Anti-Avoidance in Hong Kong Estate Duty: From Kwok to Pong

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Abstract

There have been continuing concerns on the applicability of the Ramsay principle to estate duty in Hong Kong. Recently, this question has been, for the first time, formally raised before and considered in the Court of First Instance of the Hong Kong Special Administrative Region. In addition to a summary of the facts and an analysis of the judgment of the case, in this article the authors provide their reflections and comments on the area. It should be noted that at the time of submitting this article, the case has already been heard by the Court of Appeal but no judgment has yet been handed down. Readers are therefore reminded to keep track of any further developments.

Introduction

As opposed to the case in the profits tax arena, general anti-avoidance provisions are absent from the estate duty context in Hong Kong.¹ Meanwhile, there have been continuing local concerns on the applicability of the common law principle devolving from a House of Lords case in the 1980s: W T Ramsay Ltd v. IRC² (the Ramsay principle) on Hong Kong estate duty. It is only recently that the question has been raised before and considered in the Court of First Instance of the Hong Kong Special Administrative Region in Shiu Wing Limited and others v. The Commissioner of Estate Duty (the Pong case).³

The Facts

The deceased, Mr Pong, a well-known iron and steel industrialist in Hong Kong, died on 23 January 1993. Within three years prior to his death, on
25 January 1990, he effected a series of transactions for the disposition of his properties in Hong Kong including shares in private companies as well as two valuable pieces of land. In total, eight discretionary trusts and five unit trusts were involved.

In respect of one of the two pieces of land, the steps were as follows:

1. First, a loan was arranged by a Macau bank in favour of Mrs Pong, the deceased’s wife.

2. Mrs Pong made a loan to the first plaintiff, a company incorporated in the Isle of Man which was controlled by herself and her seven children, in its capacity as the sole trustee of five Manx unit trusts.

3. The first plaintiff bought the piece of land from the deceased with the loan, and paid the purchase price into a Macau bank account.

4. The deceased donated the proceeds of sale to the second and third plaintiffs in their capacities as trustees of seven discretionary trusts for his children’s benefits.

5. The second and third plaintiffs used the money so donated to subscribe for units in the Manx unit trusts; an express term of the trust deeds provided that the unit-holders did not acquire any interest in the underlying trust assets.

6. The first plaintiff paid back Mrs Pong with the subscription money.

7. Mrs Pong repaid the bank with that money.

The transactions relating to the shares were similar except that the deceased lent the sale proceeds from the shares, together with those of the other piece of land, to the second or third plaintiffs. The debts resulting from these loans were recorded in deeds, which were subsequently delivered to the Isle of Man and remained there at the time of the deceased’s death. On the same date, the deceased made a will including a waiver of the debt. In October 1991 and October 1992, the deceased forgave the debts.

The Commissioner sought to uplift the veil and look into the underlying reality of the series of transactions with a view to charging estate duty on the properties transferred as immediate gift made *inter vivos* within three years of the deceased’s death under section 6(1)(c) of the Estate Duty Ordinance. The first line of arguments the Counsel for the Commissioner relied upon was the Ramsay principle.

The Ramsay Principle

A shorthand recapitulation of the Ramsay principle, arising from the Ramsay case and as developed through subsequent cases, is that where there is a single composite transaction into which steps are inserted but which has no business purpose except for tax avoidance, such steps may be disregarded for tax purposes and the relevant charging provision applied to the final outcome. The first local case which might have considered the application of the principle in Hong Kong was heard before the Privy Council in 1986: *Kwok Chi-leung, Karl v. Commissioner of Estate Duty*.

The scheme adopted in *Kwok* case was basically aimed at a technical removal from Hong Kong immediately prior to the deceased’s death of a substantial part of his extremely valuable property so as to obtain estate duty benefit. Readers are reminded that generally Hong Kong has prac-
tised a territorial tax system. This means that, in the context of estate duty, the situs of the property determines liability to duty. Briefly, in that case, the deceased disposed of his Hong Kong property to an offshore company controlled by his wife and children. In return, promissory notes were executed in favour of the deceased, thereby creating a simple contractual debt. The place where the debt is primarily payable, which may be the place where the debtor resides at the time of the death or the place where the debt can be recovered, represents the situs of the chose in action. On this ground, the taxpayer won the case because the promissory notes expressly provided that they were primarily payable outside Hong Kong. However, Lord Oliver, in delivering the judgment, raised the following point:

“A series of transactions so unusual and so close to the death of the Testator almost inevitably suggests that there might have been grounds for attacking the transactions as a sham or as lacking bona fide or as ineffective under the principles enunciated by the House of Lords in Ramsay v. CIR [1982] AC 300. That, however, has not been suggested by the respondent at any stage of the proceedings.”

Towards the end of the judgment, Lord Oliver took his view even a step further:

“This conclusion... is not one at which their Lordships arrive with any feeling of satisfaction. It is indeed one which the judge described as ‘flying in the teeth of common sense’... Lest, however, it should be thought that the door has been opened to making estate duty in Hong Kong a voluntary imposition, their Lordships would add that it would be unwise to assume that the genuineness of similar transactions in the future will necessarily be beyond challenge.”

Had the Counsel for the Commissioner incorporated the principle into the respondent’s case, at the very least, the Privy Council would have considered it, whether or not the ultimate result would have been different. Perhaps, having learnt the lesson, the Commissioner argued that the principle could apply in the Pong case. Hence, the issue was formally considered by the Hong Kong judiciary the first time in the Pong case.

The Judgment

Is the Ramsay Principle a Rule of Statutory Construction?

After briefing the facts and reviewing the evolution of the principle, Findlay J made the following immediate comment:

“Frankly, I find the various statements seeking to encapsulate the Ramsay principle, to explain it in the light of the facts in Furniss and other cases and to justify it as an exercise in statutory construction confusing and unsettling. I am also disturbed by the apparent inconsistencies in the application of the principle to the facts of the cases. In my respectful view, the Ramsay principle seems to be verging on making liability to tax subject to judicial discretion, rather than clear rules of law. I cannot see the judicial adventure as an exercise in statutory construction; other than in the sense that it states the obvious; that any case centered on applying a statute involves a search for the true meaning of the words of that statute. The Ramsay principle is, in truth, primarily a way of seeing the facts; of analysing the facts in order to arrive at the substance of the matter, ignoring
the mere form in which the parties sought to express what they were doing.”

**Does the Ramsay Principle Apply?**

Despite his comment quoted above, towards the end of his judgment, on the issue of whether the Ramsay principle applies, Findlay J explained his affirmative answer to the question in the following manner:

“In my view, the only justification for not applying the principle to this case would be based on the proposition that the statute excludes it. That would be so if the statute makes its own provision for the construction of the statute that does not sit with the Ramsay principle. That is not the case here.”

**The Purpose of the Transactions**

Looking into the transactions involved, Findley J first pointed out: “It is clear from the Ramsay line of cases that the purpose for which the operations were performed is of importance.” What the Commissioner in this case looked for was any of the transactions that were purely for fiscal reasons so that they could be disregarded. On the other hand, the taxpayer had the burden of showing the existence of commercial non-tax purposes for the transaction concerned. In this regard, the co-existence of estate duty planning reasons appeared irrelevant.

The plaintiffs in this present case relied on the uncertainty of both the future of the family business and that of Hong Kong, which the judge accepted as genuine.

**Circular and Self-Cancelling Transactions**

The Commissioner also attempted to distinguish this case from legitimate tax avoidance schemes by arguing that the transactions entered into were circular and self-circulating. Reading the Pong case within the context of the Ramsay line of cases, the judge started his analysis of the facts by showing great respect for personal freedom to arrange one’s own affairs so as to avoid any liability to tax legitimately. Then he said:

“The money used to finance the transactions certainly went from the bank, through the various parties, and back to the bank, but the transactions were not circular, and they were certainly not self-cancelling... There is no doubt that the money went full circle; from the bank and back to the bank, all, probably, in a matter of minutes. But there is nothing unusual in that... The money, in the hands of each of the entities involved, was used for a different purpose, each independent of the other. None of those purposes or transactions was inconsistent with another, contradicting it and rendering it a nullity.”

The judge also expressed his view that the Ramsay principle had not extended so far as to regard a sale to a family-related entity as a fiscal nullity and to treat a settlement of the proceeds to such an entity in the same way. It is also clear that he was reluctant to intervene judicially in such a way and indicated his preference to have the legislature deal with the matter instead.

**“Sham” and the Subject Matter of the Gift**

In relation to the loans to the second and third plaintiffs, the Commissioner argued that they were “shams”, i.e. pure tax avoidance because the deceased never intended to enforce the debts and therefore, they should be ignored. The end result, the Commissioner alleged, would be a single composite transaction that there was a charge-
able gift *inter vivos* of Hong Kong property as the property had, indeed, continued to be held by the family.

On this front, the judge examined the intention of the parties concerned with reference to the documentation used for the transaction. First of all, the parties had put their intentions into words. Secondly, what the second and third plaintiffs had got from the unit trust were only contractual rights against the first plaintiff but not an interest in the Hong Kong property. Even though the value of the units held might be reflected in the value of the underlying property, the trust deed had explicitly provided that they would not acquire any legal or equitable interest in that property. Again, the judge expressed his reluctance in rewriting the contractual arrangement among the parties:

“I do not accept... that it is legitimate for the court to find that a transaction was undertaken for non-fiscal purposes, and, therefore, cannot be disregarded, but to then disregard its nature and the obligations that were entered into under it. It would be a strange creature indeed that could emerge from such a judicial reconstruction of what the parties agreed if the court were free to pick and choose which rights and obligations should or should not be recognised... I do not understand on what principle it can be said that a court is entitled to say that it recognises the right of a taxpayer to enter into a particular transaction, but reserves the right, for tax purposes, to tell the taxpayer what rights and obligations should have been given and undertaken in that transaction.”

The only exception in which the judge might have held otherwise would be where, taken with another obligation under another transaction in the composite scheme, that first obligation could be said to have been cancelled out by the other obligation.20 However, the judge found that there was a disposition of the Hong Kong property for value to the first plaintiff and an offshore gift to the second and the third, neither of which fell into the tax net. Furthermore, towards the end of his judgment where the judge briefly disposed of other remaining issues, he agreed with Counsel for the plaintiffs that even though the deceased may have always intended to forgive the debts, he might yet have changed his mind if circumstances changed. The judge substantiated his view by quoting a passage of Diplock LJ in *Snook v. London and West Riding Investments Ltd*21 on the meaning of “sham”:

“It means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create... But one thing, I think, is clear... that for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give appearance of creating.”

And the judge in the *Pong* case concluded that the loans and debts were not “shams” even if it was thought that the deceased probably intended to release the debts at some time.

**Associated Operations**

As an alternative or a further ground, the Commissioner argued that the release of the debts
should be considered as operations associated with the disposition earlier made by the deceased. Readers are reminded of the existence of the phrase “associated operations” in the definition of “disposition” in the Estate Duty Ordinance and the inclusion of “disposition” in relation to the charging provision applicable to gifts inter vivos. The combined effect of the provisions in such a context is that a gift made through a series of such linked operations may be regarded as a gift of the underlying asset.

On this contention, the judge found:

“In the context of the case before me, the disposition is by the transfer of the property to the first plaintiff, the transfer of proceeds of that first transfer to the second and third plaintiffs (being an operation which affects ‘property which represents, whether directly or indirectly, that [first] property’ and the forgiving of the loans... But, at the end of the day, the only gift that one can identify from these associated operations, taking them together, is that of property situated outside Hong Kong.”

In other words, although the various phases of operations may be associated, the subject matter can never be confused with such operations. The judge, therefore, concluded:

“I do not think that applying the concept of ‘associated operations’ can alter the nature of the operations. A sale must remain a sale, not a gift, and a gift of one property must remain a gift of that property, not some other property. This must be so, at least, where the operations are not self-cancelling.”

Reflections and Comments

Is the Ramsay Principle a Rule of Statutory Construction?

The Ramsay case appears to give no clear answer to this question. In that case, the taxpayer had realised a gain and was advised to consult specialists to design a scheme with a view to producing an equivalent allowable loss. At the end of the designated series of operations, the taxpayer’s position was precisely the same as it was at the beginning and subject to no liability to tax. The Inland Revenue Commissioner asked the court to treat the scheme as a fiscal nullity producing neither a gain nor a loss. While restating and respecting the basic principles of taxation, Lord Wilberforce concluded by saying:

“... but I do not consider that they (those principles) should exclude the approach for which the Crown contends. That does not introduce a new principle: it would be to apply to new and sophisticated legal devices the undisputed power and duty of the courts to determine their nature in law and to relate them to existing legislation... In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties’ own intentions.”

The position was then clarified in Craven v. White, another House of Lords decision. Discussing the Ramsay principle, Lord Keith said:

“... in my opinion the nature of the principle... is this: the court must first construe the relevant enactment in order to ascertain its meaning; it must then analyse the series of transactions in question, regarded as a whole,
so as to ascertain its true effect in law; and finally it must apply the enactment as construed to the true effect of the series of transactions and so decide whether or not the enactment was intended to cover it."31

This seems to suggest that the principle is essentially an aid to statutory interpretation instead of a wide-ranging power for courts to simply disregard any tax-motivated transaction. Subsequent cases tend to make the picture even clearer. In *Fitzwilliam v. IRC,*32 Lord Browne-Wilkinson described the principle in the following way:

"The... court must identify the real transaction carried out by the taxpayers and, if this real transaction is carried through by a series of artificial steps, apply the words of the taxing provisions to the real transactions, disregarding the fiscal purposes of the steps artificially inserted... The Ramsay principle is essentially based on the construction of statutory taxing provisions."33

In two relatively recent cases, the courts have arrived at the same result. In *CIR v. McGuckian,*34 in the judgement of Lord Browne-Wilkinson, the following description was included:

"Having identified the artificial steps inserted with that purpose and disregarded them, then what is left is to apply the statutory language of the taxing Act to the transaction carried through stripped of its artificial steps."35

Further in the same case, Lord Steyn commented:

"The new Ramsay principle was not invented on a juristic basis independent of statute... The principle was developed as a matter of statutory construction... The new development was not based on a linguistic analysis of the meaning of particular words in a statute. It was found on a broad purposive interpretation, giving effect to the intention of the Parliament."36

In *Ingram v. IRC,*37 Lord Justice Millet of the Court of Appeal explained the principle as first allowing the court to disregard any division into or insertion of artificial steps which have merely a tax avoiding purpose. Then he continued:

"... the next question is whether the transaction as a whole or any steps artificially inserted into it have any purpose other than the avoidance of tax. These are then disregarded... in the sense that they cannot affect the application of the statute... The final question is whether the transaction so identified comes within a particular taxing or relieving statutory provision... This is a matter of statutory construction."38

It seems undeniable, along the lines of cases in England, that the principle as developed over the past decade is not one of the fiscal nullity as it was on the facts in the Ramsay case itself, but rather a device for statutory interpretation. Therefore, the comment made by Findlay J in the Pong case appears only to be able to be treated as an *obiter.*

**Does the Ramsay Principle Apply?**

The judge chose not to follow the courts in Australia and Canada, both Commonwealth jurisdictions, which have declined to apply the principle because the relevant statute already contained tax-avoidance provisions. In the United Kingdom, Capital Transfer Tax (CTT) legislation contains provisions which render taxable disposi-
tions effected by “associated operations”. It is understood that the Special Commissioners have held that the Ramsay principle can apply for CTT purposes. At the beginning, this appeared to be unclear or rather restrictive in attitude. The House of Lords in Craven v. White did not comment on the possible application of the Ramsay line of cases to taxes which contain an express associated operations provision. The Court of Appeal, instead, acted as a pioneer in this regard. Dillion LJ in Gisbourne v. Burton in which, by majority, the Ramsay principle was applied to an arrangement designed to avoid the security of tenure provisions in a statute, said:

“It seems to me that a similar principle must be applicable wherever there is a pre-ordained series of transactions which is intended to avoid some mandatory statutory provision, even if not of a fiscal nature.”

In Countess Fitzwilliam v. IRC, Lord Browne-Wilkinson, after reciting the definition of the “associated operations” in the CTT statute, raised an argument:

“This [the definition of ‘associated operations’] amounts to a statutory statement, in much wider terms of the Ramsay principle... The Ramsay principle is essentially based on the construction of statutory taxing provision. It can therefore be argued that there is no room for the court to adopt the Ramsay approach in construing an [Ordinance] which expressly provided for the circumstances and occasions on which transfers carried through by ‘associated operations’ are to be taxed.”

The Revenue, since then, has brought similar cases before the courts but enjoyed little success until recently in IRC v. McGuckian. In that case, Lord Cooke said, in his judgment:

“Always one must go back to the discernible intent of the taxing Act [of Parliament]. I suspect that advisers of those bent on tax avoidance... do not always pay sufficient heed to the theme in the speeches in the Furniss case... to the effect that the journey’s end may not yet have been found.”

In an earlier paragraph, his Lordship offered a helpful analysis of the inter-relationship between the Ramsay principle and the anti-avoidance legislation:

“... this approach to the interpretation of taxing Acts does not depend on general anti-avoidance provisions such as are found in Australia. Rather, it is antecedent to or collateral with them.”

Perhaps, therefore, with a fresh set of faces in the Lords attitudes to tax avoidance may be changing once again. This may well demonstrate that it may be unwise to assume that quotations and opinions from case law in the United Kingdom are of limited importance in Hong Kong.

The Purpose of the Transactions

The Ramsay principle, as developed, investigates the purpose instead of the effect of the transaction. In Furniss v. Dawson,

“... there must be steps inserted which have no commercial (i.e. business) purpose apart from the avoidance of liability to tax – not ‘no business effect’.”

This is endorsed by Lord Justice Millett in Ingram v. IRC:
“What is required to enable the court to disregard a transaction or step in a transaction is not the presence of a tax avoidance motive, but the absence of any other purpose.”

In estate duty planning, this is more often than not to have other reasons than merely tax avoidance. If the reason in the *Pong* case can be accepted as genuine without being challenged, by analogy, the subsisting economic recession caused by the recent financial crisis may, it is submitted, constitute another valid non-fiscal reason for estate duty purposes these days. Similarly, the presence of such other reasons as personal financial planning or restructuring of family assets should not be included within the scope of the principle.

The question then becomes, in the estate duty context, to what extent is the subjectivity of the reason affects its genuineness. Can any plausible reason put forward be genuine since a reason may be genuine but at the same time, perhaps, far-fetching and speculative because the event anticipated, or even simply the fear, may not be ultimately materialised? Are there any tests to examine the genuineness of a reason, since the deceased will never be available to give evidence? These questions have not been answered by the Court of First Instance.

**Circular and Self-Cancelling Transactions and Associated Operations**

The question here is to what extent the scheme in the *Pong* case differs from the so-called “round robin” transaction that has been routinely queried and challenged by the Commissioner. The round robin usually works this way:

1. A sale of Hong Kong assets from the deceased to an offshore entity, such as a trust or a company usually a short while before his death.

2. In order to finance the purchase, the offshore entity, often with the assistance of the deceased, applies for a loan, usually from an offshore bank, with the assets held as security for the loan. Alternatively, an unsecured loan may be arranged from the bank first by one of the deceased’s close relatives and the money is then lent to the offshore entity.

3. On receipt of the purchase money by the deceased, he deposits it into his offshore account followed by an offshore gift of cash to the offshore entity.

4. With the gift of cash, the offshore entity repays the loan.

Such a scheme is often challenged as a gift of the underlying Hong Kong assets instead of the sale that it appears to be. The gift of property may then be subject to estate duty if it was either made within three years prior to the deceased’s death or if the deceased was never totally excluded from the property before death.

Where a unit trust is used as the offshore entity, as in the *Pong* case, some complications arise. Generally, there is still divergence of opinion on the nature and effect of a unit trust in relation to the trust property. The question is, which is the property passing for estate duty purposes, the “unit” or the underlying property? Put in context, if the underlying property, which is in Hong Kong, remains the property passing, the location of property is in Hong Kong. The transfer is annulled. However, if the unit trust transforms the property into units, a chose in action is resulted. Given the trust is maintained offshore, the prop-
erty is outside Hong Kong and will be exempted from estate duty here. The transfer is effective. On the particular facts of this case, the trust provides explicitly that the trustees, by acquiring the units in the trust, did not acquire a beneficial interest in the underlying Hong Kong property, but rather only contractual rights against the first plaintiff. This appears, therefore, to stress that a well-drafted trust deed may assist in resolving the controversy. Accountants and tax lawyers involved in such schemes should not, therefore, overlook the importance in preparing the documents properly so as to make any scheme effective.

“Sham” and the Subject Matter of the Gift

Readers may recall that the operation of sham transactions does not depend on the operation of anti-avoidance provisions of tax legislation. Sham transactions are transactions which are never intended to have the legal effect that the transactions appear to or are purported to have. A sham is just a pretence or facade. On the facts of the case, the deceased made a will on the same date that the major transaction took place, in which he waived payment of the debts, and subsequently forgave the debts during his lifetime. The judge, in response, accepted the contention of the Counsel for the plaintiffs that as matter of probability, although the deceased always intended to forgive the debt, he intended to keep his options open, which saved the loans from being nullity. It appears that such further steps are not necessary at all in order to minimize the estate duty liability. The deceased could have simply recorded the debts on a deed and kept this deed in a safe deposit box offshore or even done nothing more as the debtor trustee was located offshore. It may not seem wise to include such steps, which may cause suspicion to others even though the judge may accept them. This serves as a reminder to estate duty planners that complexity may not necessarily add any good to the overall outcome, but simply add more cost to their clients.

Conclusion

Pending the decision of the Court of Appeal, it is not appropriate to reach a conclusion at this stage on whether the decision is right or wrong; instead we should currently accept it so far as it stands.

However, on the up side, the judiciary continues to recognise the freedom of an individual of planning his own affairs. It is also good to note that well-drafted documentation is given high respect by the court. On the other hand, on the down side, as commented by Findlay J towards the end of his judgment, is that there may be those who think that estate duty should be paid. We would also imagine that in the light of the Privy Council’s dictum in the Kwok case, this might be another decision the result of which their Lordships might find unsatisfactory but attained with skillful, though usually expensive, draftsmanship. “Legitimate” avoidance of duty appears to become not that difficult at all. In this regard, Lord Wilberforce voiced a challenge to the judiciary:

“While the techniques of tax avoidance progress and are technically improved, the courts are not obliged to stand still. Such immobility must result either in loss of tax, to the prejudice of other taxpayers, or to Parliamentary congestion or (most likely) both.”

Definitely, this does not mean that the lawmakers need not pay any attention to case law. After all, the present Estate Duty Ordinance follows the general framework of the original statute enacted in 1915 which was the subject of major amendments almost 40 years ago. One would imagine...
that if the Commissioner loses in the final disposal of the case, it might not be a good news for the estate planners as he will probably resort to the assistance of the legislature. No matter where the forum for the battle is, the personnel involved must definitely pray for the wisdom to distinguish black sheep from the white ones in administering justice.

Endnotes

1. However, the provision imposing the deeming charge against controlled companies (Estate Duty Ordinance (EDO) (Chapter 111) section 35) and that defining "associated operations" (section 3(2)) are considered as specific checks against tax avoidance in estate duty. In respect of profits tax, see Inland Revenue Ordinance (Chapter 112) sections 61 and 61A.

2. [1982] AC 300.

3. [1998] 3 HKC 44. The case has recently been heard by the Court of Appeal. At the time of writing, no judgment has yet been handed down.


5. (1986) 3 HKTC 106.

6. This can be evidenced by a mirror provision for exemption of offshore property from estate duty under EDO section 10(b).


9. Supra, at 150.


11. Supra, at 59.

12. Supra, at 53.

13. Ibid.


15. Supra, at 54.

16. Supra, at 55.

17. Ibid.


20. Supra, at 57.


22. Supra, at 802.

23. Section 3.
24. EDO section 6(1)(c).

25. See further ibid section 3 for definition of “associated operations”.


27. Supra, at 59.


29. Supra, at 326.


31. Supra, at 479.


33. Supra, at 535-536.

34. [1997] STC 908.

35. Supra, at 914.

36. Supra, at 916.


38. Supra, at 1269-70.


44. [1997] STC 908.

45. Supra, at 921.

46. Supra, at 920.

47. [1984] AC 474 at 527.


49. See [1998] 3 HKC 44, at 56.


51. See endnotes 9 and 10 above.


References


