, the tax implications are difficult. The tax that was paid when the assets left the trust should not have been paid. If there was an exit charge for IHT purposes, that should not have been paid. Further, the tax paid on income arising from the assets was paid by the wrong taxpayer – if the appointment is set aside, the trustees owned the assets and so should have paid tax on the income arising from them. It is quite possible that the taxpayer in fact paid less tax

[108] E.g. *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51.

[109] Also worthy of note is the emerging principle of "abus de droit" in the European context, which uses this distinction. Case C-255/02 *Halifax plc v CC&E* [2006] ECR I-1609; *WHA v HMRC* [2007] EWCA Civ. 728*; Weald Leasing Ltd v HMRC* [2008] EWHC 30 (Ch); H.L McCarthy "Abuse of rights: the effect of the doctrine on VAT planning" [2007] BTR 160; R. de la Feria "Prohibition of abuse of (Community) law: the creation of a new principle of EC law through tax" (2008) 45 CMLR 395; M. Ridsdale "Abuse of rights, fiscal neutrality and VAT" (2005) 14 ECTR 82.

[110] Walker, above, fn.29 at p.177-178.

[111] Income tax will be calculated and payable according to income deriving from the type of asset (e.g. interest on cash in a bank account, dividends from shares, profits from a business etc…) and so either under the Income Tax (Earnings and Pensions) Act 2003 (UK), Income (Trading and Other Income) Act 2005 (UK) or Income Tax Act 2007 (UK).

than the trustee would have to pay,[112] although it is unlikely that the trustees would seek to have the transaction set aside in these circumstances. In *Hastings-Bass* itself, the court pointed out that the income tax consequences of setting the transaction aside would be difficult, as the previous income tax and CGT consequences would have been different if the transaction were not effective.[113] The point is that there are many tax issues to consider even when setting aside just one transaction, particularly after some considerable time period has elapsed. Whilst this is not a strong reason to deny the relief on its own, this is of course a factor and added to the more forceful arguments, provides an extra incentive to deny a remedy where the issue pertains to tax consequences.

9. CONCLUSION

There has been much discussion about limiting the *Hastings-Bass* principle[114] which is beyond the scope of this article. There are good reasons for the principle in some cases,[115] however the tax arena is not one where the principle should be applied. A number of proposals of how the principle could operate in a more limited manner have been put forward,[116] but the main thing that any change to the principle needs to achieve is to prevent trustees from avoiding tax charges in cases where an individual would not be able to obtain the same protection. It is possible that in the absence of judicial intervention on this issue, legislation could be put in place to prevent the application of the principle so as to avoid a tax charge. In fact, it is surprising that the Revenue has not taken some action on this thus far.[117] However, the principle can no longer be allowed to run riot and reverse tax charges in an inequitable manner and continue to shelter trustees and their advisers to the detriment of the Revenue and therefore the public.

---

[112] Rates of CGT used to vary as between trustees and individuals, from 20% to 40%. However, since the Finance Act 2008 (UK), there is a general rate of CGT at 18% for all taxpayers.

[113] *Hastings-Bass*, above, fn.1 at 38.

[114] *Breadner*, above, fn.9; *NSPCC*, above, fn.24; Wu, above fn.75; Hilliard, above, fn.51, Mitchell, above, fn.29; Dawson, above, fn.85; E. Nugee Q.C., "*Re Hastings-Bass* Again--Void or Voidable? And Further Reflections" [2003] P.C.B. 173; B. Green "The law relating to trustees' mistakes – where are we now?" (2003) 17 TLI 114.

[115] For example in pension cases as discussed above.

[116] See fn.114 above.

[117] The Revenue often legislates pursuant to a case which decides tax is recoverable, or where there is a danger of the floodgates being opened as a consequence of a court decision. See for example legislation enacted in relation to time limits to bring claims in s.121 of the Finance Act 2008 (UK) and ss.320 and 321 of the Finance Act 2006 (UK).