HIGH COURT OF JUSTICE—CHANCERY DIVISION 14,15, 18 AND 19 NOVEMBER AND 6 DECEMBER 1991 A

COURT OF APPEAL—29, 30, AND 31 MARCH AND 9 JULY 1993 B

HOUSE OF LORDS—4, 5, AND 6 JULY AND 17 NOVEMBER 1994.

C

NAP Holdings UK Ltd. v. Whittles (H.M. Inspector of Taxes)(1)

D

Corporation tax—Chargeable gains—Inter-group transfer of share in exchange for shares in transferee company—Transferee company's acquisition cost—Income and Corporation Taxes Act 1970, *s* 273 *and s* 279*—Capital Gains Tax Act* 1979, *s* 78 *and s* 85.

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EO owned the entire share capital of A which it had acquired for $7.5m. In 1983 EO transferred those shares to its wholly-owned subsidiary NAP in exchange for shares in NAP: the market value of the shares in A was then about $430m. In 1985 NAP sold the shares in A out of the group for over $430m.

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NAP appealed against an assessment to corporation tax for its accounting period ended 30 December 1985. The Inspector of Taxes contended that NAP's acquisition cost of the shares in A was fixed by s 273 Income and Corporation Taxes Act 1970 as the original cost to EO. NAP contended that s 273 was excluded from operation by reason of the application of s 78 and s 85 Capital Gains Tax Act 1979, which provided that a share-for-share exchange should be treated as not involving a disposal, and its acquisition cost was, therefore, the market value of the shares when it acquired them. The Special Commissioners dismissed the appeal. NAP appealed. G

The Chancery Division held, dismissing NAP's appeal, that the share exchange in 1983 did involve a disposal within s 273; s 78 had effect only for the purpose of determining the tax position of EO; neither s 78 nor s 279 justified according an artificially restricted meaning to "disposes" in s 273; s 273 was plain and unambiguous; there was nothing to cut down the natural and ordinary meaning of the word "disposes" which clearly included share exchanges; the word possessed no secondary or alternative meaning which Parliament could have intended, and must, therefore, be given its ordinary meaning. H I

NAP appealed.

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(1) Reported (ChD) [1992] STC 59; (CA) [1993] STC 592; (HL) [1994] STC 979.

A The Court of Appeal held, allowing NAP's appeal, that the share exchange in 1983 did not involve a disposal within s 273 because:—

(1) the provisions in the Consolidating Acts of 1970 and 1979 should be construed without recourse to their antecedents as, although the language presented difficulties. they were not difficulties which classical methods of B construction could not resolve;

(2) in view of the scheme of the legislation and the intentions underlying the anti-avoidance provisions of s 279, and of s 87 (of the 1979 Act), "disposal" within s 273 bore the same meaning as in s 85, rather than its natural and ordinary meaning;

C

(3) while s 85(3) provided that s 78 was to apply "with any necessary adaptations", those words could not apply without giving an anomalous and absurd meaning to s 279 and s 87;

(4) the result did not effectively anticipate s 115 Finance Act 1988; that D provision might simply have been intended to clarify the position for the future; in any event recourse may only be had to subsequent legislation as an aid to construction if it is necessary to do so in order to resolve an ambiguity, in the strict and narrow sense of that word, and there was no such ambiguity here; moreover, an assumption by the draftsman of a later Act cannot alter the law retrospectively.

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The Crown appealed.

Held, in the House of Lords, allowing the Crown's appeal (Lord Lloyd of Berwick dissenting), that:—

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(1) on the footing that *Westcott* v. *Woolcombers Ltd.* was correctly decided, the construction which it placed on the predecessors of s 273 and of s 78 and s 85 was not displaced by the enactment of the predecessors of either s 279 or ss 87–88; recourse should not be had to the subsequent legislation, for the purpose of construing the earlier legislation, because the earlier legislation contained no ambiguity in the strict and narrow sense of that word; it G was more than likely that the draftsman of the subsequent legislation (as originally enacted) believed that the predecessor of s 273 did not apply to an inter-group share exchange, but that could not have the effect of altering the true construction of that provision; the decision in *Westcott* v. *Woolcombers Ltd.* should be considered because where there was a recent decision upon the true construction of an enactment that had been the subject of consolidation, H it would be unrealistic to disregard it when approaching the interpretation of the later statute; and in any event the consolidated legislation gave rise to a real difficulty of interpretation such as to justify reference to *Westcott* v. *Woolcombers Ltd.*;

I (2) *Westcott* v. *Woolcombers Ltd.* was correctly decided; the words "disposes of" and "disposal" in s 273(1) must bear their ordinary and natural meaning; it was plain that s 78, as applied by s 85 to a share exchange transaction, had the effect that, where the share exchange was between two companies in a group, the actual disposal which took place was to be treated as not being a disposal, but that could apply only to the tax position of a shareholder who, as a result of a company reorganisation, disposed of his original holding in it and received in exchange a new holding in it, and it could not

affect the company which was the subject of the reorganisation; s 85 was likewise intended to affect only the tax position of a shareholder who disposed of his shares in one company in exchange for shares in another company, and not the tax position of that other company. A

Westcott v. *Woolcombers Ltd.* [1987] STC 600: 60 TC 575 approved and applied; *Kirkness* v. *John Hudson & Co. Ltd.* [1955] AC 696 and *Farrell* v. *Alexander* [1977] AC 59 considered. B

CASE

C

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. On 27 and 28 February 1990 I, one of the Special Commissioners, heard the appeal of NAP Holdings UK Ltd,("NAPUK") against an assessment to corporation tax for its accounting period ending on 30 December 1985 in the sum of £230,000,000. D

2. The issue in dispute between the parties was the amount (if any) of the capital gain realised by NAPUK during the said accounting period on the disposal by it of certain shares in another company, Astbro Inc. That question depended on the figure at which, in accordance with the relevant legislation, NAPUK was to be treated as having acquired those shares. E

3. NAPUK acquired the said shares from its parent company (Exco Overseas Ltd.) in consideration of an issue of its own shares. The transaction accordingly fell within two distinct statutory provisions, namely s 273, Income and Corporation Taxes Act 1970 (disposals between group companies) and s 78 (by way of s 85) Capital Gains Tax Act 1979 (reorganisations). The relationship between those provisions was considered in *Westcott* v. *Woolcombers Ltd.* [1987] STC 600; 60 TC 575. The substance of the question for my decision was whether I was bound to determine the issue in the present case in the Inspector's favour, in the light of the said decision of the Court of Appeal. F G

4. The case was argued on agreed facts. There was no other oral or documentary evidence.

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5. At the conclusion of the hearing, I reserved my decision, which was issued in writing on 23 March 1990. A copy of my decision (to which the parties' statement of agreed facts is appended[1]) is annexed hereto, and forms part of this Case. My decision sets out the contentions of the parties. As will be seen, I held, for the reasons therein stated, that the rationale of the decision in *Westcott* v. *Woolcombers Ltd.* has not been affected by further provisions enacted since 1966 (the relevant year in that case); and also that the Court of Appeal's decision did not rest, in any respect, on unargued assumption. I, accordingly, held myself bound by that decision. I adjourned the hearing of the appeal before me for agreement of the assessment figure. I

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(1) Pages 177I/178H *post*.

A 6. It has since been reported to me that the parties are experiencing difficulty in agreeing the figure at which in accordance with my decision, the present appeals should be formally determined; and that such agreement is likely to be considerably delayed. The Appellant Company has also indicated its intention to require a Case to be stated when the appeal has been formally determined following such agreement. Following correspondence between the B parties' solicitors and ourselves, the Appellant's solicitors wrote to us on 28 June 1990 requesting us to state a Case for the opinion of the High Court at this stage, in relation to the decision in principle. The request was made with the knowledge and consent of the Solicitor of Inland Revenue. In order to enable the question of principle to be determined without undue delay, we have acceded to that request. We have, accordingly, stated this Case which I, C the Commissioner who heard the appeal, have signed.

7. The question of law for the opinion of the Court is whether I erred in holding that I was bound by the decision in *Westcott* v. *Woolcombers Ltd.* to hold that, in computing the gain accruing to NAPUK on the disposal of certain shares in Astbro Inc. which it had acquired from Exco Overseas Ltd., D those shares should be treated as having been acquired by NAPUK for a consideration such that neither a gain nor a loss accrued to Exco Overseas Ltd. on that transaction, and that that consideration is in substance equal to the base cost of the shares to Exco Overseas Ltd. and not to the market value of the shares at the time of the of the transaction.

E

B. O'Brien — Commissioner for the Special Purposes of the Income Tax Acts

F Turnstile House
98 High Holborn
London WC1V 6LQ

22 August 1990.

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DECISION

The Appellant Company, NAP Holdings UK Ltd ("NAPUK") appeals against an assessment to corporation tax in respect of its accounting period 1 H January-31 December 1985. The profits assessed are estimated at £230m. Those profits are substantially accounted for by a profitable sale by NAPUK, during that year, of certain shares in another company, Astbro Inc. ("Astbro"). Whether that sale gave rise to a chargeable gain to be included in NAPUK's profits for corporation tax purposes, and if so the amount of that chargeable gain, is dependent on the figure to be adopted as the cost to I NAPUK of acquiring the Astbro shares. That is where the problem lies.

A statement of agreed facts has been placed before me but it is common ground between the parties that a number of the details which it contains are of no significance in arriving at a solution of the problem. I have, accordingly, relegated the statement to an appendix, and will work on a simplified version (my own), as follows.

At all material times, NAPUK was a wholly-owned subsidiary of Exco Overseas Ltd. ("Overseas"); and, since both were resident in the UK, they were members of the same group of companies for the purposes of s 273–280, ICTA 1970. A

Immediately before 23 April 1983, Overseas owned the entirety of the issued share capital (100 shares) of Astbro. The acquisition cost to Overseas of those shares was (approximately) $7.5m. B

On 23 April 1983 the market value of the 100 Astbro shares was of the order of $400m. On that day Overseas transferred the Astbro shares to NAPUK in exchange for the issue to Overseas of 20m ordinary NAPUK shares of $1 each. It follows from the facts above that Astbro was, both before and after the transfer of its shares, a member of the Overseas/NAPUK group. C

By 8 August 1985 NAPUK had acquired 27.71 further shares in Astbro (at some further cost). Its total holding then represented some 95 per cent. of Astbro's share capital. D

On 8 August 1985 NAPUK sold all its Astbro shares to two American companies outside the Overseas/NAPUK group for a little over $431m. A large profit was thus realised for the group. It is apparent that most of the appreciation in value had occurred during the period of Overseas' ownership of Astbro, rather than during that of NAPUK. E

Those facts closely resemble those in *Westcott* v. *Woolcombers Ltd.*(1) 60 TC 575. Indeed, apart from names, there are only three differences. First, there was an additional step in *Woolcombers* (the further transfer from "Topmakers" to the appellant company) which added nothing to the argument; secondly, the ultimate "disposal" took the form of a liquidation of the companies corresponding to Astbro, rather than a sale to outsiders of their shares; and thirdly, the Woolcombers group suffered a loss rather than a profit. None of those differences provide grounds of distinction on the facts. Indeed, the Court expressly recognised that its decision, while favourable to Woolcombers in the light of its loss, would have been unfavourable to it if the end result had produced a profit. F G

The question in *Woolcombers*, as in the present case, may be expressed in these terms: if A Ltd. and C Ltd. are members of the same group of companies, and A Ltd. (for an issue to it of new C Ltd. shares) transfers to C Ltd. shares in B Ltd. which had cost A Ltd. £x but which are worth £y at the date of the transfer, is C Ltd.'s cost of acquiring the B Ltd. shares £x or £y? The answer to that question determines the amount (if any) of the chargeable gain (or allowable loss) which would accrue to C Ltd. if it were immediately to sell the B Ltd. shares outside the group (naturally, for £y). H

In the circumstances which I have set out-there are altogether three questions which will (or may in due course) fall to be decided, namely: I

(i) what is the immediate effect, for tax purposes, of A Ltd.'s transfer, from A Ltd.'s point of view?

(1) [1987] STC 600.

A (ii) what is C Ltd.'s acquisition cost of the B Ltd. shares?

and (iii) what is A Ltd.'s acquisition cost of the new C Ltd. shares?

The legislation has, from 1965, contained two sets of special rules which B are, or may be, relevant in the context.

(1) The "reorganisation rule". This was set out in para 4(2) of Sch 7 to the Finance Act 1965, and it was applied ("with any necessary adaptations") to reorganisations of the kind under present consideration, by para 6(1) of that Schedule. The provisions are now contained in the consolidating Capital C Gains Tax Act 1979 as ss 78 and 85(3).

By virtue of this rule, A Ltd.'s transfer is " ... not to be treated as a disposal" of its B Ltd. shares; and its new C Ltd. shares are to have, in A Ltd.'s hands, the same acquisition cost as its B Ltd. shares had had (i.e. £x). The rule is silent as to the acquisition cost to C Ltd. of the B Ltd. shares, and D ordinary principles (with or without resort to the provision treating transactions not at arm's length as taking place at market value) apply. That produces the answer £y for that.

It follows that the initial transfer by A Ltd. has no tax effect; and that a E subsequent disposal by C Ltd. of the B Ltd. shares will also have no tax effect (unless there has been appreciation or depreciation of the value of the B Ltd. shares in the meanwhile). The tax effect of the whole transaction is postponed until A Ltd. makes a chargeable disposal of the new C Ltd. shares.

F (2) The "in-group rule". This originally appeared in para 2(1) of Sch 13 to the Finance Act 1965, which became s 273 of ICTA 1970. It applies to any disposal (and corresponding acquisition) within a group of companies, and the rule is that the disposal is to be regarded as having been made for a consideration which produces "no gain, no loss" to the transferor A Ltd. (i.e. £x), the transferee C Ltd. acquiring the asset transferred (in my present example, G the B Ltd. shares) at the same value, £x. (The "in-group rule" has no application to A Ltd.'s new C Ltd. shares because the *issue* of shares does not constitute a "disposal" at all. So far as they are concerned, only the "reorganisation rule" applies and they are held by A Ltd. at £x.)

It follows that the initial transfer by A Ltd. has no tax effect—as under H the "reorganisation rule", but through the use of a different technique. But a subsequent market value sale by C Ltd. of the B Ltd. shares (outside the group) would have a tax effect, because C Ltd.'s acquisition cost is, artificially, £x. Furthermore, a subsequent market value sale by A Ltd. of its new C Ltd. shares will produce a similar tax effect—again reflecting the movement in the value of the B Ltd. shares while they were held by A Ltd.— I because the acquisition cost of the new C Ltd. shares is also artificially fixed at £x.

Thus, in a case where there has been a "shares-for-new shares" reorganisation within a group, there is a conflict between the two rules as they apply to the acquirer of the previously existing shares, if both rules apply. The only case in which the Court has, so far, had to face the problem is *Woolcombers*.

Hoffmann J. and the Court of Appeal decided in *Woolcombers*, for reasons which I need not set out in any detail, that the treatment (in appropriate circumstances) of a transfer as a non-disposal, as provided by the "reorganisation rule", is limited to the operation of that rule. Such a transfer remains capable of being a "disposal" for the purposes of the "in-group rule". On the face of it, that decision is decisive of the present case. By the "in-group rule", NAPUK's acquisition cost of the Astbro shares disposed of in August 1985 is governed largely by the $7.5m figure (the original cost to Overseas) and not by the $400m figure (the value of the shares when NAPUK actually acquired them by in-group transfer in April 1983).

Mr. Andrew Thornhill Q.C., for NAPUK, contends that *Woolcombers* is not decisive. He has two arguments.

His first does not seek to question the decision on its own facts: the critical fact being that the events in question—the in-group reorganisation involving Old Woolcombers and Topmakers—occurred in 1966. The statutory provisions before the Court for construction were, accordingly, limited to those contained in the Finance Act 1965. The statutory provisions applicable to the events in the present case are, however, in ICTA 1970 and the Capital Gains Tax Act 1979. Those consolidating Acts naturally include legislative material subsequent in date to the 1965 Act. On the principle that an Act is to be construed as a whole, the provisions in which the "reorganisation" and "in-group" rules are now to be found fall to be construed in a more extensive context. One added provision, Mr. Thornhill submits, must have been enacted on the assumption that non-disposal under the "reorganisation rule" excluded the operation of the "in-group rule" altogether. Now the modern approach to the construction of consolidation Acts is (primarily) to consider them as they stand, without reference to the antecedent provisions (*Farrell* v. *Alexander*(1) [1977] AC 59; *Commissioners of Inland Revenue* v. *Joiner*(2) 50 TC 449 (HL)); and the added provisions (which were absent for *Woolcombers* purposes) are part and parcel of the context in which the provisions giving rise to the "reorganisation" and "in-group" rules appear. If the *Woolcombers* point were now to arise for the first time, Mr. Thornhill contended that the presence of one of those provisions would lead the Court to a construction of the word "disposal" in the context of the "in-group rule" contrary to that actually reached in *Woolcombers*.

That leads me to the added provisions. They were introduced (among a number of miscellaneous amendments to the 1965 Act) by the Finance Act 1968; and are now ss 278 and 279 ICTA 1970. The modern approach to consolidation Acts does not, in my view, preclude all historical investigation because it is still legitimate to ask why the provisions are in the Act actually under construction. It is also important to see how ss 278 and 279 (the latter is the one on which Mr. Thornhill really relies) work in relation to the two "rules" to which I have referred.

Following the 1965 Act, it became apparent to the Revenue that advantage was being taken of the two rules to postpone tax liability in an artificial manner. First, there was a scheme (sometimes known as the envelope scheme) which made use of the "in-group rule". A company, owning an asset (other than shares) which has appreciated in value wishes to sell it. The company incorporates a subsidiary and transfers the asset to it (no chargeable gain) in

(1) [1976] 2 All ER 721. (1) [1975] 1 WLR 1701.

A return for an issue of the subsidiary's shares (not a disposal: those shares have an acquisition cost reflecting the current value of the asset). The company then sells the shares in the subsidiary for their current market value (no chargeable gain). Thus, the company which has actually realised the gain is not charged at all; and the taxability of the gain is postponed until the purchaser of the subsidiary's shares sells the asset (to which the original low base B cost still attaches). That may never happen.

The second scheme, taking advantage of the "reorganisation rule" was of a similar character. Company A, having a subsidiary whose shares have appreciated in value, wishes to sell the shares. Company A is instrumental in the incorporation of a new company, B, (with a nominal issued capital) of C which it is *not* a shareholder. Company A transfers the shares in its subsidiary to company B ("not to be treated as a disposal") in exchange for an issue of shares in company B. The latter are held by company A at the original low base cost; but the shares in the subsidiary are acquired by company B at current market value—and are sold by it at that value (no chargeable gain). Thus the gain is realised in the hands of company B, which has become D an almost wholly-owned subsidiary of company A as a result of the transactions. But the gain is not taxable until company A sells its shares in company B. That may never happen.

What became ss 278 and 279 are acknowledged to have been added to the 1965 capital gains tax code to deal, respectively, with schemes of those E types.

Mr. Thornhill points out, correctly, that an *in-group* reorganisation presented no problem from the Revenue's point of view if in such a case the "in-group rule" has always prevailed for the purpose of determining the acquisition cost, in the hands of the company effecting the sale outside the F group, of the shares so sold: that is to say (in terms of my description of the second scheme) company B's acquisition cost of the shares in company A's former subsidiary. The "in-group rule" equates that cost to the original cost to company A and a chargeable gain arises when the shares in the subsidiary leave the group. That is the result which s 279 also achieves. Therefore, looking at the consolidation Acts as the relevant legislation, s 279 is at best G unnecessary in the context of in-group reorganisations if the Court's view in *Woolcombers* of the meaning of "disposal" in s 273 is still fully valid.

It is that element of overlap between s 279 and the "in-group rule" (on the *Woolcombers* construction) which leads Mr. Thornhill to say that a court would now hold that the "in-group rule" does not apply to an in-group reor- H ganisation. The Court would accept the view (for which the Crown argued in *Woolcombers*) that a transfer treated by the "reorganisation rule" as a non disposal is not a "disposal" for the purposes of s 273, and the "in-group rule" is therefore inapplicable. That eliminates the overlap.

I Mr. Warren, who appears for the Inspector, submits that that argument places much more weight on s 279 than it will bear. Mr. Warren was not afraid to say, if it were necessary for him to do so, that some mistake was made when s 279 was introduced; but it is of course clear that the *Woolcombers* view of s 273 did not render s 279 wholly otiose. (I use the past tense there because s 279 has itself been overtaken and it is common ground that neither it nor its successor actually applies in the present instance. But it has not been repealed and it, accordingly, remains an element relevant to the

construction of this part of the capital gains tax code.) Section 279 was important and effective in connection with the straightforward reorganisation scheme which I have outlined, to which the "in-group rule" had no application. In the light of subs (6) of s 279, however, it cannot be suggested that the possibility of a reorganisation being an in-group reorganisation was overlooked. But for that, s 279 could be construed as applying only to cases where the reorganisation was not "in-group".

The consolidation Acts of 1970 and 1979 do not materially alter the wording of the 1965 provisions from which the two "rules" themselves derive. We now know from *Woolcombers* (admittedly, rather late in the day) how those rules interacted under the 1965 legislation, and pure consolidation does not amend the law. *Prima facie*, therefore, section 273 has the same meaning as the corresponding provision in the 1965 Act. Mr. Warren accepts (I think) that it is just possible that later additions incorporated in a consolidation Act may inferentially amend other provisions (as a matter of construction). notwithstanding that the latter are actually reproduced in unaltered form; but it would take a strong case to support such an inference.

It is in that context that I consider it important to note how ss 278 and 279 work. Neither purports to interfere in any way with either of the two "rules", as such. Both proceed by way of introducing (retrospectively) a deemed disposal and re acquisition into the chain of events—a deemed double transaction outside either "rule"—producing an immediate occasion of charge (or allowance) based on current market value. The *manner* of the operation of the appropriate "rule" (or, in the case of an in-group reorganisation, "rules") is unaffected: but the *effect* is different because different, updated, figures are involved. In those circumstances, there seems to me to be no room for the suggestion that the later provisions inferentially altered the meaning of (in particular) what is now s 273.

Finally, in relation to Mr. Thornhill's first argument, I note that both Hoffmann J. and Fox L.J. referred to the policy of the "in-group rule". The rule recognises the realities of group life, and is designed to assess liability, on the occasion of an asset leaving group ownership, on the basis of the difference between its cost to, and its value realised by, the group. Both s 278 and 279 reinforce that policy: indeed, the latter introduces it into an area where it had not naturally been before (that is to say, into some reorganisation cases where the initial transfer is not in-group). Against that background, a construction of s 273 which has the effect of ignoring that policy in a case which involves both "in-group" and "reorganisation" elements must, in my judgment, be unsound.

Mr. Thornhill's second argument does challenge the precedent force of the *Woolcombers* decision, even in relation to the position before 1968. The arguments in that case have not been reported, but the judgments (both in the Chancery Division and in the Court of Appeal) indicate that the issue actually debated was whether the transfer of certain shares by Old Woolcombers to Topmakers was, notwithstanding its position under the "reorganisation rule", a "disposal" for the purposes of the "in-group rule". There is no clear indication of any other argument to the effect that, even if it were a "disposal" for those purposes, there was another reason for the non-applicability of the "in-group rule" in the context of a reorganisation.

A Mr. Thornhill submits that there is such another reason. As I understand it, it is based on the opening words of s 273(1), (formerly, para 2(1) Sch 13 Finance Act 1965):

> "Notwithstanding any provision in [the Capital Gains Tax Act 1979] fixing the amount of the consideration deemed to be received on a
B disposal or given on an acquisition ... "

and the subsection continues in a manner which shows that it is fully bilateral in operation.

Mr. Thornhill says that one must first ascertain what values for acquisi-
C tion/disposal are indicated by the legislation, apart from s 273; and then apply s 273 if that displaces them. Where there is a reorganisation, the "reorganisation rule" ensures that, as far as the transferor is concerned, there is nothing to displace. A provision treating a transfer as a "non-disposal" is not a provision "fixing the amount of the consideration deemed to be received on a disposal". Since s 273(1) is evidently meant to apply equally to both the
D transferor and the transferee, if it does not work for one it cannot have been intended to work for the other either.

That argument seems to me to be one not without merit: indeed, even Mr. Warren is not inclined to be dismissive of it, as an argument. The difference between the parties lies in whether I am effectively precluded from con-
E sidering it by the decision in *Woolcombers.* Mr. Thornhill contends that the Court, in that case, simply assumed that if "disposal" in s 273 (or, to be accurate, its predecessor) included a transfer which (under the "reorganisation rule") was not to be treated as a disposal, then the "in-group rule" would take effect, and the acquisition cost to Topmakers would, accordingly, be Old Woolcombers' base cost (under the "rule") instead of current market value.
F He accepts that the doctrine of *stare decisis* precludes challenge to the Court of Appeal's construction of "disposal" in s 273 in relation to a transferee (a construction which depended on its view of the scope of the "non-disposal" treatment of the transfer from the transferor's point of view, under the "reorganisation rule"). But that construction does not constitute the whole of the *ratio decidendi.* In arriving at the determination of the appeal, the Court had
G to come to a further conclusion: namely, that the disposal was a disposal to which s 273 applied. That further conclusion was, Mr. Thornhill says, not a real conclusion, but an assumption only.

In *Eaton Baker & Another* v. *Regina* [1975] AC 774(1), at page 788 Lord Diplock, delivering the opinion of the Privy Council, said:

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> " ... in its opinions delivered on an appeal the Board may have assumed, without itself deciding, that a proposition of law which was not disputed by the parties in the court from which the appeal is brought is correct. The proposition of law so assumed to be correct may be incorporated, whether expressly or by implication, in the ratio decidendi of the particular appeal; but because it does not bear the authority of an
I opinion reached by the Board itself it does not create a precedent for use in the decision of other cases."

In *Barrs & Others* v. *Bethell & Others*(2) [1982] Ch 294, Warner J. held that principle to be of general application; and he applied it in relation to a

(1) [1975] 3 All ER 55. (2) [1982] 1 All ER 106.

previous decision of the Court of Appeal (*Prescott* v. *Birmingham Corporation*)(1). In *Beauchamp* v. *F W Woolworth plc*(2) [1988] STC 714, the Court of Appeal took a similar line in relation to a previous decision of its own (*The European Investment Trust Co. Ltd.* v. *Jackson*)(3) Mr. Thornhill, accordingly, invites me to adopt the same approach to *Woolcombers*, so far as concerns the further point on which his second argument is founded.

Mr. Warren, to the contrary, cited *Morelle Ltd.* v. *Wakeling & Another*(4) [1955] 2 QB 379 in which the Court of Appeal, in rejecting an argument presented by the Attorney General, said, at page 406, that it was not

> "... open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide."

According to Mr. Warren, Mr. Thornhill's argument is simply that *Woolcombers* was inadequately argued: and that that does not suffice.

Now the debate in *Morelle Ltd.* v. *Wakeling* ("the second *Morelle* case") was about whether the Court of Appeal's decision a few months earlier in the first *Morelle* case had been reached "*per incuriam*"; and the words cited above have to be understood in that context. In my opinion, the "*per incuriam*" doctrine and what I may call the *Baker* v. *Regina* principle are essentially distinct. The effects on the standing of the previous decision are quite different: in the one case, it is declared to have been wrong, whereas in the second, it is merely not a binding authority. It was not suggested in the second *Morelle* case that all the relevant issues had not been before the Court in the first *Morelle* case, or that those issues had not been positively decided by the Court, so the Attorney General had to rely on the "*per incuriam*" doctrine. I do not consider that the second *Morelle* case had anything relevant to say about the *Baker* v. *Regina* principle.

I may add that the second *Morelle* case did contain a point which brought it closer to that principle. A question arose as to whether the Court was bound by another Court of Appeal decision, namely that in *Rodnall Ltd.* v. *Ludbrook*(5) which had been decided by the Court at the same time as the first *Morelle* case but which had not been separately argued because counsel had then admitted that it was on all fours with the first *Morelle* case. In fact it was not, because while the title to the land in the first *Morelle* case was not registered, the title to the land in *Rodnall Ltd.* v. *Ludbrook* (and in the second *Morelle* case) was. The Court of Appeal, in the second *Morelle* case, considered the Land Registration Act point (namely, whether registration with absolute title displaced the effect of breach of the Mortmain Acts) because, if it were sound, *Rodnall Ltd.* v. *Ludbrook* would be shown to have been decided "per incuriam", a statute having been overlooked. The Court said nothing about *Rodnall Ltd.* v. *Ludbrook* not being a binding authority on its separate point by reason of the fact that the point had not been taken. I recognise, however, that the *Morelle* cases were heard nearly 30 years before *Baker* v. *Regina*.

(1) [1955] Ch 210. (2) 61 TC 542. (3) 18 TC 1.
(4) [1955] 1 All ER 708. (5) [1955] 1 QB 1.

A As I see it, the question is whether *Woolcombers* is a case to which the *Baker* v. *Regina* principle applies, so far as Mr. Thornhill's new point is concerned: namely that an in-group reorganisation transfer is not a "disposal" within s 273 because of the wording and structure of s 273 itself (quite apart from whether it would otherwise be a "disposal", notwithstanding the reorganisation provisions).

B

One thing is quite plain. It cannot be said that the Court of Appeal did not have the terms of s 273's predecessor in front of it. It is also clear from the judgment of Fox L.J., that the Crown drew the Court's attention to the wording and structure of that provision (see page 592D in 60 TC 575).

C The Court did not decide that where a transfer is in-group, the "in-group rule" always prevails (so as to displace the "reorganisation rule" if the transfer happens to be part of a reorganisation). As I understand the position, the "reorganisation rule", if relevant, governs the position of the transferor, and the "in-group rule" that of the transferee. The Court must have seen that that was what it was saying; and in the light of that the Crown had said about the D "bilateral" nature of the "in-group rule", the Court must have concluded, as a matter of *decision*, that the lack of strict reciprocity inherent in their decision did not matter.

I do not find that surprising when I read the judgments as a whole. The E Court—and, indeed, Hoffmann J.— had a firm grasp of the overall policy on in-group transfers (and of Parliament's corresponding intentions in relation to transfers ex-group). This played a considerable part in the Court's conclusions on the argument with which it expressly dealt. It also explains why it would not be moved to construe s 273's predecessor itself in a manner which would run contrary to that policy.

F

I, therefore, find myself bound by *Woolcombers* to hold that the gain arising to NAPUK on the occasion of its sales of Astbro shares is to be computed by reference, in substance, to the base cost to Overseas. The parties will, doubtless, now be able on that basis to agree the corporation tax figures for my formal determination.

G

B. O'Brien } Commissioner for the Special Purposes of the Income Tax Acts

H Turnstile House
98 High Holborn
London WC1V 6LQ

23 March 1990.

I

STATEMENT OF AGREED FACTS

1. NAP Holding UK Ltd. ("NAPUK") was a United Kingdom resident wholly-owned subsidiary of Exco Overseas Ltd. ("Overseas") which was itself a United Kingdom resident subsidiary of Exco International plc.

2. In July 1981 Overseas acquired the entire issued share capital (comprising 2 shares of no par value) of Astbro Inc. ("Astbro") from Astley & Pearce (Netherlands) BV for Dfls 560 (£112 @ 5.01). On 4 January 1982 48 shares of no par value in Astbro were issued to Overseas for a consideration of $4,311,870. On 13 April 1982 a further 50 shares of no par value were issued to Overseas for a consideration of $3,188,030.

3. On 23 April 1983 Overseas transferred its 100 Astbro shares to NAPUK in exchange for the issue to Overseas of 20m ordinary NAPUK shares of $1 each.

The market value of the 100 Astbro shares as at 23 April 1983 was [$400 m (£258,732,212 @ 1.546)(1)]

4. On 24 April 1983 NAPUK transferred its 10 per cent, shareholding in Unitel International Inc. ("Unitel") to Astbro (which already owned 49.9 per cent. of the issued share capital of Unitel) in exchange for the issue to NAPUK of a further 20 shares of no par value of Astbro.

NAPUK had acquired its 10 per cent. shareholding in Unitel for a total consideration for tax purposes of (1).

5. It was accepted by the Inland Revenue on 13 April 1983 that s 87(1) Capital Gains Tax Act 1979 would not apply to either of the transactions in paras 3 and 4 above.

6. On 12 March 1984 Astbro issued a further 6 shares of no par value to Overseas in satisfaction of a debt owed by Astbro to Overseas.

7. On 1 August 1985 Astbro issued a further 7.71 shares of no par value to NAPUK in satisfaction of a debt of $26,528,855 owed by Astbro to NAPUK.

The market value of the 7.71 Astbro shares as at 1 August 1985 was $26,528,855 (£19,209,888 @ 1.381).

8. On 8 August 1985 NAPUK sold its 127.71 Astbro shares to Dow Jones & Co. Inc. and The Oklahoma Publishing Co. for a total consideration of $439,176,552 (£324,115,336 @ 1.355).

The case was heard in the Chancery Division before Millett J. on 14, 15, 18 and 19 November 1991 when judgment was reserved. On 6 December 1991 judgment was given in favour of the Crown with costs.

Andrew Thornhill Q.C. and *Kevin Prosser* for the Company.

Nicholas Warren for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Farrell* v. *Alexander* [1977] AC 59; [1976] 2 All ER 721; *Regina* v. *West Yorkshire Coroner*, ex parte *Smith* [1983] 1 QB 335;

(1) Figures to be agreed/determined.

A *Commissioners of Inland Revenue* v. *Joiner* 50 TC 449; [1975] 1 WLR 1701; *Beswick* v. *Beswick* [1968] AC 58; *Attorney General* v. *Lamplough* (1878) 3 LR Ex 214; *Real Estate House (Broadtop) Ltd* v. *Real Estate Agents Licensing Board* (1987) 2 NZLR 593; *Lewisham London Borough Council* v. *Lewisham Juvenile Court Justices* [1980] AC 273.

B

Millett J.:—This is an appeal by NAP Holdings UK Ltd ("the taxpayer") from a decision of the Special Commissioner on 23 March 1990 dismissing the taxpayer's appeal against an assessment to corporation tax for its C accounting period ending 30 December 1985 in the sum of £230m. The issue in dispute is the amount, if any, of the capital gain realised by the taxpayer on the disposal of its shares in another company called Astbro Inc. ("Astbro"). The question turns on the amount of the consideration for which, in accordance with the relevant legislation then in force, the taxpayer is to be treated as having acquired its shares in Astbro.

D

At all material times, the taxpayer was a wholly-owned subsidiary of Exco Overseas Ltd. ("Overseas"). Both companies were resident in the United Kingdom and, accordingly, were members of the same group of companies for the purposes of ss 273 to 279 of the Income and Corporation Taxes Act 1970 ("the 1970 Act"). In April 1983 Overseas also owned the E entire share capital of Astbro which it had acquired at a cost of some $7.5m and the market value of which was said to be of the order of $400m. During 1983 Overseas transferred all of the shares in Astbro to the taxpayer in exchange for the issue to Overseas of shares in the taxpayer. Both before and after the transaction, Astbro was, therefore, a member of the same group. In August 1985 the taxpayer sold all its shares in Astbro (then representing F some 95 per cent. of Astbro's share capital) out of the group for a little over $431m, thereby realising a large profit for the group.

Since the taxpayer acquired the 100 shares in Astbro from its own parent company in consideration of an issue of its own shares, the transaction appears to fall within two distinct statutory provisions, namely s 273 of the 1970 Act G (dealing with transfers between members of the same group) and s 78 (made applicable by s 85(3)) of the Capital Gains Tax Act 1979 ("the 1979 Act") (share-for-share exchanges). The relationship between the statutory predecessor of s 273 (before the enactment of what is now s 279) of the 1970 Act and the statutory predecessors of ss 78 and 85(3) of the 1979 Act was considered by the Court of Appeal in *Westcott* v. *Woolcombers Ltd*(1) 60 TC 575. The question H which now falls to be decided is whether the relationship between the successor sections remains the same despite consolidation and amendment (in particular, despite the enactment of s 279 of the 1970 Act) since the transactions which were the subject of the Court of Appeal's decision.

I The figures have not yet been determined. The question has been argued as a matter of principle and can be expressed in the following terms. *P* (the parent company) has a wholly-owned subsidiary *S* which it acquired at a cost of £x and is now worth £y. *P* forms a shell company *T* as another wholly-owned subsidiary and transfers its shares in *S* to *T* in exchange for an issue of new shares in *T*. *T* later disposes of *S* out of the group. Is *T's* cost of

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(1) [1987] STC 600.

acquiring *S* to be treated as £x or £y? The Crown contends for £x, the taxpayer for £y. A

The principal statutory provisions

The principal statutory provisions in force in 1983 and 1985 relevant to the determination of the present question were as follows:- B

(i) *Share for share exchanges*

These were governed by s 78 of the 1979 Act (made applicable by s 85(3)). Section 78 provides that P's transfer to T of the shares in *S* is " ... not to be treated as involving any disposal" of the shares in S, and that P's acquisition cost of the new shares in T issued in exchange is to be taken to be £x. C The section does not affect T's acquisition cost of the shares in S, which unless otherwise provided is £y.

If s 78 stood alone, neither the initial transfer of the shares in S to T nor the subsequent disposal of the shares by T would have any tax consequences, unless the shares had appreciated or depreciated in the meantime. P's transfer D would not be treated as involving a disposal and T's acquisition cost would be £y. Any charge to or relief from tax on the difference between £x and £y would be postponed until P disposed of T, which might never happen.

(ii) *Transfers between members of the same group* E

These were governed by s 273 of the 1970 Act. That section provides that where a member of a group, of companies disposes of an asset to another member of the same group both the disposal and the corresponding acquisition are to be treated as having been made for a consideration which produces neither a gain nor a loss to the disponor. As Fox L.J., explained in *Westcott* v. *Woolcombers Ltd.* (at page 592) the policy to which the section gives effect F is to ignore intra-group transactions and to compute gains and losses by comparing the consideration paid when the asset came into the group with the consideration received when it left the group. It is not an anti-avoidance section. If the section applies, T's acquisition cost of the shares in S is £x.

Once again, the initial transfer of the shares in S to T would have no tax G consequences; but now a subsequent disposal of the shares by T outside the group would have tax consequences because T's acquisition cost is artificially fixed at £x. Furthermore, a disposal by P of the shares in T whose acquisition cost is also artificially fixed at £x (by s 78), would have similar tax consequences producing a double charge to tax on the gain or a double allowance for the loss. H

(iii) *Supplementary provisions*

Section 540(2) of the 1970 Act provides that that Act, so far as it relates to capital gains, is to be construed as one with the 1979 Act.

I

It is to be observed that there is no conflict between s 78 of the 1979 Act on the one hand and s 273 of the 1970 Act on the other. If s 273 applies, T's acquisition cost is £x; if the section does not apply it is £y. However, s 78 does not provide that it is £y; it simply does not deal with T's acquisition cost of the shares. Its relevance is that it provides that P's transfer of the shares in S to T is " ... not to be treated as involving a disposal" of those shares and thus arguably excludes the operation of s 273, for that section does not apply

A unless there is a disposal of an asset by one member of a group of companies to another member of the group.

The legislative history

(i) *The Finance Act 1965*

B The 1979 Act is a consolidation Act. Sections 78 and 85(3) re-enact (with changes which are not material) paras 4(2) and 6(l) of Sch 7 to the Finance Act 1965 ("the 1965 Act"). They were given legislative force by s 22(9) of the 1965 Act, which has not been re-enacted, the provisions formerly appearing in the Schedule to the 1965 Act now being enacted in the main body of the C 1979 Act.

The 1970 Act is also a consolidation Act. Section 273 re-enacts (with exchanges that are immaterial) para 2 of Schedule 13 to the 1965 Act. Sections 278 and 279 re-enact tax-avoidance provisions first introduced by the Finance Act 1968 ("the 1968 Act").

D In what follows, I have for ease of comprehension substituted references to the principal sections (ss 273, 278 and 279 of the 1970 Act and ss 78 and 85(3) of the 1979 Act) for their statutory predecessors.

(ii) *Sections 278 and 279*

E Section 278 deals with what was commonly known as "the envelope scheme". A company (P in our example), owning an asset such as a factory which had appreciated in value (from £x to £y), wished to sell it and realise the gain without incurring a charge to tax. P, therefore, incorporated a new subsidiary (T) and transferred the factory to it in exchange for the issue of shares in T. P then sold T (the factory in its "envelope") outside the group for F £y. Neither P's transfer of the factory to T nor P's subsequent disposal of T gave rise to a charge to tax: the former because P's transfer was at a consideration (£x) which produced neither a gain nor a loss (s 273), the latter because P's acquisition of T's shares was at market value (£y). The gain was realised by a sale out of the group but tax on the gain was postponed until such time, if ever, as the purchaser chose to remove the factory from its "envelope".

G Section 278 counteracts this scheme. It has effect whenever a company (T) acquires an asset from another member of the same group (P) and within six years thereafter, ceases to be a member of the group. It treats T as if immediately after acquiring the asset from P (for a consideration fixed by s 273 at £x), it had sold and immediately re-acquired the asset at market H value (£y). The result of the notional transaction is retrospectively to make T chargeable to tax on the gain at the date of the intra-group transaction. This does not so much counteract the effect of s 273 (for T is made liable instead of P) but the indefinite postponement of T's liability.

I Section 279 deals with a different scheme similar to the arrangements which were made in the present case. P, owning a subsidiary (S) which had appreciated in value from £x to £y, wished to sell it and realise the gain without incurring a charge to tax. P, therefore, incorporated a new subsidiary (T) and transferred its shares in S to it in exchange for the issue of shares in T. P then arranged for T to sell S outside the group for £y. Neither P's transfer of the shares in S to T nor T's subsequent disposal of the shares gave rise to a charge to tax; the former because the share exchange was "not to be treated

as involving a disposal" by P (s 78), the latter because T's acquisition cost was at market value (£y). The gain was realised by a sale out of the group, but tax on the gain was postponed until such time, if ever, as P chose to dispose of its shares in T. A

The success of the scheme depended on the non-application of s 273, for if the share exchange fell within that section as a disposal by one member of the group (P) to another member of the same group (T), then T's acquisition cost would be £x. If, however, it was feared that s 273 might apply to the share exchange (despite the direction in s 78 that it was "not to be treated as involving any disposal") this could be easily circumvented by taking care to incorporate T outside the group, for example by purchasing it ready-made "off the shelf". Section 273 did not apply to a disposal to a company which became a member of the same group as the disponer only as a result of the disposal. B C

Section 279 counteracts this scheme. It has effect whenever a subsidiary (S) is disposed of by a member of a group (P) to another member of the group (T) by way of share exchange, and within six years thereafter S ceases to be a member of the group. It treats P as if, immediately before the share exchange, it had sold and immediately re-acquired the shares in S at market value (£y). The result of the notional transaction is retrospectively to make P chargeable to tax on the gain at the time of the share exchange and to make P's acquisition cost of the shares in T £y, thus preventing a double charge to tax or allowance for loss if P should subsequently dispose of T. It does not affect T's acquisition cost of S. Section 279 requires only P to be treated as having entered into the notional transaction; it does not require T to be treated as having done so. D E

Two points need to be made. First, the section applies where P and T were already members of the same group before the share exchange as well as where they became members of the same group only as a result of the share exchange: s 279(6) expressly so provides. Yet, in the former case, there was no mischief to address unless the operation of s 273 was excluded by s 78. Secondly, the simultaneous application of both ss 273 and 279 would result in a double charge to tax on the same gain or a double allowance for the same loss on the disposal of S. Section 279 would retrospectively cause the gain or loss to be realised by P on the notional transaction which immediately preceded the share exchange, while s 273 would cause the same gain or loss to be realised by T when S left the group; and both would occur as a result of the same event, *viz.* the sale of S outside the group by T. (This would not be alleviated by s 279(5), which is directed to a different problem). F G

(iii) *The Finance Act 1977* H

During the 1970's, ss 78 and 85(3) were exploited by numerous tax avoidance schemes, and in 1977 Parliament acted to prevent this for the future. By s 40(2) of the Finance Act 1977 ("the 1977 Act") it excluded the operation of the sections unless the share exchange was effected for bona fide commercial reasons and did not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, was avoidance of liability to capital gains tax or corporation tax. The section introduced a clearance procedure. It was not retrospective; s 40(10) provided that it was to apply only where the share exchange was effected after 19 April 1977 and disapplied s 279 except where it was effected on or before that date. Section 40(2) was re-enacted as s 87 of the 1979 Act, para 2(4) of Sch 7 of which amended s 279(1) by inserting the words "but before 20 April 1977" where I

A appropriate. In relation to intra-group share exchanges after 19 April 1977, Parliament was replacing one piece of anti-avoidance legislation by another. Provided that tax avoidance was not involved, Parliament was content to return to the legislation as it was before the 1968 Act was enacted.

In the present case, the share exchange took place in 1983, so the opera-
B tion of s 279 is excluded. To that extent the case is a re-run of *Westcott* v. *Woolcombers*, where the relevant transactions took place in 1966 before the passing of the 1968 Act and the introduction of what were to become ss 278 and 279.

(iv) *Westcott v. Woolcombers Ltd.*

C

This case concerned a transaction by which T disposed of S at a loss, and the taxpayer relied on s 273 in order to claim relief. The Revenue unsuccessfully argued that the operation of s 273 was excluded by s 78 which provided that the share exchange was not to be treated as involving a disposal by P. The Court of Appeal held that s 78 had effect only for the purpose of
D determining the tax position of P. As far as T was concerned, therefore, there was a disposal by P with the result that s 273 applied. The Court of Appeal did not consider the subsequent legislation after 1966.

(v) *The Finance Act 1988*

Westcott v. *Woolcombers Ltd.* was decided by the Court of Appeal on 31
E July 1987. The decision was reversed by the Finance Act of the following year, s 115 of which provided that s 273(1) should not apply to a transaction treated by virtue of ss 78 and 85 of the 1979 Act as not involving a disposal by P. The speed with which Parliament acted to reverse the decision must, I apprehend, have been due to a genuine concern for the revenue. As I have pointed out, if s 273 was not excluded by s 78 there would be a double charge
F to tax on the same gain or a double allowance for the same loss when T disposed of S outside the group. Parliament was not being altruistic. If there was a gain, P could avoid the double charge to tax by retaining S within the group for six years; if there was a loss, it was within P's power to claim the double allowance by disposing of S within six years.

G *Legislative error*

I have set out the legislative history at length because, in my judgment, it leads to the irresistible conclusion that, over a period of 20 years, Parliament has consistently legislated in the mistaken belief that s 273 had no application to a share exchange which s 78 required to be treated as not involving a dis-
H posal, a belief which was not shown to be erroneous until 1987. That this was the view of the revenue—at whose behest s 279 must have been enacted—cannot be seriously doubted. Between 1965 and 1968, s 78 was much exploited for tax-avoidance purposes. Some taxpayers took care to cause T to be incorporated outside the group so that s 273 was excluded on any view; others did not. The revenue did not distinguish between the two cases, nor
I did Parliament when enacting s 279. It is impossible to believe that s 279 would have been drafted as it was, had the draftsman not shared the revenue's view that it made no difference whether T was incorporated within the group or outside it, that is to say, that s 273 did not apply to the share exchange in either case. That can only have been due to a belief that, in the former case, the operation of s 273 was excluded by s 78. The draftsman of an anti-avoidance section as detailed and meticulously drawn as s 279 cannot have failed to realise what the consequence of the new section would be if the

share exchange also fell within s 273. In such a case, s 279 would not merely be superfluous in that there would be no mischief to remedy, but would create a double charge to tax or allowance for loss. Since the realisation of the gain or loss would be within the control of the taxpayer, this cannot have been his intention. It would have turned a tax-avoidance section into a charter for tax avoidance. That sometimes happens, but only by mistake.

That Parliament legislated in error is confirmed by the later history: the disapplication of s 279 when s 78 was amended and made avoidance proof in 1977 (which shows the belief that the two sections were linked); the consistency in the revenue's attitude which it demonstrated by contesting the taxpayer's claim in *Westcott* v. *Woolcombers*; and the speed with which it acted to obtain a reversal of the decision in that case. However, many of the considerations to which I have referred would be inadmissible on a pure question of statutory construction, which is what I am concerned with; and to which I now turn.

Section 78

Section 78 (or, more accurately, its statutory predecessor in the 1965 Act) was construed by the Court of Appeal in *Westcott* v *Woolcombers* as having effect only for the purpose of determining P's tax position. So far as T's tax position was concerned, there was a disposal by P to T, so that s 273 applied to fix the acquisition cost of T. So far as concerns the meaning of s 78, even if that decision is not strictly binding upon me because of the re-enactment of the section in a consolidation Act, it is nevertheless of great persuasive authority; and all the more so, if I may say so without disrespect, because it accords with the construction I would have placed upon the section unaided. The only material change which occurred on consolidation was the disappearance of s 22(9), and of the four Judges who decided *Westcott* v. *Woolcombers* only one (Sir Denys Buckley) mentioned that section.

Of course, by the time the 1979 Act was enacted, s 279 (as amended by the 1977 Act) was on the statute book. But that cannot affect the true construction of s 78. The evidence, however compelling, that Parliament legislated elsewhere (that is to say, in the 1970 Act) in the mistaken belief that the predecessor of s 78 had a meaning which it did not in fact possess does not entitle the Court to place a similar misconstruction on its successor. Although, in my view, it makes no difference, it is to be observed that the 1979 Act contains no provision corresponding to s 540(2) of the 1970 Act.

Section 273

It is the taxpayer's contention that the word "disposes" in s 273, construed without reference to the legislative history which preceded the passing of the 1970 Act but, in the light of the provisions of s 279, must be accorded an artificially restricted meaning so as not to include a transaction which s 78 directs is not to be treated as involving a disposal by P.

Before the Special Commissioner an argument was presented which relied on the opening words of s 273:—

> "Notwithstanding any provision in the [1979 Act] fixing the amount of the consideration deemed to be received on a disposal or given on an acquisition ..."

A It was submitted that s 78 was not such a provision. I do not understand the argument, which in any case was not repeated before me. I agree that s 78 is not a provision which fixes the amount of the consideration deemed to be given on an acquisition and is not displaced by s 273, but that is not the reason why s 273 is not excluded by s 78. Many provisions of the 1979 Act require a deemed consideration to be substituted for the actual consideration B on a disposal; in the case of a transaction between connected parties (such as members of the same group of companies), for example, a disposal is deemed to be for market value. Section 273 displaces such deeming provisions and substitutes a different but equally fictitious consideration. The opening words of the section are, accordingly, apt whether the word "disposes" bears its natural meaning or an artificially restricted one.

C

Before me, the taxpayer submits that ss 273 to 280 of the 1970 Act constitute a statutory scheme for the taxation of capital gains arising from transactions between members of the same group of companies; that those sections must be construed as a whole; and that it is impossible to make sense of the D statutory scheme unless the word "disposes" in s 273 is given a restricted meaning which excludes share exchanges and thus avoids the simultaneous application of both ss 273 and 279. In support of the argument that on its true construction, the word "disposes" in s 273 bears a restricted meaning, reliance is placed on the fact that in s 279(1) where the word "disposed" clearly includes share exchanges, this is achieved by express words in subs (6). It is submitted E that this shows that, in the absence of express provision to the contrary, the word "dispose" in the group of sections does not include share exchanges. But s 279(6) does not define "disposal"; it defines "disposal in the course of amalgamation or reconstruction of the group"; and it is necessary in order to bring within the section cases which would fall outside s 273 because the companies became members of the same group only as a result of the share exchange. F Moreover, while it is true that ss 273 to 280 deal with the same subject-matter, it is misleading to describe them as constituting a statutory scheme. Section 273 lays down the general principle applicable to intra-group transactions; ss 278 and 279 are specific anti-avoidance provisions. There can be no presumption that the two sections should not overlap.

G Reliance is also placed on anomalies which, it is alleged, would occur even if s 273 stood alone unless the word "disposes" were given a restricted meaning. I do not find them persuasive. They were also present in the 1965 Act and did not persuade the Court of Appeal in *Westcott* v. *Woolcombers*.

H The principal argument advanced on behalf of the taxpayer is, however, that it is impossible to give sensible effect to s 279 unless the word "disposes" in s 273 is given a restricted meaning which avoids the simultaneous application of both sections. It is not merely that if the word "disposes" in s 273 includes share exchanges the two sections overlap; it is that where they do overlap s 279 is (i) superfluous and (ii) productive of a double charge to tax. I This cannot have been the intention of Parliament. Moreover, as I have already shown, there are compelling reasons for concluding that Parliament enacted ss 273 to 280 of the 1970 Act in the mistaken belief that s 273 did not apply to transactions which s 78 directed were to be treated as not involving a disposal. Given that the purpose of statutory construction is to ascertain the intention of Parliament, it is submitted, no distinction can properly be drawn between giving a word the meaning which Parliament intended it to have and giving it the meaning which Parliament evidently thought it had.

In my judgment, those submissions are fallacious. They depend, in part at least, upon a misunderstanding of the words "the intention of Parliament". That has justly been described as "a common but very slippery phrase": *Salomon* v. *Salomon & Co. Ltd.* [1897] AC 22, at page 38, *per* Lord Watson. When construing a statute the function of the Court is to ascertain the meaning of what Parliament has enacted, not what Parliament meant to enact and thought it had enacted. The two are not necessarily the same. "The intention of Parliament" is limited to the intention of Parliament as expressed in the words of the statute; it must be collected from the language in which it has been embodied. Effect cannot be given to an unenacted intention. For an extreme example, see *Ayrshire Employers' Mutual Insurance Association Ltd.* v. *Commissioners of Inland Revenue*(1) 27 TC 331.

Section 273 is plain and unambiguous. There is nothing to cut down the natural and ordinary meaning of the word "disposes", which clearly includes share exchanges. The word possesses no secondary or alternative meaning which Parliament could have intended. It must be given its ordinary meaning, for it does not permit of another interpretation which produces a more rational result. To exclude share exchanges from its scope would require a special definition, but none has been enacted. Giving the word its natural and ordinary meaning does not make it impossible to give full effect to s 279, which is perfectly capable of taking effect according to its terms, though the result cannot be what Parliament intended to produce.

This is compelling evidence that a mistake has been made, though it is far from clear, merely from the language of the sections, that the error is in the drafting of s 273 rather than s 279. That would make a difference to the outcome of the present case if the error could be remedied by construction. Moreover, an examination of the legislative history of the principal sections shows that Parliament did not intend the word "disposes" in s 273 to bear an artificially restricted meaning. It intended the word to bear its ordinary meaning, though only because it mistakenly believed it had provided elsewhere (in s 78) that a share exchange should not be treated as involving a disposal. The correction of such an error requires legislation; it cannot be achieved by construction.

For those reasons, which are similar to those of the Special Commissioner, I dismiss the taxpayer's appeal.

Appeal dismissed, with costs.

The company's appeal was heard in the Court of Appeal (Ralph Gibson, Nolan and Hirst L.JJ.) on 29, 30, and 31 March 1993 when judgment was reserved. On 9 July 1993 judgment was given unanimously against the Crown, with costs.

Andrew Thornhill Q.C. and *Kevin Prosser* for the Company.

Nicholas Warren for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Dunstan* v. *Young, Austen & Young Ltd.* 61 TC 448; [1989] STC 69; *Johnson & Another* v. *Moreton* [1980] AC 37; *Aberdeen*

(1) 1946 SC (HL) 1.

A *Construction Group Ltd.* v. *Commissioners of Inland Revenue* 52 TC 281; [1978] AC 885; *Beswick* v. *Beswick* [1968] AC 58; [1967] 2 All ER 1197; *Regina* v. *Heron and Others* [1982] 1 WLR 451; [1982] 1 All ER 993; *In re Billson's Settlement Trusts* [1984] Ch 409; [1984] 2 All ER 401; *In re Stevens* ex parte *McGeorge* (1881–1882) 20 Ch 697; *Furness* v. *Dawson* 55 TC 324; [1984] 1 All ER 530; *Marshall* v. *Kerr* 67 TC 56; [1993] STC 360.

B

Nolan L.J.:—This is an appeal by the taxpayer, NAP Holdings UK Ltd., ("Napuk") against a decision of Millett J. given on 6 December 1991. By that C decision, Millett J. dismissed Napuk's appeal from a decision of a Special Commissioner, who had in turn dismissed Napuk's appeal against an assessment to corporation tax for its chargeable accounting period to 30 December 1985 in the sum of £230m. The sole question at issue between the parties is the amount of the taxable gain realised by Napuk during that period on its sale of the shares in a company called Astbro Inc. ("Astbro"). The question D turns upon the amount of the consideration for which Napuk must be taken, under the relevant legislation, to have acquired the Astbro shares. The facts are these.

Prior to 23 April 1983 both Napuk and Astbro were wholly-owned sub-E sidiaries of Exco Overseas Ltd. ("Exco"). All three companies were resident in the United Kingdom. They were, therefore, members of the same group of companies for the purposes of corporation tax on chargeable gains: see s 272 Income and Corporation Taxes Act 1970. On 23 April 1983 Napuk acquired the Astbro shares from Exco in consideration for the issue to Exco of a further 20m ordinary shares in Napuk of one dollar each. The value of the F Astbro shares at the time was some $400m (the precise figures have yet to be agreed) but its original cost to Exco was only some $7.5m. On 8 August 1985 Napuk sold the Astbro shares outside the group for $431m. It is common ground that, apart from the statutory provisions dealing with certain share exchanges and with transfers of assets between members of the same group of companies, the tax consequences of these transactions would have reflected G the value of the consideration for which they were carried out. The transfer of the Astbro shares by Exco to Napuk would have been treated as a sale by Exco and a purchase by Napuk for a price of some 400m dollars, the market value of the Astbro shares (and also, it may be assumed of the Napuk shares issued in exchange), either under the general law as stated in *Stanton* v. *Drayton Commercial Investment Co. Ltd.*(1) [1983] 1 AC 501 or under the H capital gains tax rules laid down by s 62 Capital Gains Tax Act 1979 for transactions between connected persons. Other things being equal, that would leave Exco liable to tax on its gain of some $392.5m, and Napuk liable to tax on its gain of some $31m. But, by virtue of the share exchange provisions, Exco incurred no liability on the transfer of the Astbro shares to Napuk: The gain of $392.5m was, as it is said, "rolled over" into the new shares in Napuk I which were acquired in exchange. The critical question is whether, as the Revenue contend, the transaction also fell within the scope of the provisions dealing with the transfer of assets between members of the same group of companies. If it did, then the consideration treated as having been given by Napuk for the Astbro shares would be, not $400m, but $7.5m, the price for which they were acquired by Exco.

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(1) 55 TC 286.

A At the time of the crucial transaction, the main relevant provisions dealing with share exchanges and with the transfer of assets between members of the same group of companies were contained, respectively, in ss 78 and 85 Capital Gains Tax Act 1979 and s 273 Income and Corporation Taxes Act 1970. Both of these Acts have been replaced by later measures, but in the interests of simplicity I shall refer to their provisions in the present tense. B Section 85 is part of a group of sections (Chapter II of Part IV of the Act) concerned primarily with the internal reorganisation of the share capital of a company by means of, for example, a bonus issue, or reduction of capital. Section 78 provides that a reorganisation "...shall not be treated as involving any disposal" of the original shares (that is, shares held before the reorganisation) or any acquisition of the new holding (that is, the shares which as a C result of the re-organisation represent the original shares), but the original shares and the new holding "...shall be treated as the same asset acquired as the original shares were acquired". Section 85 extends the "reorganisation" concept to certain share exchanges. Section 85(1) provides that s 85(3) is to have effect where a company issues shares to a person in exchange for shares of another company and the first company holds, or in consequence of the D exchange will hold, more than one quarter of the ordinary share capital of the second company. Section 85(3) provides that, subject to the provisions of ss 87 and 88, s 78 is to apply "with any necessary adaptations" as if the two companies were a single company and the exchange were a re-organisation of its share capital. Section 87 provides that s 85 does not apply to an exchange unless it is effected for bona fide commercial reasons and does not form part E of a scheme or arrangement of which the main purpose or one of the main purposes is avoidance of liability to capital gains tax or corporation tax. Section 88 provides a procedure for clearance from the Revenue in advance. Such clearance was duly obtained by Exco for the exchange of the Astbro shares for new shares in Napuk.

F Section 273 of the 1970 Act provides *inter alia* that

> "...where a member of a group of companies disposes of an asset to another member of the group, both members shall, ... be treated, so far as relates to corporation tax on chargeable gains, as if the asset acquired by the member to whom the disposal is made were acquired for a consideration of such amount as would secure that on the other's disposal G neither a gain nor a loss would accrue to that other;..."

If this provision governs the transfer of the Astbro shares by Exco to Napuk, then Napuk must be treated as having acquired the shares for the price paid by Exco, that is \$7.5m. Napuk contends that s 273 does not govern H the transaction because it only applies "...where a member of a group of companies disposes of an asset to another member of the group"; and, by virtue of ss 78 and 85 of the 1979 Act, the transfer of the Astbro shares by Exco to Napuk "...shall not be treated as involving any disposal". To this simple contention the Revenue put forward an equally simple reply:—it is that the contention was rejected by this Court, by reference to identical word- I ing in the statutory predecessors to ss 78 and 85 and s 273, in the case of *Westcott* v. *Woolcombers Ltd.*(1) 60 TC 575. Mr. Thornhill Q.C. submits, however, on behalf of Napuk, that the *Woolcombers* decision, while correct on the basis of the legislation as it stood at the material time, has been superseded by subsequent legislation. Although the Court of Appeal and

(1) [1987] STC 600.

A Hoffmann J. (as he then was) in the *Woolcombers* case were aware of this subsequent legislation, they declined to take it into account in arriving at their decisions. It has since been incorporated, together with s 273 and ss 78 and 85, in the 1970 and 1979 Acts. These Acts are consolidating measures which the Appellant invited us to read without reference to previous legislation. So read, submits Mr. Thornhill, they show that the language used in s B 273 and in ss 78 and 85 is intended to bear a different meaning from that given to it by this Court in Woolcombers. For the Revenue, Mr. Warren invokes the traditional presumption against a consolidating Act altering the law contained in the statutes which it replaces, and submits that there is nothing in the legislation enacted subsequently to the period covered by the *Woolcombers* decision which could justify a different construction of the three C crucial sections.

I turn now to that decision. I do so without in any way pre-judging Mr. Thornhill's submissions that the decision is of no assistance, because it seems to me that one cannot sensibly consider that submission without knowing what the decision was. The precise details of the case are unimportant. It is D sufficient to say that there, as here, there had been an exchange of shares within a group of companies. The original transferor, Holdings, had acquired the shares for some £1.3m. It transferred them to a subsidiary, Topmakers, in exchange for the issue of Topmakers shares, and Topmakers subsequently sold them to another subsidiary, Woolcombers, for some £600,000. Woolcombers then disposed of the shares, by liquidating the companies in E which they were held, and received some £600,000 from the liquidators. It claimed to have realised a loss, for tax purposes, representing the difference between Holdings' original purchase price of some £1.3m and the ultimate disposal proceeds of some £600,000. The case was thus the converse of the present case in that it was the taxpayer which was arguing that, despite the language of paras 4(2) and 6(1) of Sch 7 to the Finance Act 1965 (the prede- F cessors to ss 78 and 85), the transfer of the shares in question from Holdings to Topmakers on the share exchange, as well as the transfer by Topmakers to Woolcombers, was governed by para 2(1) of Sch 13 to the 1965 Act (the predecessor of s 273). Since the language is identical, I shall henceforth as a general rule refer to the sections as numbered in the 1970 and 1979 Acts.

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Both Hoffmann J. and the Court of Appeal held, in effect, that the simple juxtaposition of the language of s 273 ("...where a member of a group of companies disposes of an asset") with that of s 78 (the reorganisation "...shall not be treated as involving any disposal") upon which the Revenue relied in that case and the taxpayer relies in this was undermined by the qual- H ification in s 85 that s 78 was applicable to share exchanges only "with any necessary adaptations". At page 583 of the report, Hoffmann J. said of the reorganisation provisions[1]:—

"It is easy to see how, in a single company share exchange, the original shares and new holding can be 'treated as the same asset' so that the I shareholder is deemed not to have disposed of the one or acquired the other. The statute identifies an asset held at one time with another asset held at a later time. Similarly, in a two-company share exchange the original shares and the new holding can be treated as the same asset in the hands of the person who has parted with the one and acquired the other. But once the original shares are in the hands of the transferee

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[1](Ch D) [1986] STC 182, at page 188c/j.

company they cannot be treated as the same asset as the new holding which has been acquired by the transferor company. The purpose of the paragraph is to assimilate successive ownerships of different assets by the same person but not simultaneous ownerships of different assets by different persons ... The assumption of a single continuing asset in the absence of a disposal and acquisition are two sides of the same coin. The hypothesis is directed, in the cases of both para 4 and para 6, solely to the tax consequences of an exchange by one person of one holding of shares for another which has been issued either by the same company or a different company. It requires that person to be taxed as if he had continued to own the same asset. Since this assumption plainly cannot apply to the company which has acquired the original shares, I do not think that the assumption that there was no disposal or acquisition can have been intended to apply to that company either. The "necessary adaptations" required by para 6 mean that its effect must be limited to the tax consequences of the transaction for the person who has exchanged holdings. I can see no reason or logic in applying it to the person who has acquired the original shares and subjecting him to the inelegant hypothesis of having made an acquisition without a disposal."

At page 585 of the report, Hoffmann J. turned to broader considerations. He said(1):

"From language, concept and authority, I turn to the guidance which can be obtained from the general scheme of the legislation. As Lord Wilberforce said in *Ramsay* v. *Commissioners of Inland Revenue* (1982) AC 300, at page 326E: 'The capital gains tax was created to operate in the real world, not that of make belief'. The policy of para 2(1) of Sch 13 is to recognise that in the case of transactions between members of a group of companies, the legal theory that each company is a separate entity does not accord with economic reality. It gives effect to that policy by, broadly speaking, ignoring transactions within the group, computing the gain as the difference between the consideration given when an asset was acquired by the group and the consideration received when it left the group and charging the tax upon whichever company made the outward disposal."

In the Court of Appeal, at page 589 of the report, Fox L.J. said that the combined effect of para 4(2) and para 6(1) was to impose two fictions—the "no disposal fiction" and the "composite single asset fiction". At pages 590 to 591, he continued(2):

"Paragraph 4(2) itself is concerned to ensure that the shareholder is not taxed in consequence of the transposition of his shareholding. To that end, the paragraph requires it to be assumed that the shareholder has neither disposed of nor acquired an asset in consequence of his having exchanged his old shareholding for the new. For that purpose the two fictions are imposed and give rise to no difficulty. Paragraph 6(1) is similarly concerned to ensure that where a shareholder in company A exchanges that shareholding for an issue of shares in company B, the shareholder is not taxed on that transaction. The shareholder in company A is treated as having continued to own the same asset. But company B cannot be treated as owning the shares which it has issued in consequence of the exchange. On the other hand, company B has, in law,

(1) [1986] STC 182, at pages 189j/190h. (2) (CA) [1987] STC 600, at pages 604g/605b.

A become the owner of the shares in company A. That is a situation which has no counterpart in a one company situation. The composite single asset fiction cannot therefore operate in relation to company B (Topmakers in this case). If one of the fictions cannot be applied to Topmakers I do not think that the other can be applied either. I agree with the Judge that the fictions are part of a single tax hypothesis and go B together. The purpose of this hypothesis is to relieve the shareholder (in a one company situation) and the transferor of the original shares (in the two company situation) from liability to tax. In the two companies situation the purpose can be achieved by limiting the fictions to the tax consequences of the transaction to the owner of the original shares (Holdings). That, as it seems to me, sufficiently effectuates the purpose C of the enactment. The single composite asset fiction simply cannot be applied to Topmakers; and to apply the no disposal fiction to Topmakers produces the situation that Topmakers, which has undoubtedly acquired the shares in the three companies by an ordinary transfer *inter vivos*, must be assumed to have done so without any disposal to it at all. I see no reason to accept so unreal a result when the purpose of D the legislation, as I read it, can be achieved by limiting the operation of the fictions to the tax position of Holdings."

At page 592, Fox L.J. added[1]:

"The Crown contends that the construction of the paragraphs E which I have adopted (as did the Judge) does not have adequate regard to the language of para 2(1).

It is said that the paragraph is a bilateral provision which indicates how each party to a disposal is to be treated and therefore cannot be applied if the disposal is a disposal only from the point of view of one of F the parties.

It seems to me, however, that the construction which I have adopted gives full effect to the language of para 2(1) since it assumes, as is the fact, that there was a disposal by Holdings to Topmakers. The limitation which one has to impose upon the operation of the no disposal fiction for the purposes of para 6(1) does not alter that."

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Later on, on the same page, Fox L.J. expressed his agreement with Hoffmann J. that

"...the policy of para 2 (1) is to ignore transactions within a group of companies and to compute gains and losses by comparing the consid- H eration paid when the asset came into the group with the consideration received when it left the group. Tax is then assessed upon the company making the disposal out of the group."

The *Woolcombers* case, although not finally decided until 1987, was concerned with a share exchange (the transfer of shares by Holdings to I Topmakers) which took place on 23 March 1966, and was, therefore, decided by reference to the legislation governing share exchanges and transfers of assets between members of the same group of companies as it stood on that date. The subsequent legislation, upon which Napuk's appeal is principally based, was introduced by para 19 Sch 12, Finance Act 1968, which was reenacted as s 279 of the consolidating Act of 1970. Before considering its

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[1] [1987] STC 600, at pages 605j/606a.

terms it will, I think, be helpful to stand back and review the broader effects of the *Woolcombers* decision in relation to shares which have been the subject of a share exchange within a group, and which have (a) increased (b) decreased in value before their disposal outside the group. In doing so I shall, like the Judge, refer to the companies concerned as P, the original acquirer and transferor of the shares (Exco in the present case) S, the company whose shares are exchanged and ultimately disposed of outside the group (Astbro in the present case) and T, the company which effects that disposal (Napuk in the present case). In case (a) suppose that the shares in S had been acquired by P for £100, and had risen in value to £1,000 at the time when they are exchanged by P for shares in T. T then sells them for £1,000 outside the group. On the basis of the *Woolcombers* decision that s 273 applies to such a case as well as ss 78 and 85 then £100 must be taken both as the cost to P of the shares in T and the cost to T of the shares in S. On the sale of the shares in S, T will pay tax on a gain of £900. If one assumes for the purposes of illustration that T has no other assets or liabilities, and that it is then sold by P for its net asset value (£1,000 less the tax paid on the gain), or is simply wound up by P, then there will be a further charge of tax on what is essentially the same gain, that is to say the gain represented by the rise in the value of the shares in S. Conversely in case (b), which is the *Woolcombers* case, where the shares in S have declined in value, then that same decline will generate a claim for loss relief by T in respect of the shares in S and by P in respect of the shares in T. Neither Hoffmann J. nor the Court of Appeal seems to have been unduly disturbed by this prospect. It is a point to which I must return.

As appears from the contentions advanced on their behalf in *Woolcombers*, the Revenue's view of the law from 1965 (when capital gains tax was introduced) until that case was decided in 1987 had been that s 273 did *not* apply to s 85 share exchanges. If that view had prevailed in *Woolcombers*, then the taxpayer in that case would have made no allowable loss (for it is clear from the facts that the underlying shares were worth no more than £600,000 at the time of the share exchange, and this would have represented their cost to Woolcombers for tax purposes) and conversely the taxpayer, T, in my example (a) would have made no taxable gain since it would have been treated as acquiring the shares in S for the same price—£1,000—as that for which it sold them. In both cases the original cost to P of the shares in S would rank as the cost of its shares in T, and would form the basis of the calculation of chargeable gain or allowable loss if and when those shares were disposed of. This state of affairs, if allowed to persist, was advantageous to groups of companies, since if the underlying shares had increased in value they could be disposed of outside the group without any immediate payment of tax, and subject only to the possibility of a deferred charge when the shares in T were disposed of, a possibility which as a practical matter can often be deferred indefinitely: whereas if the underlying shares had gone down in value, a double loss could often if not always be realised promptly by the disposal of the shares in T as well as the shares in S.

It should be noted, however, that these advantages were not confined to groups of companies. They were also available, for example, to individuals who effected share for share exchanges falling within ss 78 and 85. But presumably it was felt that the advantages were more likely to be exploited by groups of companies because of the relative ease with which shares and other assets could be moved around the group.

A That was the background to the introduction in 1968 of what became s 279. It seems clear that, when this section was enacted, Parliament, like the Revenue, took the view that s 273 did not apply to intra-group s 85 share exchanges, and was concerned to counter the advantages to which that view gave rise. In argument, Mr. Warren conceded that he could not seriously dispute this proposition though he strongly disputed its relevance.

B

The section applied to a transaction whereby shares in S held by P were the subject of (*inter alia*) a share exchange falling within s 85, and S and T were members of the same group as P, or became members of the same group as a result of the exchange, and within six years of the share exchange S ceased to be a member of the group. When that happened, P was treated C for all the purposes of the Act as if, immediately before the share exchange, it had sold and immediately reacquired the shares in S at market value at that time. Thus in the example I have given of a case where the shares in S have risen in value, P would be taxed as if, immediately before the share exchange, it had sold the shares in S for £1,000, but thereafter the figure of £1,000 would be taken as the cost to P of the shares in T. £1,000 would also become D the cost of the S shares to T. This is so whether or not s 273 is taken to apply. If the section does not apply, then the cost is treated as £1,000 under normal tax principles because that is the market value of the shares at the time of acquisition. If the section does apply, then the same result follows by virtue of the notional disposal and reacquisition of the shares by P at market value, immediately prior to the share exchange, which s 279 prescribes. (It is E common ground that the learned Judge misdirected himself upon this point, though it did not, I think, materially affect his conclusion).

It will be noted that s 279 applied not only to intra-group share exchanges but also to cases where the companies became members of the same group in consequence of the share exchange. These latter cases fell out- F side s 273 on any view of the matter. In this latter category, therefore, the effect of s 279 in the cases to which it applied (i.e. those in which the ultimate disposal outside the group occurred within six years after the share exchange) was to impose a charge to tax (or confer a right to loss relief) on P in respect of the rise (or fall) in value of the shares in S during the period of their ownership by P which would not otherwise have arisen unless and until P had G disposed of its shares in T. If, contrary to the decision in *Woolcombers*, intra-group share exchanges also fell outside the scope of s 273, s 279 would have had the same important practical effect in their case as well. But, if *Woolcombers* was rightly decided, the only practical effect of s 279 in the case of intra-group share exchanges was to transfer the burden of tax (or right to loss relief) on the rise (or fall) of the shares in S during the period of their H ownership by P from T to P. While there was, no doubt, a certain tidiness and logic in this result, in itself it would hardly seem worth the expenditure of legislative effort, particularly in the context of the general policy of treating all members of the group as one person for the purposes of corporation tax on chargeable gains.

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Long before *Woolcombers* was decided, however, Parliament resolved to dispense with s 279. It did so simultaneously with the introduction of a new anti-avoidance measure, first enacted by s 40 Finance Act 1977, which provided that all share exchanges, whether by individuals or companies and whether intra-group or not, should be protected by ss 78 and 85 only if they fell within the provisions now contained in ss 87 and 88 of the 1979 Act. The effect of these provisions, to which I have already referred, is that the share

exchange is protected only if, to put it shortly, it is carried out for bona fide commercial reasons and does not form part of a tax-avoidance scheme. Advance clearance may be sought from the Revenue, and as I have mentioned, was sought and obtained in the present case. Section 40 applies to all share exchanges occurring after 19 April 1977, and s 40(10) provides that s 279 shall not apply to s 85 share exchanges after that date. Section 279 was not, however, formally amended until the enactment of the 1979 Act which, by para 2(4) of Sch 7, amended s 279(1) by inserting the words "but before 20th April 1977" where appropriate. There the matter stood until after the *Woolcombers* decision. The Revenue did not seek to appeal against that decision to the House of Lords, but it was effectively reversed for the future (not retrospectively) by s 115 Finance Act 1988 which provided that, with effect from 15 March 1988, s 273 should not apply to a transaction treated by virtue of ss 78 and 85 of the 1979 Act as not involving a disposal.

So much for the legislative history. I return now to the law as it stood both at the time of the share exchange in the present case on 23 April 1983 and during Napuk's chargeable accounting period ending 31 December 1985 in which the sale of the Astbro shares which gave rise to the assessment under appeal was made. The law then in force, as Mr. Thornhill has stressed, was that contained in the consolidating Acts of 1970 and 1979. Section 279 had ceased to apply before the share exchange in the present case took place, but, like the Judge, I accept Mr. Thornhill's submission that it remained part of the Act, and therefore falls to be taken into account in construing the legislation. Mr Thornhill also reminded us that s 540(2) of the 1970 Act provides that, so far as it relates to capital gains tax, it is to be construed as one with the 1979 Act. (The reference in s 540(2) to the 1979 Act was substituted for a reference to the previous capital gains tax legislation by the 1979 Act itself).

In construing the legislation, submits Mr. Thornhill, we must keep it firmly in mind that, if the Revenue is right, then not only is Napuk taxable on a gain computed by reference to the $7.5m acquisition cost of the Astbro shares but Exco will also be potentially taxable on a gain computed by reference to the same cost if and when it disposes of its Napuk shares outside the group. Mr. Thornhill referred to the passage in the speech of Lord Wilberforce in *W.T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* 54 TC 101[1] at page 178E, which Hoffmann J. had quoted in *Woolcombers*, and in which Lord Wilberforce says that the capital gains tax was created to operate in the real world, not that of make-believe:—it is a tax on gains, not on arithmetical differences. Mr. Thornhill submits that a construction of the legislation which would involve tax being chargeable on two or more occasions in respect of what is substantially the same gain cannot be reconciled with the principle stated by Lord Wilberforce.

I have mentioned that the same argument seemed to have made little impact upon Hoffmann J. and the Court of Appeal in *Woolcombers*. They declined to accept that the legislation embodied a firm policy of taxing gains only once. As Fox L.J. said, at 60 TC 575, at page 593[2]:

> "I think that Mr. Park, for the taxpayer, rightly asserts that an increase in the value of an asset can give rise to a liability to tax on the part of the company which owns the asset and to a further liability on

[1] [1982] AC 300. [2] [1987] STC 600, at page 606e/f.

A a disposal by a person owning, directly or indirectly, shares in that company."

That is an undeniable feature of the tax and one which must have been understood by taxpayers from the outset. If a company is formed with a paid-up share capital of £100, and invests the £100 in the acquisition of an B asset, then the growth in the value of the asset may result in taxable gains both on the disposal of the asset and on the disposal of shares in the company. That is, however, significantly different from creating a potential duplicate charge on an existing growth in value, which is the effect of the *Woolcombers* decision.

C Next, submits Mr. Thornhill, we are not required by the *Woolcombers* decision to adopt that construction because it was not a decision on the 1970 and 1979 Acts. The provision in ss 78 and 85 of the 1979 Act to the effect that the share exchange "...shall not be treated as involving any disposal" is, to put it no higher, capable of being construed as meaning that there *is* no disposal for capital gains tax purposes. No doubt the share exchange involves D a disposal by the transferor company within the ordinary meaning of that word, but in the context of the relevant legislation "disposal" is a term of art. This is illustrated by s 273 itself, which, by subs (2), makes special provision for transactions such as the satisfaction of a debt or the redemption of shares which are not disposals in the ordinary meaning of that word, but are treated as disposals for capital gains tax purposes. So when Parliament said that a E share exchange should not be treated as involving any disposal, it was saying that s 273 did not apply to such a transaction. To reinforce his argument that "disposal" is used as a term of art in the legislation Mr. Thornhill furnished us with a list of no less than 28 examples of provisions deeming something to be a disposal which in fact was not, or deeming something not to be a disposal which in fact was.

F

Mr. Thornhill submitted that the construction for which he contended was supported by the scheme of the legislation, and by a consideration of the anomalies consequent upon the construction for which the Revenue contended. He said that if the Revenue were right then s 279 was largely superfluous as an anti-avoidance measure. Further, and illogically, if the Revenue G were right, its effect in a case such as the present was positively favourable to the taxpayer since the increase in the value of the shares of S during their ownership by P was taxable only once: the potential double charge of which Napuk complains did not arise. He submitted that the Revenue's contention produced an even more bizarre result in a case such as the present which arose after s 279 had ceased to apply to s 85 share exchanges and the anti-H avoidance provisions of s 87 had come into operation. Section 87 did not apply to Exco because Exco had satisfied the Revenue that the exchange of Astbro shares for shares in Napuk was a *bona fide* commercial transaction and not a tax-avoidance scheme. Therefore, Exco was exempted from tax on the share exchange, but carried forward the contingent liability which would mature on its disposal of the shares in Napuk. And Napuk, if the Revenue I were right, was liable by virtue of s 273 to tax on a gain which included the rise in the value of the Astbro shares during the period of ownership by Exco. If, however, the share exchange *had* been effected for tax-avoidance purposes, Exco would have lost the benefit of s 85 but s 273 would have protected Exco from tax on the transfer of the Astbro shares to Napuk. Napuk would have been taxable, when it sold the Astbro shares, on the full amount of the gain over the original cost of $7.5m but Exco, not being within ss 78

and 85, would have been treated as acquiring the Napuk shares for the actual commercial cost, namely the market value of the Astbro shares which it had given in exchange for them. Thus again the rise in their value during the period of their ownership by Exco would only be taxed once. How strange, observed Mr. Thornhill, if the law thus favoured the tax avoider. A

In support of his submission that we must apply our minds solely to the construction of the two consolidating Acts, and should close our eyes to the earlier provisions which had been the subject of the *Woolcombers* decision, Mr. Thornhill relied upon the approach adopted towards consolidating Acts by the House of Lords in *Commissioners of Inland Revenue* v. *Joiner*(1) 50 TC 449 and *Farrell* v. *Alexander* [1977] AC 59. The approach is exemplified in a passage from the speech of Lord Wilberforce in the latter case, at page 73 of the report, where he said that B C

> "...self-contained statutes, whether consolidating previous law or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents and that the recourse should only be had when there is a real and substantial difficulty or ambiguity, which classical methods of construction cannot resolve." D

Mr. Thornhill added that if, as the Judge thought and as Mr. Warren did not seriously dispute, the indications were that Parliament when enacting s 279 believed that s 273 did not apply to a s 85 share exchange, then we should construe the section in such a way as to give effect to Parliament's belief. This would be in accordance with the spirit, if not the letter, of *Pepper* v. *Hart*(2) [1992] 3 WLR 1032. E

This last part of Mr. Thornhill's argument seems to me to go too far. I do not accept that *Pepper* v. *Hart* authorises us to be guided by the supposed beliefs of Parliament. It merely authorises us, in certain defined circumstances, to have regard to what has actually been said in the course of Parliamentary debate. Neither party suggests that those circumstances exist in the present case. Consequently, I agree with the Judge that our task is to have regard to the intention of Parliament as expressed in the language which Parliament has enacted. F

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I am, however, persuaded by Mr. Thornhill that, for this purpose, we need look no further than the two consolidating Acts in which the relevant law was set out at the material time. For the purpose of his primary submission, Mr. Warren did not seek to dispute this argument. His primary submission was that the consolidated legislation was clear, and amounted to a re-enactment of the *Woolcombers* decision. But his alternative submission was that the construction for which Napuk contended gave rise to real and substantial difficulties and ambiguities, and that accordingly recourse should be had to the earlier legislation. H

For a time I was attracted by this alternative submission, but I have concluded that it would be wrong to accede to it. The passage which I have quoted from the speech of Lord Wilberforce in *Farrell* v. *Alexander*, at [1977] AC 59, at page 73, is immediately preceded by the words: I

> "In recent times, because modern statutes have become so complicated, the courts myself included (cf. Inland Revenue Commissioners v.

(1) [1975] 1 WLR 1707. (2) 65 TC 421.

A Joiner (1975) 1 WLR 1701) rather too easily accept this process, whether under persuasion of counsel or from their own scholarly inclinations. But unless the process of consolidation, which involves much labour and careful work, is to become nothing but a work of mechanical convenience, I think that this tendency should be firmly resisted."

B In the present case I agree with Mr. Warren that Napuk's construction gives rise to difficulties, but so does that of the Revenue. This, however, is not enough to justify an enquiry into the history of the legislation. The language of the taxing statutes is often difficult and sometimes very difficult to understand. The whole purpose of the consolidating fiscal measures which have been introduced at regular intervals in the second half of this century C has been to make the law more readily comprehensible than it would otherwise be. Although the language with which we are concerned presents difficulties, I do not think they merit the description of difficulties "...which classical methods of construction cannot resolve".

It follows that we cannot regard the question before us as being con- D cluded by the *Woolcombers* decision, but must take a fresh look at the language of s 273 in the context in which it appeared on 23 April 1983 when Napuk acquired the Astbro shares from Exco, and on 8 August 1985 when Napuk sold those shares. That is to say, we must construe the section in the context of an Act which included s 279, and which was to be read in conjunction with the 1979 Act which included s 87 as well as ss 78 and 85. That E does not, of course, mean that we should ignore the *Woolcombers* decision: it means that we should consider whether it still holds good in the light of the consolidated legislation.

In approaching this task, I find it helpful to reflect upon three aspects of the decision. The first, which I have already mentioned, is that the construc- F tion which the decision upholds has the effect in a case such as the present of creating a potential duplicate charge on an existing growth in value. The second is that it treats the same purchase price, that is the price paid by Exco for the Astbro shares in the present case, as if it were the purchase price of two different assets, the Astbro shares and also the Napuk shares acquired by Exco in exchange. Both of these effects seem, at first sight, surprising and G they are not, I think, produced by any other part of the capital gains tax legislation. Thirdly, and I think even more surprisingly, the only taxpayers for whom these effects are created are companies which are members of the same group. This seems particularly odd because the apparent purpose of s 273(1) is simply to ignore or neutralise intra-group transactions, postponing the charge of tax or allowance of loss until the asset is disposed of outside the H group. Thus the group is treated as if it were a single individual taxpayer. Yet if Exco had been an individual, ss 78, 85 and 87 would have been equally applicable to the share exchange but s 273, obviously, would not.

These reflections seem to me to add to the attraction of Mr. Thornhill's I arguments about the scheme of the legislation and the intentions underlying the anti-avoidance provisions of s 279 and s 87. If "disposal" in s 273 bears the same meaning as in s 85, then all the difficulties fall away and a coherent and intelligible result follows. Mr. Warren submits that such an approach ignores the "necessary adaptations" for which s 85(3) provides, and which the Courts in *Woolcombers* interpreted adversely to the argument put forward by Mr. Thornhill. But it is clear from the *Woolcombers* judgments that the question was regarded as one of considerable difficulty. I do not think it is by any

means to be assumed that Hoffmann J. and the members of this Court would have regarded the adaptation for which the Revenue contend as being "necessary" if they had been faced with the anomalous and indeed absurd meaning which it attaches to s 279 and s 87. Certainly I cannot, for my part, accept the *Woolcombers* decision as having survived the enactment of the 1970 and the 1979 Acts. I would uphold the construction for which Napuk contends.

From this, it must follow as a practical matter that the Exco group will pay no tax on the rise in value of the Astbro shares during the period of their ownership by Exco unless and until Exco liquidates Napuk or disposes of the Napuk shares outside the group. That rise in value has been rolled over into the Napuk shares which are still within the group, and so remains, for tax purposes, unrealised. To the ordinary taxpayer this may seem a remarkable result, and not the less remarkable because it follows from a view of the law which was put forward by the Revenue in the *Woolcombers* case (even without the support of the later legislation) and which was adopted by Parliament, presumably with full knowledge of the implications, when s 115 Finance Act 1988 was passed. It is to be remembered, however, that the result is only possible because the share exchange passed the s 87 test; and, as I have said, the result would undoubtedly be the same (*mutatis mutandis*) if the taxpayer in Exco's place were an individual. Further the result would seem no less strange if Exco were compelled, for example, through economic necessity, to liquidate Napuk or sell away its shares and the Revenue were thus entitled, as they contend, to two bites at the cherry.

Before concluding, I should mention one final argument put before us by Mr. Warren. It was to the effect that the result for which Napuk contended effectively anticipates s 115 Finance Act 1988. Clearly, submitted Mr. Warren, the draftsman of that section must have thought that s 273 did apply to the share exchange. I am not sure, however, that this is necessarily so. Parliament may simply have wanted to clarify the position for the future. In any event it is well settled that recourse may only be had to subsequent fiscal legislation as an aid to construction if it is necessary to do so in order to resolve an ambiguity, in the strict and narrow sense of that word: see *Kirkness* v. *John Hudson & Co. Ltd.* [1955] AC 696, especially *per* Viscount Simonds, at pages 712–3. In the same passage Viscount Simonds described language as being ambiguous where it is "fairly and equally open to divers meanings". I do not think that there is any such ambiguity in the present case. The critical words, in their context, appear to me to bear the meaning for which Napuk contends and not that for which the Revenue contend. An assumption by the draftsman of a later fiscal Act certainly cannot alter the law retrospectively: see, again, Viscount Simonds, at page 713 of the report where, quoting Rowlatt J. in an earlier case, he described an argument to the contrary as "a sinister and menacing proposition". The effect of a decision in favour of Napuk is, therefore, simply that before as well as after the introduction of s 115 Finance Act 1988 s 273 did not apply to intra-group share exchanges.

For these reasons I would allow the appeal.

Hirst L.J.:—I agree.

Ralph Gibson L.J.:—I also agree.

Appeal allowed, with costs.

A The Crown's appeal was heard in the House of Lords (Lords Keith of Kinkel, Jauncey of Tullichettle, Browne-Wilkinson, Mustill and Lloyd of Berwick) on 4, 5 and 6 July 1994 when judgment was reserved. On 17 November 1994 judgment was given in favour of the Crown, (Lord Lloyd of Berwick dissenting), with costs.

B *Andrew Thornhill Q.C.* and *Kevin Prosser* for the Company.

Edward Nugee Q.C. and *Nicholas Warren Q.C.* for the Crown.

C The following cases were cited in argument in addition to the cases referred to in the judgment:—*Aberdeen Construction Group Ltd.* v. *Commissioners of Inland Revenue* 52 TC 281; [1978] AC 855; *Berry* v. *Warnett* 55 TC 92; [1982] 1 WLR 698.

D **Lord Keith of Kinkel**:—My Lords, this appeal is concerned with the interaction between certain provisions of the capital gains tax legislation in force at the time of the transactions in issue. These provisions have since been superseded by later statutes, but for convenience I shall refer to them in the present tense. The first and perhaps the most important of the provisions in question is s 273 of the Income and Corporation Taxes Act 1970, subs (1) E of which, as amended by the Capital Gains Tax Act 1979, provides:

> "Notwithstanding any provision in [the Capital Gains Tax Act 1979] fixing the amount of the consideration deemed to be received on a disposal or given on an acquisition, where a member of a group of companies disposes of an asset to another member of the group, both members shall, except as provided by subsections (2) and (3) below, be F treated, so far as relates to corporation tax on chargeable gains, as if the asset acquired by the member to whom the disposal is made were acquired for a consideration of such amount as would secure that on the other's disposal neither a gain nor a loss would accrue to that other; but where it is assumed for any purpose that a member of a group of companies has sold or acquired an asset, it shall be assumed also that it was G not a sale to or acquisition from another member of the group."

The transactions in issue are these: (1) in 1981 and 1982 Exco Overseas Ltd. ("Overseas") acquired 100 shares in a company called Astbro Inc. ("Astbro") for a consideration amounting to about \$7.5m; (2) in 1983 Overseas transferred these 100 shares to the Respondents, NAP Holdings H UK Ltd. ("Napuk") in exchange for the issue to it of 20m shares in Napuk, both Overseas and Napuk then being companies in the Exco International Group and the market value of the 100 shares being at the time about \$400m; (3) in 1985 Napuk sold the 100 Astbro shares outside the group for a price of about \$344m.

I The dispute between the parties relates to the acquisition cost of the 100 Astbro shares which falls to be attributed to Napuk for the purpose of ascertaining its liability, if any, to corporation tax on capital gains tax principles. The Appellant Inspector of Taxes maintains that, by virtue of s 273(1) of the Income and Corporation Taxes Act 1970, that acquisition cost is \$7.5m, being the amount of the consideration for which Overseas originally acquired the shares. That is the amount of consideration which would secure that, on the

disposal by Overseas to Napuk, neither a gain nor a loss would accrue to Overseas. In the result, it is maintained that Napuk made a capital gain of about $336.5m and is liable to corporation tax accordingly. A

Napuk, on the other hand, contends that the acquisition cost to it of the 100 Astbro shares is $400m, being the market value of the shares at the time of acquisition, by virtue of ss 29A and 62 of the Capital Gains Tax Act 1979, dealing with transactions between connected persons, which Overseas and Napuk were as being members of the same group of companies. That would result in Napuk sustaining a loss on the disposal, rather than realising a gain. It is argued for Napuk that s 273(1) of the Income and Corporation Taxes Act 1970 has no application, because the effect of ss 78 and 85 of the Capital Gains Tax Act 1979 is to exclude it. B C

Section 78 provides:

"Subject to sections 79 to 81 below, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired." D

Certain terms in this section are defined by s 77(1), providing:

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"For the purposes of this section and sections 78 to 81 below 'reorganisation' means a reorganisation or reduction of a company's share capital, and in relation to the reorganisation—

(*a*) 'original shares' means shares held before and concerned in the reorganisation,

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(*b*) 'new holding' means, in relation to any original shares, the shares in and debentures of the company which as a result of the reorganisation represent the original shares (including such, if any, of the original shares as remain)."

Section 85 provides: G

"(1) Subsection (3) below has effect where a company (company A) issues shares or debentures to a person in exchange for shares in or debentures of another company (company B) and—

(*a*) company A holds, or in consequence of the exchange will hold, more than one quarter of the ordinary share capital (as defined in section 526(5) of the Taxes Act) of company B, or H

(*b*) company A issues the shares or debentures in exchange for shares as the result of a general offer—

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(i) which is made to members of company B or any class of them (with or without exceptions for persons connected with company A), and

(ii) which is made in the first instance on a condition such that if it were satisfied company A would have control of company B.

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(2) Subsection (3) below also has effect where under section 86 below persons are to be treated as exchanging shares or debentures for shares or debentures held by them in consequence of the arrangement there mentioned.

(3) Subject to the provisions of sections 87 and 88 below, sections 78 to 81 above shall apply with any necessary adaptations as if the two companies mentioned in subsection (1) above, or as the case may be in section 86 below, were the same company and the exchange were a reorganisation of its share capital."

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Condition (a) in subs (1) was satisfied in relation to the share exchange between Napuk and Overseas.

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The argument for Napuk is that the effect of s 78, as applied by s 85(3) to the case where a person acquires shares in company A in exchange for shares in company B, is that for all capital gains tax purposes that person is to be treated as not having disposed of the shares in company B, and as not having acquired the shares in company A. On the contrary, the shares in company A are to be treated as being the same asset as the shares in company B and as having been acquired for the cost at which the shares in company B were acquired. The result in the present case, so it is claimed, is that so far as s 273 of the Income and Corporation Taxes Act 1970 is concerned, there never was any disposal by Overseas of the Astbro shares and, therefore, the section does not apply.

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In *Westcott* v. *Woolcombers Ltd.*[1] [1986] STC 182 and [1987] STC 600, Hoffmann J. and the Court of Appeal had occasion to deal with the statutory predecessors of the enactments referred to above, which were for all practical purposes in the same terms. Section 273 of the Income and Corporation Taxes Act 1970 was, at the material time, represented by para 2(1) of Sch 13 to the Finance Act 1965 and ss 78 and 85 of the Capital Gains Tax Act 1979 by paras 4(2) and 6(1) of Sch 7 to that Act. The position was that the taxpaying company, to which its holding company ("Holdings") had, via a share exchange transaction with another subsidiary ("Topmakers"), transferred shares in three companies which were later liquidated, had made an allowable loss if Topmakers' acquisition cost of the shares fell to be treated as being that for which Holdings had originally acquired the shares, by virtue of para 2(1) of Sch 13, but not if paras 4(2) and 6(1) of Sch 7 had the effect that there had been no disposal by Holdings to Topmakers within para 2(1). The Revenue's argument was the opposite of that presented in the present case. It maintained that para 2(1) was excluded, so that there had been no allowable loss. That argument was rejected both by Hoffmann J. and by the Court of Appeal (Fox and Nourse L.JJ. and Sir Denys Buckley), and it was held that an allowable loss had indeed been incurred.

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Hoffmann J. [1986] STC 182, 188, said[2]:

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"Paragraph 6 of Sch 7 applies the rules for a single-company share exchange contained in para 4(2) to a two-company share exchange 'with any necessary adaptations'. What adaptations are necessary? There are two limbs to para 4(2). The first says that the reorganisation shall not be treated as involving any disposal of the original shares or acquisition of the new holding. The second says that the original shares and the new

(1) 60 TC 575. (2) *Ibid*, at page 583A/D.

holding shall be treated as the same asset, acquired as the original shares were acquired. It is easy to see how, in a single-company share exchange, the original shares and new holding can be 'treated as the same asset' so that the shareholder is deemed not to have disposed of the one or acquired the other. The statute identifies an asset held at one time with another asset held at a later time. Similarly, in a two-company share exchange the original shares and the new holding can be treated as the same asset in the hands of the person who has parted with the one and acquired the other. But once the original shares are in the hands of the transferee company they cannot be treated as the same asset as the new holding which has been acquired by the transferor company. The purpose of the paragraph is to assimilate successive ownerships of different assets by the same person but not simultaneous ownerships of different assets by different persons."

After alluding to an argument for the Revenue that, while the second limb of para 4(2) could not apply to the shares in the hands of the transferee, there was no absurdity in applying the first limb, so that the transferee company was deemed to have acquired the shares without there having been any disposal, he continued(1):

"I have not found this an easy point, but I do not think that one can distinguish between the two limbs of para 4(2) in this way. They are in my judgment part of a single tax hypothesis. The assumption of a single continuing asset and the absence of a disposal and acquisition are two sides of the same coin. The hypothesis is directed, in the cases of both para 4 and para 6, solely to the tax consequences of an exchange by one person of one holding of shares for another which has been issued either by the same company or a different company. It requires that person to be taxed as if be had continued to own the same asset. Since this assumption plainly cannot apply to the company which has acquired the original shares, I do not think that the assumption that there was no disposal or acquisition can have been intended to apply to that company either. The 'necessary adaptations' required by para 6 mean that its effect must be limited to the tax consequences of the transaction for the person who has exchanged holdings. I can see no reason or logic in applying it to the person who has acquired the original shares and subjecting him to the inelegant hypothesis of having made an acquisition without a disposal."

Later Hoffmann J. said, at page 190(2):

"The policy of para 2(1) of Sch 13 is to recognise that in the case of transactions between members of a group of companies, the legal theory that each company is a separate entity does not accord with economic reality. It gives effect to that policy by, broadly speaking, ignoring transactions within the group, computing the gain as the difference between the consideration given when an asset was acquired by the group and the consideration received when it left the group, and charging the tax on whichever company made the outward disposal. (For this purpose, liquidation is treated as an outward disposal.) Paragraph 4(2) of Sch 7 also favours economic reality over the legal theory that every share in a company is a separate asset. Its application by para 6(1) to an exchange of shares in one company for shares issued by another combines both the

(1) 60 TC 575, at page 583G/I. (1) *Ibid*, at page 585B/E.

A policies to which I have referred. Thus all the provisions with which we have been concerned are directed to neutralising the tax effects of transactions which are disposals in legal theory but not in real life."

In the Court of Appeal [1987] STC 600, Fox L.J., who gave the leading judgment, after observing, at page 603, that paras 4(2) and 6(1) imposed two B fictions "the no disposal fiction" and "the composite single asset fiction", and referring, at page 604, to the argument for the Revenue that, while the single composite asset fiction could not be applied to the shares in the hands of the transferee company, there was no reason why the no disposal fiction should not apply, said(1):

C "I do not feel able to accept the Crown's approach. Paragraph 4(2) itself is concerned to ensure that the shareholder is not taxed in consequence of the transposition of his shareholding. To that end, the paragraph requires it to be assumed that the shareholder has neither disposed of nor acquired an asset in consequence of his having exchanged his old shareholding for the new. For that purpose the two fictions are imposed D and give rise to no difficulty.

Paragraph 6(1) is similarly concerned to ensure that where a shareholder in company A exchanges that shareholding for an issue of shares in company B, the shareholder is not taxed on that transaction. The shareholder in company A is treated as having continued to own the E same asset. But company B cannot be treated as owning the shares which it has issued in consequence of the exchange. On the other hand, company B has, in law, become the owner of the shares in company A. That is a situation which has no counterpart in a one company situation. The composite single asset fiction cannot therefore operate in relation to company B (Topmakers in this case). If one of the fictions cannot be applied F to Topmakers, I do not think that the other can be applied either. I agree with the judge that the fictions are part of a single tax hypothesis and go together. The purpose of this hypothesis is to relieve the shareholder (in a one company situation) and the transferor of the original shares (in the two companies situation) from liability to tax. In the two companies situation the purpose can be achieved by limiting the fictions to the tax con- G sequences of the transaction to the owner of the original shares (Holdings). That, it seems to me, sufficiently effectuates the purpose of the enactment. The single composite asset fiction simply cannot be applied to Topmakers; and to apply the no disposal fiction to Topmakers produces the situation that Topmakers, which has undoubtedly acquired the shares in the three companies by an ordinary transfer inter vivos, H must be assumed to have done so without any disposal to it at all. I see no reason to accept so unreal a result when the purpose of the legislation, as I read it, can be achieved by limiting the operation of the fictions to the tax position of Holdings. That result, I appreciate, does not avoid artificiality itself. But we are dealing with fictions and, in pursuance of the statutory direction, adapting them, as realistically as one can, to a sit- I uation which is very different from that for which paragraph 4(2) itself was designed. The no disposal fiction cannot be sensibly applied to a two companies situation without severe limitations, any more than the single composite asset fiction can. To limit the no disposal fiction to the tax consequences of the exchange to Holdings seem to me less objectionable than assuming that an actual transfer of the shares in the three compa-

(1) 60 TC 575, at pages 590G to 591F.

nies, which undeniably did take place, was something that never took place at all. I bear in mind that para 6(1) specifically requires us to make adaptations." A

Fox L.J. agreed, at page 606, with Hoffmann J. upon the general policy considerations favouring his construction of the relevant legislation.

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The Special Commissioner and Millett J.[1] [1992] STC 59 decided the present case in favour of the Revenue, applying the *Woolcombers* case. But their decisions were reversed by the Court of Appeal[2] (Ralph Gibson, Nolan and Hirst L.JJ.): ([1993] STC 592). The Revenue now appeals to your Lordships' House.

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The reasoning of Nolan L.J., whose judgment was concurred in by the other two members of the Court without any addition, was on the following lines. The *Woolcombers* decision was not conclusive of the instant case, because since the period to which it related certain additions had been made to the relevant legislation and these additions had been consolidated with it in the Acts of 1970 and 1979, which governed the instant case. In the circumstances, it was appropriate to construe the provisions of these consolidating statutes without reference to the earlier provisions which had been the subject of the *Woolcombers* decision. Reliance for that proposition was placed upon a passage from the speech of Lord Wilberforce in *Farrell and Another* v. *Alexander* [1977] AC 59, 73, where he said[3]: D E

"... self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

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It was the opinion of Nolan L.J. that, on a proper construction of s 273(1) in the context of the consolidated legislation, there had been no disposal of the Astbro shares by Overseas to Napuk.

The additional provisions consolidated into the Acts of 1970 and 1979 were para 12 of Sch 19 to the Finance Act 1968, which became s 279 of the Act of 1970, and s 40 of the Finance Act 1977, which became ss 87 and 88 of the Act of 1979. G

Subsections (1) and (2) of s 279 provide:

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"(1) This section has effect if a company (in this section called 'the subsidiary') ceases to be a member of a group of companies, and on an earlier occasion shares in the subsidiary were disposed of by another company (in this section called 'the chargeable company') which was then a member of that group in the course of an amalgamation or reconstruction in the group, but only if that earlier occasion fell— I

(*a*) on or after 6th April 1965 [but before 20th April 1977], and

(*b*) within the period of six years ending with the date on which the subsidiary ceases to be a member of the group;

(1) Pages 168-178 and 179-186 *ante*. (2) Pages 187-198 *ante*. (3) [1976] 2 All ER 721, at page 726b.

A and references in this section to a company ceasing to be a member of a group of companies do not apply to cases where a company ceases to be a member of a group by being wound up or dissolved or in consequence of another member of the group being wound up or dissolved.

(2) The chargeable company shall be treated, for all the purposes of B Part III of the Finance Act 1965, as if immediately before the earlier occasion it had sold, and immediately reacquired, the said shares at market value at that time."

Subsections (1) and (2) of s 87 of the Act of 1979 provide:

C "(1) Subject to subsection (2) below, and section 88 below, neither section 85 nor section 86 above shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange, reconstruction or amalgamation in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of D liability to capital gains tax or corporation tax.

(2) Subsection (1) above shall not affect the operation of section 85 or 86 in any case where the person to whom the shares or debentures are issued does not hold more than 5 per cent. of, or of any class of, the shares in or debentures of the second company mentioned in subsection E (1) above."

Section 88(1) provides:

"Section 87 above shall not affect the operation of section 85 or 86 above in any case where, before the issue is made, the Board have, on F the application of either company mentioned in section 87(1) above, notified the company that the Board are satisfied that the exchange, reconstruction or amalgamation will be effected for bona fide commercial reasons and will not form part of any such scheme or arrangements as are mentioned in section 87(1) above."

G These provisions superseded for the future s 279 of the Act of 1970, which was formally amended by para 2(4) of Sch 7 to the Act of 1979 to the effect of inserting into s 279(1) the words "but before 20th April 1977" where appropriate.

Nolan L.J. adverted, at page 601, to anomalies which would arise if the H Revenue's argument in the present case were correct. In particular, s 279, which was designed as an anti-avoidance measure, would be largely superfluous for that purpose, and the effect of ss 87 and 88 would be that a taxpayer's position would be more favourable if no clearance had been given under the latter section than if it had been obtained. He was also impressed by the consideration that, if s 273 applied, then there would be a double I charge to tax in respect of the same gain, namely the appreciation in the value of the transferred shares from the time they were originally acquired by the transferor up to the time when they were sold outside the group by the transferee. There would be a charge when the transferee company sold the shares outside the group and again when the transferor company liquidated the transferee company or sold it outside the group. If the shares declined in value there would in similar circumstances be a double allowable loss. (See page 600).

In the course of his judgment, Millett J. expressed the opinion [1992] STC 59, 72 that the predecessors of s 279 of the Act of 1970 and ss 87 and 88 of the Act of 1979 were enacted by Parliament in the belief that the application of the predecessor of s 273(1) to inter-group share exchanges was excluded by the predecessors of ss 78 and 85. If the *Woolcombers* case [1987] STC 600 was correctly decided that was an erroneous belief. No doubt it reflected Inland Revenue thinking as demonstrated by the argument presented by it in *Woolcombers*.

The next Finance Act after *Woolcombers*, that of 1988, reversed the decision by enacting in s 115 that s 273(1) should not apply to a transaction treated by ss 78 and 85 of the Act of 1979 as not involving a disposal by the transferor company.

Assuming that *Woolcombers* was correctly decided, I do not consider that the construction which it placed on the predecessors of s 273(1) and ss 78 and 85 was displaced by the enactment of the predecessor to s 279, or by that of the predecessor to ss 87 and 88.

Nolan L.J. referred to *Kirkness* v. *John Hudson & Co. Ltd.*(1) [1955] AC 696, 712, *per* Viscount Simonds:

> "... recourse may only be had to subsequent fiscal legislation if it is necessary to do so in order to resolve an ambiguity in the strict and narrow sense of that word."

No such ambiguity is present here. It is more than likely that the draftsman of what became s 279 and ss 87 and 88 believed that the predecessor of s 273 did not apply to an inter-group share exchange, but that belief could not have the effect of altering the true construction of the enactment in question. It was, in any event, not the later enactments in themselves which caused the Court of Appeal in the instant case to differ from the *Woolcombers* decision, but the circumstance that these enactments had been incorporated in consolidation legislation. The Court of Appeal considered that the right course was to construe the consolidated legislation untrammelled by the earlier decision on a material part of what had been consolidated. In my opinion, it was wrong to do so. The rule in *Farrell* v. *Alexander* [1977] AC 59 is not an absolute one. Where there is a recent decision upon the true construction of an enactment that has been the subject of consolidation, it would be unrealistic to disregard it when approaching the interpretation of the later statute. It is a peculiarity of the present case that the *Woolcombers* decision did not come until after the consolidation had taken place, although because of the time at which the transaction in issue was entered into the legislation which had to be construed was that which had been in force long before the consolidation. The terms of the Acts of 1970 and 1979 were drawn to the attention of the Court of Appeal, but did not affect its decision. These circumstances tend to reinforce its significance. Further, even taking the consolidated legislation as it stands, there is, in my opinion, a real difficulty of interpretation such as to justify reference to the *Woolcombers* case, which contains careful reasoning which cannot fail to be of assistance.

The Court of Appeal was, of course, bound by the *Woolcombers* decision unless it could find some way to distinguish it. This House is not so bound

(1) 36 TC 28.

A but is free to consider whether the decision was right on its merits. In my opinion, it was indeed correct. The words "disposes of" and "disposal" in s 273(1) just bear their ordinary and natural meaning. Any type of asset might be disposed of within a group of companies. The asset might be shares but it might also be a factory or a ship or anything else. The word cannot have a different meaning according to the nature of the asset disposed of.
B However, the question is whether s 78 as applied by s 85 to a share exchange transaction has the effect that, where the share exchange is between two companies in a group, the actual disposal which takes place is to be treated as not being a disposal. It is plain that s 78 can apply only to the tax position of a shareholder who, as a result of a company reorganisation, disposes of his original holding in it and receives in exchange, a new holding in it. It cannot
C affect the company which is the subject of the reorganisation. For the reasons given by Hoffmann J. and Fox L.J. in the *Woolcombers* case, which I find convincing, I am of opinion that s 85 is likewise intended to affect only the tax position of the shareholder who disposes of his shares in one company in exchange for shares in another company, and not the tax position of that other company. I regard as particularly important the emphasis placed on the
D *Woolcombers* case on the policy aspects of the matter. In relation to a group of companies, that policy is that gains and losses should be computed by reference to the consideration paid when an asset comes into the group and the consideration received when it goes out. As Fox L.J. observed, it is hard to see why there should be a difference in tax consequences between the transfer of shares within the group in consideration of an issue of shares, and trans-
E fers for some other consideration. That the legislation as it stands in the Consolidation Acts is capable of leading to the anomalies is undoubted, but I agree with Millett J. that the most serious of these arise because the draftsman of the later provisions was under an erroneous impression as to the proper construction of the earlier.

F My Lords, for these reasons, I would allow the appeal.

Lord Jauncey of Tullichettle:—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Keith of Kinkel and, for the reasons which he gives, I too would allow the appeal. Like my noble and learned friend, I am much impressed by the reasoning of
G Hoffmann J. and Fox L.J. in the *Woolcombers* case. Were it not for the carefully reasoned dissent of my noble and learned friend, Lord Lloyd of Berwick, I would not find it necessary to say any more. However, because of that dissent, I feel it appropriate to state very briefly a summary of my views on the matter.

H It seems to me that s 273(1) of the Income and Corporation Taxes Act 1970 and ss 78 and 85 of the Capital Gains Tax Act 1979 were intended to deal with different situations. Section 273 is directed at inter-group transfers and covers two types of events, namely:

I (i) where company A disposes of an asset to company B receiving either cash or nothing in return. But for s 273(1), A's disposal would be treated as having been made for a consideration equal to the market value of the asset and corporation tax would then have been payable on any chargeable gain accruing (ss 29(A) and 62 of the Capital Gains Tax Act 1979). Section 273(1), however, has the effect that A's disposal does not give rise to a chargeable gain but that any such gain will only arise on the disposal of the asset outwith the group, upon which event the acquisition cost of the disposing com-

pany, whether B or some later disponee company, will be that incurred by company A.

(ii) where company A disposes of an asset X to company B, receiving in return some other asset Y, such as a building or a block of shares in a third company. Section 273(1), once again, neutralises the effect of ss 29(A) and 62 of the Capital Gains Tax Act 1979. In relation to asset X, the position is as I have already referred to in the previous paragraph. In relation to asset Y, the position is the same as in relation to asset X except that when A or some later disponee company disposes of the asset outwith the group the relative acquisition cost, if such there be, will be that incurred by company B when it was first brought into the group.

The underlying philosophy of this section is that movement of assets within a group of companies does not give rise to a charge to tax. However, when an asset leaves the group, tax will be charged on any gain accruing since it first entered the group on acquisition.

Sections 78 and 85, on the other hand, are directed at the position of a shareholder who is as likely to be a private individual as a company. Section 78(1) relates to the reorganisation of a single company's share capital and provides that a shareholder is not to be treated as disposing of his shares in the company as a result of reorganisation whereby, *inter alia*, he receives new shares or debentures in place of existing ones. Section 85 relates to a two-company situation where shares in one company are issued to a shareholder in another company in exchange for his shares in that other company. The section provides that s 78(1) applies to this situation with necessary adaptations as though both companies were the same company and the exchange of shares were a reorganisation of its share capital. The underlying philosophy of these sections is not hard to discern. It is to secure that shareholders in companies which are involved in reorganisations of share capital or which are the subject of amalgamations or takeovers do not incur chargeable gains on disposals over which they have little or no control. Only when they later dispose of the new shares, will a chargeable gain arise.

Whereas s 273(1) in the second type of event to which I have referred is relevant to the acquisitions by both members in an inter-group exchange, s 85 is directed not at the companies whose shares are being exchanged but at the holder of those shares alone. Thus in the present case s 273(1), if applicable, would have the effect of fixing Napuk's acquisition cost of the Astbro shares at the price of $7.5m paid for them by Overseas. Section 85 treats Overseas as the shareholder and provides that it should be treated as though the Astbro and Napuk shares were shares in the same company which had undergone a reorganisation to which s 78 applied. Thus if Overseas were to sell the Napuk shares outside the group, the acquisition cost thereof would be deemed to be the $7.5m which Overseas had originally paid for the Astbro shares. Both ss 78 and 85 are concerned solely with the disposal by the shareholder (Overseas) of the original shares (Astbro) and in no way with the ultimate disposal by the disponee (Napuk) of those shares. Like my noble and learned friend, Lord Keith of Kinkel, I would find it surprising if s 273(1) were to apply to an inter-group transfer of shares where the consideration therefor was nil or some asset not being shares issued by the transferee company, but was excluded when the consideration was the issue of such shares. If the taxpayers' argument were correct, it would follow that, if Napuk had transferred to Overseas shares in a non-group company instead of issuing its

A own shares, there would have been a chargeable gain accruing on the sale by Napuk of the Astbro shares of some $336.5m whereas, because it issued its own shares to Overseas it has incurred an allowable loss of the order of $56m. There is, in my view, nothing in the relevant statutory provisions which requires so bizarre a result. Section 273(1), accordingly, applies to the Napuk sale of the Astbro shares.

B

Lord Browne-Wilkinson:—My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I too would allow the appeal.

Lord Mustill:—My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Keith of Kinkel, and for the C reasons which he gives, I too would allow the appeal.

Lord Lloyd of Berwick:—My Lords, the chronology in this case is important. The starting point is 1965. By para 4(2) and 6(1) of Sch 7 to the Finance Act of that year, Parliament enacted the provisions which are now contained in ss 78 and 85 of the Capital Gains Tax Act 1979. D Section 78 provides:

> "Subject to sections 79 to 81 below, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated E as the same asset acquired as the original shares were acquired."

Section 85 provides:

> "(1) Subsection (3) below has effect where a company (company A) issues shares or debentures to a person in exchange for shares or debentures of another company (company B) ...
>
> F
>
> (3) ... sections 78 to 81 above shall apply with any necessary adaptations as if the two companies mentioned in subsection (1) above ... were the same company and the exchange were a reorganisation of its share capital."

G By para 2(1) of Sch 13 to the Act of 1965, Parliament enacted provisions which are now contained in s 273 of the Income and Corporation Taxes Act 1970. Section 273, as amended, provides:

> "(1) Notwithstanding any provision in [the Capital Gains Tax Act 1979] fixing the amount of the consideration deemed to be received on a H disposal or given on an acquisition, where a member of a group of companies disposes of an asset to another member of the group, both members shall ... be treated, so far as relates to corporation tax on chargeable gains, as if the asset acquired by the member to whom the disposal is made were acquired for a consideration of such amount as would secure that on the other's disposal neither a gain nor a loss would accrue to that other ... "

I

The question in the present case is whether s 273 applies, as the Revenue contends, to the acquisition by NAP Holdings UK Ltd. ("NAPUK") of shares in Astbro Inc. ("Astbro") from Exco Overseas Ltd. ("Overseas"). If it does, then NAPUK's acquisition cost is fixed at an artificially low level of US$7.5m, resulting in a chargeable gain of about US$336.5m on the disposal of the shares by NAPUK outside the group. If s 273 does not

apply, as the taxpayer contends, then NAPUK's acquisition cost is the market value of the shares at the time of acquisition, and the chargeable gain is correspondingly reduced.

The next date of importance is 1968. It had become apparent to the Revenue that companies in a group were taking advantage of the combined effect of the above provisions of the Act of 1965 to postpone tax liability on the disposal of a subsidiary outside the group. Accordingly, Parliament enacted what was to become s 279 of the Act of 1970. Section 279 provides:

> "(1) This section has effect if a company (in this section called 'the subsidiary') ceases to be a member of a group of companies, and on an earlier occasion shares in the subsidiary were disposed of by another company (in this section called 'the chargeable company') which was then a member of that group in the course of an amalgamation or reconstruction in the group, but only if that earlier occasion fell—
>
> (*a*) on or after 6th April 1965 [but before 20 April 1977], and
>
> (*b*) within the period of six years ending with the date on which the subsidiary ceases to be a member of the group ...
>
> (2) The chargeable company shall be treated for all the purposes of the [Capital Gains Tax Act 1979], as if immediately before the earlier occasion it had sold, and immediately reacquired, the said shares at market value at that time."

The effect of s 279 was to create a notional gain in the books of the company disposing of the shares, Overseas in the present case. It was common ground that s 279 was enacted on the assumption that s 273 did not apply to such a case, by reason of ss 78 and 83. Otherwise, s 279 would have been largely (though not entirely) otiose. It would have been closing a non-existing loophole. Presumably, the Revenue shared in that assumption.

But notwithstanding s 279, ss 78 and 85 continued to be exploited by various tax-avoidance schemes. So by the Finance Act 1977, Parliament took a more radical course. Section 279 continued to apply to transactions effected before 20 April 1977. But thereafter, share exchange transactions were to be governed by a new s 87 which provides:

> "Subject to ... section 88 below, neither section 85 nor section 86 above shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange, reconstruction amalgamation in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax."

Section 88 provides the machinery for obtaining clearance in advance that a transaction is effected for bona fide commercial reasons, and not for the purpose of tax avoidance.

The transaction in the present case, whereby Overseas transferred the shares in Astbro to NAPUK, in exchange for 20m ordinary shares of US$1 in NAPUK, was effected on 23 April 1983. It had been cleared in advance by the Board under s 87. So this is not a tax-avoidance case. NAPUK sold the

A shares on 8 August 1985. There could have been no question at that stage of the Revenue assessing NAPUK's gain to tax, since it was accepted by the Revenue that ss 78 and 85 applied, and it was the Revenue's then view that when ss 78 and 85 applied, s 273 did not.

B The next occurrence was *Westcott* v. *Woolcombers Ltd.*(1) [1986] STC 182, decided by Hoffmann J. on 25 February 1986, and by the Court of Appeal on 31 July 1987, [1987] STC 600. That case was the other way round, in the sense that the group made a loss on the transaction, and not a profit. The Revenue contended, according to its then view, that s 273 did not apply. The taxpayer company contended that it did. The Court of Appeal upheld C the taxpayer's contention.

The last date of importance is the Finance Act 1988. By s 115 Parliament reversed the decision in *Westcott* v. *Woolcombers Ltd.* That section inserts a new subsection in s 273 as follows:

D "(1). In section 273 of the Taxes Act 1970 ... after subsection (2) there shall be inserted—

"(2A) Subsection (1) above shall not apply to a transaction treated by virtue of sections 78 and 85 of the Capital Gains Tax Act 1979 as not involving a disposal by the company first mentioned in E that subsection."

(2). This section shall apply to transactions on or after 15th March 1988."

The explanation of s 115 may be that the Revenue was more anxious to F prevent the creation of artificial losses than to secure the taxation of capital gains on disposal of a subsidiary outside the group. But whatever the reason, there can be no doubt that, if the transaction in the present case had occurred on or after 15 March 1988 and if a clearance had been obtained from the Board, as it was in this case, the taxpayer company would have been entitled to succeed. Thus the position now is as NAPUK contends it G always has been, and as the Revenue always understood it to be until the decision of the Court of Appeal in *Westcott* v. *Woolcombers Ltd.*

Mr. Nugee, who appears for the Crown, justifies the Revenue's change of stance on the ground that, having been obliged to allow losses as a result of the decision in *Westcott* v. *Woolcombers Ltd.*, it is under a corresponding H duty to assess gains on the same basis.

Against that legislative background, I turn to the construction of the relevant sections. For convenience, I adopt the same shorthand as has been used in the Courts below, and call Overseas ("P"), Astbro ("S") and NAPUK I ("T"). Section 78 provides for the simple one-company case as where, for example, in the simplest case of all, a shareholder becomes entitled to bonus shares. The purpose of s 78 is to ensure that the "reorganisation" does not involve any "acquisition" by the shareholder of the bonus shares. The new holding of bonus shares is treated as the same asset as the original shares, and as having been acquired when the original shares were acquired.

(1) 60 TC 575.

Section 85 provides for a two-company case. But the purpose is the same. So is the machinery, save that it provides for an additional fiction. Substituting "P", "S" and "T" in s 85 for "A" and "B", it provides that where a company, T, issues shares to a person, P, in exchange for shares in another company, S, then T and S are to be treated as the same company (the additional fiction) and the exchange of shares is to be treated as a reorganisation of the fictional company's share capital, that is to say the share capital of the T/S company.

The effect of ss 78 and 85 combined is that the reorganisation of the share capital of T/S is to be treated as not involving any disposal by P of the original T/S shares, i.e. the shares in S, nor any acquisition by P of the new holding of T/S shares, i.e. the shares in T, but the original holding and the new holding are to be treated as the same asset, acquired when P acquired the S shares.

Granted the additional fiction which s 87 requires, I do not find greater difficulty (or perhaps I should say not much greater difficulty) in applying s 78 in a two-company case than in a one-company case. Nor does it require any radical adaptation.

Then comes s 273. It provides that where one member of a group, P, disposes of an asset, S, to another member of the same group, T, *both* members are treated as if T's acquisition cost were the same as P's acquisition cost. Since, under ss 78 and 85, the transaction in the present case is not to be treated as having involved any disposal of the original T/S shares by P, it must follow that s 273 does not in terms apply. There is no disposal of any asset by P to another member of the group, so s 273 does not bite.

Mr. Nugee, for the Crown, meets this difficulty in two ways. His first argument is that the word "disposes" in the phrase " ... where a member of a group of companies disposes of an asset to another member of the group" should be given its ordinary non-technical meaning. Since P did, in fact, dispose of the S shares to T, s 273 applies even though that disposal is deemed not to have been a "disposal" by virtue of ss 78 and 85.

I cannot accept this argument. It is clear from s 273 itself, and in particular from the first sentence, that the draftsman uses the word "dispose" as the verb corresponding to the noun "disposal". It is further clear the word "disposal" is used throughout the Act of 1979 as a term of art: see *Marshall* v. *Kerr*(1) [1994] 3 WLR 299, 313, *per* Lord Browne-Wilkinson. It describes an event which triggers, or is capable of triggering, a chargeable gain under s 1 of the Act. By way of illustration, Mr. Thornhill drew our attention to numerous instances in the Act of 1979 where it is provided that an event which would not normally be regarded as a disposal is to be treated as a disposal, and vice versa.

The word "disposal" is used eight times in s 273. The opening words of the section show that it must be given the same meaning, as a term of art, as it bears in the Act of 1979, including s 78. This is not surprising, since, as has already been noted, both provisions owe their origin to the Finance Act 1965. If then "disposal" is used as a term of art in s 273, it must follow that "disposes" is also used as a term of art.

(1) 67 TC 56.

A Mr. Nugee's second argument is that ss 78 and 85 are intended to apply, and apply only, to P's tax position. This is the same as the argument which the taxpayers advanced successfully in *Westcott* v. *Woolcombers Ltd.*(1) [1987] STC 600. There is nothing, he says, in ss 78 and 85 which is capable of affecting the tax position of T. Even if, therefore, contrary to Mr. Nugee's first argument, s 273 does not apply to P, by reason of P being treated as not having disposed of any asset, there is nothing to prevent s 273 applying to T. If this argument is correct, it would mean that P disposed of the S shares to T at market value, since s 273 would not apply to P's disposal; but T would have acquired the shares at P's acquisition cost, since s 273 would apply to the acquisition by T. It would follow that the difference between T's deemed acquisition cost and the price obtained on disposal by T outside the group would be taxable in T's hands.

I find Mr. Nugee's second argument no easier to accept than his first. It does too much violence to the language of s 273 itself. There is nothing in that section which justifies splitting the effect of the section into two, and applying it to T even though it does not apply to P. On the contrary; the section applies *only* where there is a disposal by P. Where there is indeed such a disposal it applies to both members of the group, that is to say, T as well as P. But where there is deemed to be no such disposal it cannot apply to either.

This does not, of course, mean that there has not been a transfer of the S shares from P to T in reality. There obviously has. All it means is that s 273 does not apply to the transfer, since it is deemed not to have been a disposal by P for the purposes of s 273.

How then should T's acquisition cost be calculated for tax purposes? The point was anticipated by Nolan L.J. in the Court of Appeal [1993] STC 592. He said, at page 594(2):

> "It is common ground that apart from the statutory provisions dealing with certain share exchanges and with transfers of assets between members of the same group of companies the tax consequences of these transactions would have reflected the value of the consideration for which they were carried out. The transfer of the Astbro shares by Overseas to the taxpayer company would have been treated as a sale by Overseas and a purchase by the taxpayer company for a price of some $400m, the market value of the Astbro shares (and also, it may be assumed, of the taxpayer company shares issued in exchange), either under the general law as stated in *Stanton (Inspector of Taxes)* v. *Drayton Commercial Investment Co. Ltd.* [1983] AC 501 or under the capital gains tax rules laid down by s 62 of the Capital Gains Tax Act 1979 (the 1979 Act) for transactions between connected persons."

I see no reason to take a different view.

That leaves only the question of *Westcott* v. *Woolcombers Ltd.* Hoffmann J. [1986] STC 182, 188 and Fox L.J. [1987] STC 600, 603, pointed out that s 78 involves two limbs or fictions. The first is the "no disposal fiction" and the second is the "single asset fiction". They both found it impossible to apply the single asset fiction in a two-company case. As Hoffmann J. said, at page 188(3):

(1) 60 TC 575. (2) Page 187F/H *ante*. (3) 60 TC 575, at page 583D.

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"The purpose of [section 78] is to assimilate successive ownerships of different assets by the same person but not simultaneous ownerships of different assets by different persons."

Fox L.J. said, at pages 604–605[1]:

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"The composite single asset fiction cannot, therefore, operate in relation to company B (Topmakers in this case). If one of the fictions cannot be applied to Topmakers, I do not think that the other can be applied either. I agree with the judge that the fictions are part of a single tax hypothesis and go together. The purpose of this hypothesis is to relieve the shareholder (in a one company situation) and the transferor of the original shares (in the two companies situation) from liability to tax. In the two companies situation the purpose can be achieved by limiting the fictions to the tax consequences of the transaction to the owner of the original shares (Holdings). That, it seems to me, sufficiently effectuates the purpose of the enactment. The single composite asset fiction simply cannot be applied to Topmakers; and to apply the no disposal fiction to Topmakers produces the situation that Topmakers, which has undoubtedly acquired the shares in the three companies by an ordinary transfer inter vivos, must be assumed to have done so without any disposal to it at all. I see no reason to accept so unreal a result when the purpose of the legislation, as I read it, can be achieved by limiting the operation of the fictions to the tax position of Holdings. That result, I appreciate, does not avoid artificiality itself. But we are dealing with fictions and, in pursuance of the statutory direction, adapting them, as realistically as one can, to a situation which is very different from that for which para 4(2) itself was designed. The no disposal fiction cannot be sensibly applied to a two companies situation without severe limitations, any more than the single composite asset fiction can. To limit the no disposal fiction to the tax consequences of the exchange to Holdings seem to me less objectionable than assuming that an actual transfer of the shares in the three companies, which undeniably did take place, was something that never took place at all. I bear in mind that para 6(1) specifically requires us to make adaptations."

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I see the force of that line of reasoning. But, with respect, it fails to give sufficient weight to the additional fiction *required* by s 85(3) that T and S are to be treated as the same company and that it is the share capital of that notional company which is to be treated as being reorganised. Once swallow that fiction, and the single asset fiction begins to shed some of its difficulties and the no-disposal fiction presents no difficulties at all.

H

Only Sir Denys Buckley in the Court of Appeal attempted to grapple with what I would call "the same company fiction". The passage in question is very closely reasoned; but as I understand it, his conclusion at the bottom of page 608 is that the fictions must be made to apply. They cannot be disregarded. Moreover, they could be made to apply on the facts before him without any adaptation of the language of s 78. The result was, in his view, that there was deemed to be no disposal by P of the shares in question, and no acquisition by T.

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[1] 60 TC 575, at page 591A/F.

A I respectfully agree with Sir Denys Buckley's approach. I would only disagree with his restricted application of that approach. In my opinion, it should be applied for all purposes, not just for the limited purpose of computing P's tax liability. The judgment of Hoffmann J. and the majority of the Court of Appeal are open to the criticism that they did not follow through the fictions which they were required to assume to their logical conclusion. B Mr. Nugee relies on the statutory purpose, or policy, which he says underlies s 273. But the policy is not stated, and must in any event be regarded as transient in the light of s 115 of the Finance Act 1988. As for the statutory purpose, this can only be inferred from the language which Parliament has chosen to use. This must be true above all in a taxing Act. On the language of ss 78 and 85, s 273 does not apply to P's disposal of the S shares. In those C circumstances, I do not see how it can be made to apply to T's acquisition of those shares from P. It follows that, in my opinion, *Westcott* v. *Woolcombers Ltd.* [1987] STC 600 was wrongly decided. So to hold should not cause great concern, since the decision has already been reversed by statute.

For reasons which necessarily differ from those given by Nolan L.J. in D the Court of Appeal, I would uphold the taxpayer's contentions, and dismiss the appeal.

Appeal allowed, with costs.

[Solicitors:—Messrs. Ashurst Morris Crisp; Solicitor of Inland Revenue.]

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