

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. v Inland Revenue Commissioners; Ex p. Unilever Plc

Court of Appeal (Civil Division)

13 February 1996

Westlaw Case Analysis 20 pages

Official Transcript 46 pages

Status:  Positive or Neutral Judicial Treatment

R. v Inland Revenue Commissioners Ex p. Unilever Plc

R. v Inland Revenue Commissioners Ex p. Matteson's Walls Ltd

Court of Appeal (Civil Division)

13 February 1996

Case Analysis

Where Reported

[1996] S.T.C. 681; 68 T.C. 205; [1996] C.O.D. 421; [Official Transcript](#)

Case Digest

Subject: Tax

Keywords: Administrative decision-making; Claims; Time limits

Summary: Inland Revenue; corporation tax claims; time limits; 25 year practice of ignoring formal time limits; decision not to exercise discretion to allow late claims irrational

Abstract: The IRC appealed against a decision that U had made the necessary claims relating to corporation tax within the two year period specified. The case concerned tax charged on the profits of companies and the setting off of losses against those profits. [Taxes Management Act 1970 s.42](#) empowered the IRC to prescribe the form in which such a claim should be made. [Income and Corporation Taxes Act 1988 s.393\(11\)](#) provided that a claim must be made within two years from the end of the accounting period in which the loss incurred. Since the late 1960s the IRC and U had used an agreed procedure and schedule for the provisional and final assessment of company profits. The content of the schedule was altered by the IRC in 1987. Although the procedure was not completed within the two year period, there was no evidence that either party consciously disregarded the time limit. U argued that the IRC had abused their power and that their decision not to exercise discretion in U's favour was so unreasonable as to satisfy the public law test of irrationality.

Held, dismissing the appeal, that (1) U's claims were allowed in the past irrespective of whether they were on time or late; (2) the two year time limit was pointless on the facts of this case, formal compliance would have availed the IRC nothing. In fact the cooperative informal arrangement provided the IRC with more than the statutory provisions required, [R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd \[1990\] 1 W.L.R. 1545](#) and [R. v Inland Revenue Commissioners Ex p. Matrix Securities Ltd \[1994\] 1 W.L.R. 334](#) distinguished. The decision of the IRC not to exercise discretion in favour of U to allow late claims was irrational.

Judge: Sir Thomas Bingham, M.R.; Simon Brown, L.J.; Hutchison, L.J.

Counsel: For IRC: A Moses Q.C. and R Singh. . For U: R Venables Q.C. and A Hardy.

Solicitor: For IRC: IRC Solicitors. . For U: Beachcroft Stanleys.

Appellate History & Status

Queen's Bench Division

R. v Inland Revenue Commissioners Ex p. Unilever Plc
[\[1994\] S.T.C. 841](#); [\[1994\] S.T.I. 1023](#); [Independent, September 12, 1994](#)

Affirmed

Court of Appeal (Civil Division)

R. v Inland Revenue Commissioners Ex p. Unilever Plc
[\[1996\] S.T.C. 681](#); [68 T.C. 205](#); [\[1996\] C.O.D. 421](#); [Official Transcript](#)

Significant Cases Cited

R. v Inland Revenue Commissioners Ex p. Matrix Securities Ltd
[\[1994\] 1 W.L.R. 334](#); [\[1994\] 1 All E.R. 769](#); [\[1994\] S.T.C. 272](#); [66 T.C. 629](#); [Times, February 19, 1994](#); [Independent, March 14, 1994](#); [HL](#); 1994-02-17

R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd

[\[1990\] 1 W.L.R. 1545](#); [\[1990\] 1 All E.R. 91](#); [\[1990\] S.T.C. 873](#); [62 T.C. 607](#); [\[1990\] C.O.D. 143](#); (1989) 139 N.L.J. 1343; [Times, July 17, 1989](#); [Independent, August 4, 1989](#); [Independent, August 7, 1989](#); [Financial Times, July 19, 1989](#); [Guardian, July 20, 1989](#); [QBD](#); 1989-07-07

All Cases Cited

R. v Inland Revenue Commissioners Ex p. Matrix Securities Ltd
[\[1994\] 1 W.L.R. 334](#); [\[1994\] 1 All E.R. 769](#); [\[1994\] S.T.C. 272](#); [66 T.C. 629](#); [Times, February 19, 1994](#); [Independent, March 14, 1994](#); [HL](#); 1994-02-17

Woolwich Equitable Building Society v Inland Revenue Commissioners

[\[1993\] A.C. 70](#); [\[1992\] 3 W.L.R. 366](#); [\[1992\] 3 All E.R. 737](#); [\[1992\] S.T.C. 657](#); (1993) 5 Admin. L.R. 265; [65 T.C. 265](#); (1992) 142 N.L.J. 1196; (1992) 136 S.J.L.B. 230; [Times, July 22, 1992](#); [Independent, August 13, 1992](#); [Guardian, August 19, 1992](#); [HL](#); 1992-07-20

Gallic Leasing Ltd v Coburn (Inspector of Taxes)

[\[1991\] 1 W.L.R. 1399](#); [\[1992\] 1 All E.R. 336](#); [\[1991\] S.T.C. 699](#); [64 T.C. 399](#); [\[1991\] S.T.I. 1082](#); [Times, December 3, 1991](#); [Independent, December 30, 1991](#); [Financial Times, December 3, 1991](#); [HL](#); 1991-11-28

R. v Jockey Club Ex p. RAM Racecourses Ltd

[\[1993\] 2 All E.R. 225](#); (1991) 5 Admin. L.R. 265; [\[1990\] C.O.D. 346](#); [QBD](#); 1990-03-30

R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd

[\[1990\] 1 W.L.R. 1545](#); [\[1990\] 1 All E.R. 91](#); [\[1990\] S.T.C. 873](#); [62 T.C. 607](#); [\[1990\] C.O.D. 143](#); (1989) 139 N.L.J. 1343; [Times, July 17, 1989](#); [Independent, August 4, 1989](#); [Independent, August 7, 1989](#); [Financial Times, July 19, 1989](#); [Guardian, July 20, 1989](#);

QBD; 1989-07-07

R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd

[\[1988\] A.C. 858](#); [\[1988\] 2 W.L.R. 654](#); [\[1988\] 1 All E.R. 961](#); [86 L.G.R. 321](#); [\[1988\] R.A. 45](#); [\[1988\] E.G. 36 \(C.S.\)](#); [\(1988\) 138 N.L.J. Rep. 89](#); [\(1988\) 132 S.J. 4621](#); HL; 1988-03-17

R. v Inland Revenue Commissioners Ex p. Preston

[\[1985\] A.C. 835](#); [\[1985\] 2 W.L.R. 836](#); [\[1985\] 2 All E.R. 327](#); [\[1985\] S.T.C. 282](#); [59 T.C. 1](#); HL; 1985-04-25

Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)

[\[1983\] Q.B. 529](#); [\[1983\] 2 W.L.R. 248](#); [\[1983\] 1 All E.R. 301](#); [\[1983\] 1 Lloyd's Rep. 146](#); [\(1983\) 133 N.L.J. 133](#); [\(1982\) 126 S.J. 853](#); [Times, November 30, 1982](#); CA (Civ Div); 1982-11-26

United Scientific Holdings Ltd v Burnley BC

[\[1978\] A.C. 904](#); [\[1977\] 2 W.L.R. 806](#); [\[1977\] 2 All E.R. 62](#); [75 L.G.R. 407](#); [\(1977\) 33 P. & C.R. 220](#); [\(1977\) 243 E.G. 43](#); [\(1977\) 121 S.J. 223](#); HL; 1977-03-23

Key Cases Citing

Distinguished

R. (on the application of Niazi) v Secretary of State for the Home Department

[\[2008\] EWCA Civ 755](#); [\(2008\) 152\(29\) S.J.L.B. 29](#); [Times, July 21, 2008](#); [Official Transcript](#); CA (Civ Div); 2008-07-09

Application to Vary the Undertakings of A, Re

[\[2005\] S.T.C. \(S.C.D.\) 103](#); [\[2005\] W.T.L.R. 1](#); [\[2004\] S.T.I. 2502](#); [\(2004\) 148 S.J.L.B. 1432](#); Sp Comm; 2004-10-27

R. (on the application of Carvill) v Inland Revenue Commissioners

[\[2003\] EWHC 1852 \(Admin\)](#); [\[2003\] S.T.C. 1539](#); [75 T.C. 477](#); [\[2004\] B.T.C. 123](#); [\[2003\] S.T.I. 1395](#); [Official Transcript](#); QBD (Admin); 2003-07-29

Applied

R. (on the application of Lewisham LBC) v Assessment and Qualifications Alliance (AQA)

[\[2013\] EWHC 211 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2013-02-13

Hanover Company Services Ltd v Revenue and Customs Commissioners

[\[2010\] UKFTT 256 \(TC\)](#); [\[2010\] S.F.T.D. 1047](#); [\[2010\] S.T.I. 2575](#); [Official Transcript](#); FTT (Tax); 2010-06-09

R. v National Lottery Commission Ex p. Camelot Group Plc

[\[2001\] E.M.L.R. 3](#); [Times, October 12, 2000](#); [Official Transcript](#); QBD; 2000-09-21

Followed

C, Re

[\[2005\] EWHC 966 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2005-04-22

Considered

R. (on the application of British Medical Association) v General Medical Council

[\[2008\] EWHC 2602 \(Admin\); Times, January 19, 2009; Official Transcript](#); QBD (Admin); 2008-10-03

R. (on the application of Niazi) v Secretary of State for the Home Department

[\[2007\] EWHC 1495 \(Admin\); \[2007\] A.C.D. 75; Times, July 9, 2007; Official Transcript](#); DC; 2007-06-26

R. (on the application of S) v Secretary of State for the Home Department

[\[2007\] EWCA Civ 546; \[2007\] Imm. A.R. 781; \[2007\] I.N.L.R. 450; \[2007\] A.C.D. 94; \(2007\) 104\(27\) L.S.G. 30; \(2007\) 151 S.J.L.B. 858; Official Transcript](#); CA (Civ Div); 2007-06-19

R. (on the application of Bamber) v Revenue and Customs Commissioners

[\[2005\] EWHC 3221 \(Admin\); \[2006\] S.T.C. 1035; \[2006\] B.T.C. 146; \[2006\] S.T.I. 46; Official Transcript](#); QBD (Admin); 2005-12-21

British Sky Broadcasting Group Plc v Customs and Excise Commissioners

[\[2001\] EWHC Admin 127; \[2001\] S.T.C. 437; \[2001\] B.T.C. 5123; \[2001\] B.V.C. 198; \[2001\] S.T.I. 246; Official Transcript](#); QBD (Admin); 2001-02-23

R. v Institute of Chartered Accountants in England and Wales Ex p. Friend & Co

[Official Transcript](#); QBD; 2000-06-30

All Cases Citing**Mentioned by**

Carlsberg UK Ltd v Revenue and Customs Commissioners

[\[2013\] UKFTT 573 \(TC\); Official Transcript](#); FTT (Tax); 2013-10-15

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Chelham Ltd v Revenue and Customs Commissioners

[\[2013\] UKFTT 418 \(TC\); Official Transcript](#); FTT (Tax); 2013-07-31

Mentioned by

Navaratnam v Secretary of State For the Home Department

[\[2013\] EWHC 2383 \(QB\)](#); QBD (Admin); 2013-07-31

Mentioned by

R. (on the application of Che) v Secretary of State for the Home Department

[\[2013\] EWHC 2220 \(Admin\)](#); QBD; 2013-07-26

Mentioned by

Everycar Contracts Ltd v Revenue and Customs Commissioners

[\[2013\] UKFTT 405 \(TC\); Official Transcript](#); FTT (Tax); 2013-07-25

Mentioned by

Ryanair Ltd v Revenue and Customs Commissioners

[\[2013\] UKUT 176 \(TCC\)](#); [\[2013\] S.T.I. 2046](#); [Official Transcript](#); UT (Tax); 2013-04-10

Mentioned by

R. (on the application of Patel) v General Medical Council

[\[2013\] EWCA Civ 1938](#); CA (Civ Div); 2013-03-27

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Hassan v Secretary of State for the Home Department

[\[2013\] EWHC 582 \(Admin\)](#); QBD (Admin); 2013-03-18

Mentioned by

R. (on the application of Buckinghamshire CC) v Secretary of State for Transport

[\[2013\] EWHC 481 \(Admin\)](#); [\[2013\] P.T.S.R. D25](#); [Official Transcript](#); QBD (Admin); 2013-03-15

Applied

R. (on the application of Lewisham LBC) v Assessment and Qualifications Alliance (AQA)

[\[2013\] EWHC 211 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2013-02-13

Mentioned by

R. (on the application of Children's Rights Alliance for England) v Secretary of State for Justice

[\[2013\] EWCA Civ 34](#); [\[2013\] 1 W.L.R. 3667](#); [\[2013\] H.R.L.R. 17](#); [\(2013\) 157\(7\) S.J.L.B. 31](#); [Official Transcript](#); CA (Civ Div); 2013-02-06

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R. (on the application of K) v Birmingham City Council

[\[2012\] EWCA Civ 1432](#); [\[2013\] 1 W.L.R. 1755](#); [\[2013\] 1 All E.R. 945](#); [\[2013\] 1 F.C.R. 153](#); [\[2013\] H.L.R. 4](#); [\(2012\) 15 C.C.L. Rep. 741](#); [Official Transcript](#); CA (Civ Div); 2012-11-07

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R. (on the application of Mohammed) v Secretary of State for the Home Department

[\[2012\] EWHC 3091 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2012-11-02

Mentioned by

Rogers Concrete Ltd v Revenue and Customs Commissioners

[\[2012\] UKFTT 482 \(TC\)](#); [Official Transcript](#); FTT (Tax); 2012-08-01

Mentioned by

R. (on the application of Patel) v General Medical Council

[\[2012\] EWHC 2120 \(Admin\)](#); [\(2012\) 128 B.M.L.R. 146](#); [Official Transcript](#); QBD (Admin); 2012-07-26

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Patel v Secretary of State for the Home Department

[\[2012\] EWHC 2100 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2012-07-24

Mentioned by

R. (on the application of Dudley MBC) v Secretary of State for Communities and Local Government

[\[2012\] EWHC 1729 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2012-06-25

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R. (on the application of Vieira) v Camden LBC

[\[2012\] EWHC 287 \(Admin\)](#); QBD (Admin); 2012-02-21

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R. (on the application of Wood) v Secretary of State for Education

[\[2011\] EWHC 3256 \(Admin\)](#); QBD (Admin); 2011-12-09

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R. (on the application of Davies) v Revenue and Customs Commissioners

[\[2011\] UKSC 47](#); [\[2011\] 1 W.L.R. 2625](#); [\[2012\] 1 All E.R. 1048](#); [\[2011\] S.T.C. 2249](#); [81 T.C. 134](#); [\[2011\] B.T.C. 610](#); [\[2012\] W.T.L.R. 215](#); [\[2011\] S.T.I. 2847](#); [\(2011\) 155\(40\) S.J.L.B. 31](#); [\[2011\] N.P.C. 107](#); [Times, October 24, 2011](#); [Official Transcript](#); SC; 2011-10-19

Mentioned by

R. (on the application of Lunn) v Revenue and Customs Commissioners

[\[2011\] EWHC 240 \(Admin\)](#); [\[2011\] S.T.C. 1028](#); [\[2011\] B.T.C. 104](#); [\[2011\] S.T.I. 526](#); [Official Transcript](#); QBD (Admin); 2011-02-16

Mentioned by

Matthews v Revenue and Customs Commissioners

[\[2011\] UKFTT 24 \(TC\)](#); [Official Transcript](#); FTT (Tax); 2010-12-29

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Paponette v Attorney General of Trinidad and Tobago

[\[2010\] UKPC 32](#); [\[2011\] 3 W.L.R. 219](#); [Times, December 15, 2010](#); [Official Transcript](#); PC (Trin); 2010-12-13

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[\[2010\] EWHC 2825 \(Admin\)](#); [\[2011\] H.R.L.R. 5](#); [Official Transcript](#); QBD (Admin); 2010-11-05

Mentioned by

Eurosel Ltd v Revenue and Customs Commissioners

[\[2010\] UKFTT 451 \(TC\)](#); [Official Transcript](#); FTT (Tax); 2010-09-23

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R. (on the application of Grimsby Institute of Further and Higher Education) v Chief Executive of Skills Funding (formerly Learning and Skills Council)

[\[2010\] EWHC 2134 \(Admin\)](#); [\[2010\] 3 E.G.L.R. 125](#); [Official Transcript](#); QBD (Admin); 2010-08-12

Applied

Hanover Company Services Ltd v Revenue and Customs Commissioners

[\[2010\] UKFTT 256 \(TC\)](#); [\[2010\] S.F.T.D. 1047](#); [\[2010\] S.T.I. 2575](#); [Official Transcript](#); FTT (Tax); 2010-06-09

Mentioned by

R. (on the application of Davies) v Revenue and Customs Commissioners

[\[2010\] EWCA Civ 83](#); [\[2010\] S.T.C. 860](#); [\[2010\] B.T.C. 198](#); [\[2010\] W.T.L.R. 681](#); [\[2010\] S.T.I. 485](#); [\(2010\) 107\(9\) L.S.G. 17](#); [Times, February 23, 2010](#); [Official Transcript](#); CA (Civ Div); 2010-02-16

Mentioned by

R. (on the application of M) v Secretary of State for the Home Department

[\[2009\] EWCA Civ 833](#); [Official Transcript](#); CA (Civ Div); 2009-07-30

Mentioned by

FJ Chalke Ltd v Revenue and Customs Commissioners

[\[2009\] EWHC 952 \(Ch\)](#); [\[2009\] S.T.C. 2027](#); [\[2009\] 3 C.M.L.R. 14](#); [\[2009\] B.V.C. 486](#); [\[2009\] S.T.I. 1694](#); [Official Transcript](#); Ch D; 2009-05-08

Mentioned by

R. (on the application of S) v Secretary of State for the Home Office

[\[2009\] EWCA Civ 142](#); [Official Transcript](#); CA (Civ Div); 2009-02-25

Mentioned by

R. (on the application of BMW AG) v Revenue and Customs Commissioners

[\[2009\] EWCA Civ 77](#); [\[2009\] S.T.C. 963](#); [\[2009\] B.T.C. 5222](#); [\[2009\] B.V.C. 221](#); [\[2009\] S.T.I. 549](#); [Official Transcript](#); CA (Civ Div); 2009-02-18

Mentioned by

R. (on the application of Huntingwood Trading Ltd) v Revenue and Customs Commissioners

[\[2009\] EWHC 290 \(Admin\)](#); [\[2009\] S.T.C. 2277](#); [Official Transcript](#); QBD (Admin); 2009-01-21

Mentioned by

Sun Life Assurance Co of Canada (UK) Ltd v Revenue and Customs Commissioners

[\[2009\] EWHC 60 \(Ch\)](#); [\[2009\] S.T.C. 768](#); [\[2009\] B.T.C. 73](#); [\[2009\]](#)

[S.T.I. 218; Official Transcript](#); Ch D; 2009-01-20

Mentioned by

R. (on the application of Hillingdon LBC) v Lord Chancellor

[\[2008\] EWHC 2683 \(Admin\)](#); [\[2009\] C.P. Rep. 13](#); [\[2009\] 1 F.L.R. 39](#); [\[2009\] 1 F.C.R. 1](#); [\[2009\] B.L.G.R. 554](#); [\[2009\] Fam. Law 13](#); [\(2008\) 158 N.L.J. 1602](#); [\[2009\] P.T.S.R. \(C.S.\) 20](#); [Official Transcript](#); DC; 2008-11-06

Mentioned by

R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs

[\[2008\] UKHL 61](#); [\[2009\] 1 A.C. 453](#); [\[2008\] 3 W.L.R. 955](#); [\[2008\] 4 All E.R. 1055](#); [\(2008\) 105\(42\) L.S.G. 20](#); [\(2008\) 158 N.L.J. 1530](#); [\(2008\) 152\(41\) S.J.L.B. 29](#); [Times, October 23, 2008](#); [Official Transcript](#); HL; 2008-10-22

Considered

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[\[2008\] EWHC 2602 \(Admin\)](#); [Times, January 19, 2009](#); [Official Transcript](#); QBD (Admin); 2008-10-03

Mentioned by

R. (on the application of Lower Mill Estate Ltd) v Revenue and Customs Commissioners

[\[2008\] EWHC 2409 \(Admin\)](#); [\[2008\] B.T.C. 5743](#); [\[2008\] B.V.C. 859](#); [Official Transcript](#); QBD (Admin); 2008-09-19

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[\[2008\] EWCA Civ 755](#); [\(2008\) 152\(29\) S.J.L.B. 29](#); [Times, July 21, 2008](#); [Official Transcript](#); CA (Civ Div); 2008-07-09

Mentioned by

Obienna v Secretary of State for the Home Department

[\[2008\] EWHC 1476 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2008-06-27

Mentioned by

Revenue and Customs Commissioners v Holland

[\[2008\] EWHC 2200 \(Ch\)](#); [\[2009\] Bus. L.R. 1](#); [\[2008\] S.T.C. 3142](#); [\[2009\] B.C.C. 37](#); [\[2008\] 2 B.C.L.C. 613](#); [\[2008\] S.T.I. 1642](#); [Official Transcript](#); Ch D (Companies Ct); 2008-06-24

Mentioned by

Staff Side of the Police Negotiating Board v Secretary of State for the Home Department

[\[2008\] EWHC 1173 \(Admin\)](#); [\[2008\] A.C.D. 81](#); [Official Transcript](#); DC; 2008-06-10

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[\[2008\] EWHC 712 \(Admin\)](#); [\[2008\] S.T.C. 3090](#); [\[2008\] B.T.C. 5399](#); [\[2008\] B.V.C. 519](#); [\[2008\] S.T.I. 1330](#); [Official Transcript](#); QBD (Admin); 2008-05-09

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R. (on the application of Bath) v North Somerset Council

[\[2008\] EWHC 630 \(Admin\)](#); [\[2009\] H.L.R. 1](#); QBD (Admin); 2008-04-04

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Baron of Ardgowan v Lord Lyon King of Arms

[\[2008\] CSOH 36](#); [2008 S.L.T. 251](#); [2008 G.W.D. 7-121](#); [Official Transcript](#); OH; 2008-02-22

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[\[2008\] EWHC 232 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2008-02-14

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R. (on the application of Actis SA) v Secretary of State for Communities and Local Government

[\[2007\] EWHC 2417 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2007-11-02

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DS (Afghanistan) v Secretary of State for the Home Department

[\[2007\] EWCA Civ 774](#); [\[2008\] Imm. A.R. 148](#); [Official Transcript](#); CA (Civ Div); 2007-07-25

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[\[2007\] EWHC 1684 \(Ch\)](#); [\[2008\] S.T.C. 2045](#); [78 T.C. 705](#); [\[2008\] B.T.C. 502](#); [\[2007\] S.T.I. 1815](#); [Official Transcript](#); Ch D; 2007-07-12

Considered

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[\[2007\] EWHC 971 \(Admin\)](#); [\[2007\] B.T.C. 5699](#); [\[2007\] B.V.C. 667](#); [\[2007\] S.T.I. 1399](#); [Official Transcript](#); QBD (Admin); 2007-05-02

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[\[2007\] EWHC 51 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2007-01-26

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[\[2006\] EWCA Crim 2918](#); [\[2007\] Q.B. 659](#); [\[2007\] 2 W.L.R. 226](#); [\[2007\] 3 All E.R. 451](#); [\[2007\] 1 Cr. App. R. 27](#); [\[2007\] Crim. L.R. 320](#); [Times, November 30, 2006](#); [Official Transcript](#); CA (Crim Div); 2006-11-28

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[\[2006\] EWHC 526 \(Admin\)](#); [\[2006\] Imm. A.R. 477](#); [Official Transcript](#); QBD (Admin); 2006-03-22

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R. (on the application of Tinn) v Secretary of State for Transport

[\[2006\] EWHC 193 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2006-01-11

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[\[2005\] EWHC 2270 \(Admin\)](#); [Official Transcript](#); QBD (Admin); 2005-07-13

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[\[2005\] EWCA Civ 847](#); [\[2006\] 1 W.L.R. 158](#); [\[2005\] 3 All E.R. 1000](#); [\(2005\) 8 C.C.L. Rep. 504](#); [\(2005\) 85 B.M.L.R. 190](#); [Times, September 6, 2005](#); [Official Transcript](#); CA (Civ Div); 2005-07-06

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R. (on the application of Thomson) v Minister of State for Children

[\[2005\] EWHC 1378 \(Admin\)](#); [\[2006\] 1 F.L.R. 175](#); [\[2005\] 2 F.C.R. 603](#); [\[2005\] Fam. Law 861](#); [Times, August 12, 2005](#); [Official Transcript](#); QBD (Admin); 2005-07-04

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Regina v Commissioners of Inland Revenue

Regina v Commissioners of Inland Revenue

QBCOF/94/1618/D

QBCOF/94/1622/D

Court of Appeal (Civil Division)

13 February 1996

1996 WL 1090368

Before: The Master of the Rolls (Sir Thomas Bingham) Lord Justice Simon Brown Lord Justice
Hutchison

Tuesday 13 February 1996

On Appeal from the High Court of Justice, Queen's Bench Division (Crown Office List)

(Mr. Justice Macpherson of Cluny)

In the matter of an Application for Judicial Review

Representation

Mr A Moses QC & Mr. R Singh (Instructed by Solicitors to the Inland Revenue) appeared on
behalf of the Appellants.

Mr. R Venables QC & Mr. J Kessler & Miss A Hardy (Instructed by Messrs. Beachcroft
Stanleys , DX45 London) appeared on behalf of the Respondents.

Judgment

Tuesday 13 February 1996

The Master of the Rolls:

These appeals concern two companies, one of them for three accounting years and the other for two. Because of legislative changes, the statutory provisions governing the two earlier accounting years differ from those governing the third. But the problem is in each instance almost exactly the same, and can conveniently be described by taking one company (Unilever PLC) for one accounting year (the 12—month period which ended on 31 December 1988).

Section 6 of the Income and Corporation Taxes Act 1988 (ICTA 1988) provided that corporation tax should be charged on the profits of companies. Section 393 (2) of ICTA 1988 provided (subject to qualifications not here relevant) that where in an accounting period ending after 5 April 1988 a company carrying on a trade incurred a loss in the trade, the company might make a claim requiring that the loss be set off for the purposes of corporation tax against profits of whatever description of that accounting period. Section 42 of the Taxes Management Act 1970 (TMA 1970) empowered the Board of Inland Revenue to prescribe the form in which such a claim should be made, but it has never done so. Section 393 (11) of the ICTA 1988 does, however, provide that “a claim under subsection (2) above must be made within two years from the end of the accounting period in which the loss is incurred.”

At the relevant time the Inland Revenue enjoyed no express statutory power to extend or waive that two-year time limit, which on its face bound both the Inland Revenue and companies seeking to set off losses against profits in the same accounting year. But section 1(1) of TMA 1970 provided that corporation tax should be under the care and management of the Commissioners of Inland Revenue, and it is common ground on these appeals that the Revenue had a discretion

under that section to accept late claims for loss relief. Under what is now section 393 A(10) of ICTA 1988, not in force at the material time, claims for loss relief must be made within two years of the end of the accounting period "or within such further period as the Board may allow". This express new statutory discretion is not said to vary the discretion which the Board already enjoyed under section 1 of TMA 1970.

The Revenue disallowed a claim made by Unilever to set off trading losses incurred during the accounting year ended 31 December 1988 against profits of that accounting period on the ground that a claim to do so had not been made within two years after the end of the accounting period, that is by 31 December 1990. Unilever contended that it had made a claim within the two-year period; that if it had not the Revenue could not in fairness, having regard to its conduct in the past, treat the claim as time-barred; and that in all the circumstances the Revenue should exercise its discretion in Unilever's favour.

The difference between Unilever and the Revenue proved irreconcilable, and Unilever sought judicial review of the Revenue's decision. Its application came before Macpherson of Cluny J, and the main issues argued were those already mentioned. He gave judgment on 29 July 1994 (dealing with both companies and all three accounting years, without drawing any material distinction between them). He held that Unilever had not made a claim within the two year period, and Unilever argue that he was wrong to reach that decision. But he went on to hold that the Revenue could not in fairness, having regard to its past conduct, treat the claim as time-barred and that the Revenue should have exercised its discretion in Unilever's favour. The Revenue challenge those decisions, on which ground the judge granted the applications of both companies for judicial review. His decision is reported at [1994] STC 841.

I

In *R v Independent Television Commission ex parte TSW Broadcasting Limited* (House of Lords, unreported, 26 March 1992) Lord Templeman observed (at page 16):

"Of course in judicial review proceedings, as in any other proceedings, everything depends on the facts".

These must be briefly summarised.

The Unilever group is a very large world-wide trading group with a turnover of £23 billion, most of it outside the United Kingdom. About 70 group companies pay corporation tax in the UK. The group's tax affairs are of great complexity, and take some years to finalise.

Towards the end of the 1960s the Revenue and the Unilever tax department (which handled the tax affairs of group companies taxed here) devised an extra-statutory two-stage procedure for the provisional and final assessment of company profits.

At stage 1, the Revenue sent to Unilever a list of group companies. A typical list had four columns. In column 1 was the tax reference for each company; in column 2 the name of the company; and in column 3 the date on which the respective companies' accounting years ended (usually 31 December). Column 4, typically headed "Amount/Notes", was left blank. Unilever called these documents "questionnaires". That is a misnomer. The documents asked no specific question. But the purpose of the documents was clear: to enable Unilever to give the Revenue an approximate estimate of the profit of each company for the relevant accounting period. Unilever would accordingly fill in the blank fourth column against each company either "nil profits" (if the company had made no profit), or "loss" (if the company had made an overall loss), or a figure if the company had made a profit during the period.

Usually, since Unilever has been a successful group, companies made trading profits and in such cases the profit figure represented the total of profit earned from trade and other sources. Sometimes, however, companies made trading losses but earned profits from other sources which outweighed those losses. In such cases Unilever's almost invariable practice was to set a company's losses against its profits from other sources during the same accounting period. So it would enter in column 4 the net profit figure, after deducting the losses from the profits, so taking the benefit of same-year loss relief. But the schedule supplied by the Revenue made no reference to loss relief or any other relief, and when filling in the schedule Unilever did not identify

the cases in which trading losses had been deducted to reach the profit figure entered. So it was not possible, simply by looking at the schedule (which was all the Revenue received at this stage), to know which profit figures were shown net of trading losses.

On receiving the completed schedules back from Unilever, the Revenue would raise assessments based on the information provided. Unilever would appeal (to preserve its position pending finalisation of the accounts) but paid the tax assessed.

This consensual procedure had important practical benefits for both Unilever and the Revenue. It was Unilever's policy, for sound fiscal reasons, to calculate likely taxable profits as accurately as it could at this first stage, so that it could then pay as nearly as possible the tax that would ultimately become due. The Revenue for its part collected the tax which was due (subject to final adjustment).

That was stage 1 of the procedure. At stage 2, Unilever sent to the Revenue the accounts for each company and a detailed tax computation. There was inevitably a lapse of time before this stage could be accomplished, since final figures had to be obtained and accounts drawn up and audited. On receiving the accounts and tax computation the Revenue would review them to see if any adjustment or further assessment was needed. Since Unilever took great pains to give accurate estimates at stage 1, adjustments were generally relatively minor.

The tax computations supplied by Unilever would show a trading loss where such had been incurred and a deduction from profit from other sources where there had been such profit. So the computation would make plain that the relevant company was taking the benefit of loss relief.

On receiving the accounts and tax computations the Revenue would have no reason to look back at the estimated profit schedules received some time earlier at stage 1, and in practice did not do so. But since at this second stage it was plain when the company was taking the benefit of loss relief, and the adjustments made at that stage were usually relatively minor, it was obvious that the assessment at stage 1 had been based on substantially the same calculation as was particularised at stage 2 and therefore must have taken the benefit of loss relief.

This consensual procedure worked harmoniously for many years. The evidence suggests that Unilever was a model taxpayer. There is no suggestion that Unilever has ever sought to evade or obstruct payment of any tax lawfully due.

In 1987, following a meeting between the Revenue and Unilever, the content of the schedule supplied by the Revenue at the outset of stage 1 was altered somewhat. the schedule for Unilever PLC for 1988 will serve as an example. Column 1 still contained the tax references of the various companies listed in column 2, of which Unilever PLC was one. Column 3 was blank, for entry of the end of a company's accounting period if it was not 31 December 1988. Column 4 was blank but headed "Profit (before GR)" (i.e. before group relief). There were then three additional columns, all blank but headed "Group Relief", "DTR" (double taxation relief) and "ACT" (advanced corporation tax). There was no reference to loss relief. Unilever's practice where there were trading losses remained as before: a net figure was given, but no indication of the loss or the deduction. In this accounting period Unilever PLC did incur a trading loss (of £24.75 million) but also earned substantial profits from other sources. So a net figure was entered in column 4 when the completed schedule was returned to the Revenue on 13 September 1989, and tax was thereafter assessed on the basis of that figure and paid.

In due course Unilever's accounts and tax computation for the accounting period ended 31 December 1988 were supplied to the Revenue. This was on 31 March 1992, more than 2 years after the end of the relevant accounting period. The Revenue objected that no claim for loss relief had been made within 2 years of the end of the accounting period as required by section 393(11) and, after consideration of the case at a high level, refused to allow Unilever to claim the relief out of time. (The same objection was taken and the same decision reached in relation to the two earlier accounting periods and the other company).

For purposes of this case an exhaustive examination has been made of different Unilever companies for accounting periods since 1969, some 1247 company accounting periods in all. In the great majority of instances there was no trading loss and accordingly no question of loss relief. But in 116 instances over the period companies did incur trading losses available (in principle) for set-off against same-year profits from other sources. In all those 116 cases, the stage 1 procedure was followed as described above, always within the two year period for

claiming relief (and never later than nine months after the beginning of that period). In 76 of those 116 cases stage 2 was also followed within the two year period: those cases present no problem, since on any showing the tax computation amounted to a claim for loss relief and so the time limit was met at that point if it had not already been met. In 40 of these 116 cases, however, the tax computation was sent to the Revenue after expiry of the two year period. The Revenue, in evidence and argument before us, challenged 10 of these cases, contending that the accounts were drawn and the computations made in such a way as to obscure the fact that the benefit of loss relief was being taken. It may therefore be fair to regard only 30 computations taking the benefit of same-year loss relief as having been sent after the expiry of the two year period. In each of these 30 cases loss relief was allowed by the Revenue without comment or question or objection. These 30 cases represent about a quarter of the total of loss-relief cases, whether measured by the number of claims or the value of losses set-off (£4.1 million out of a total of £16.6 million. If the calculation is made starting in 1979, set-off losses notified after 2 years represented 36% of all set-off losses). From the late 1960s until the present no objection was raised and (subject to one letter discussed below) no reference was made by Unilever or the Revenue, directly or indirectly, to the two year time limit for claiming loss relief. The Revenue occasionally called for greater expedition in finalising Unilever accounts and tax liabilities, but these exhortations were in general terms and not directed to claims for relief. Both parties appear to have regarded the consensual procedure described above as a very satisfactory means of handling these matters, even though delivery of the accounts and tax computations was frequently delayed for more than two years.

If the Revenue succeed in these appeals, Unilever will be liable to pay additional corporation tax of some £17 million.

II

In the course of 1990 there was correspondence between Unilever and the Revenue concerning the accounts and computation supplied on behalf of a company (Unilever (UK) Central Resources Limited) not involved in these proceedings. The Revenue queried (as one of a few “relatively minor points”) the treatment of rental income, and Unilever acknowledged that it had been wrongly shown in the computation. The Revenue replied (on 11 May 1990):

“Rental Income

a. I had overlooked the rental income in the previous year (1986 appears to have been a loss of £479,624 at Schedule XI) but agree this ought to be put on a proper footing for 1987 and subsequent years. Strictly a claim to set-off Case 1 losses against Schedule A income under Section 393(2) ICTA 1988 was out of time for 1987 when the accounts were submitted in January but as the treatment of Schedule A income as Case 1 for past years was accepted in turn I can accept the loss set-off for 1987. I would be glad if you would note the need for a timeous Section 393(2) claim in future years should the accounts be submitted more than two years after the end of the accounting period.”

Unilever replied on 19 June 1990:

“Rental Income

I note your comments with regard to timeous claims under Section 393(2) TA 1988 .”

On 2 November 1990 that company made a formal claim under section 393(2) to set off trading losses against Schedule A income for the accounting period ended 31 December 1988.

There was no further correspondence until the disputes which are the subject of these proceedings arose.

III

By a respondent's notice, Mr Venables QC for Unilever contended that a claim for loss relief sufficient to satisfy section 393(2) had been made in the completed estimated profit schedules by including a net profit figure for those companies which had incurred a trading loss and had set off that loss against profits from other sources during the same accounting period. This argument was put to the judge but he rejected it, although with reluctance, holding (at 846 f) that no relevant claim could be spelt out of the documents.

I agree. No one looking at the completed estimated profit schedules could know which companies had suffered trading losses, still less which companies had set off trading losses against other profits. There was nothing at all to draw the Revenue's attention to the fact that a loss relief situation existed, or that a claim would or might be made.

In *Gallic Leasing Limited v Coburn* [1991] 1 WLR 1399 the House of Lords considered what was required to constitute a claim. The case was concerned with group relief, but the point of principle is the same. The House held that no more was required than a general and unparticularised intimation of an intention to claim. Thus Unilever could have satisfied section 393(2) and (11) by marking the relevant companies on the completed estimated profit schedules with an asterisk, explained as meaning "loss relief". This would have been of no practical benefit to the Revenue. It would not have led to the Revenue collecting more tax, or collecting it sooner. It would not have expedited the final computation. It would have alerted the Revenue to the fact that the final computation, when received, would show a trading loss deducted from a profit from other sources. But once alerted there was nothing useful the Revenue could have done until the computation was received. The Revenue is, however, correct in submitting that Unilever did not make a claim which satisfied section 393(2) by delivering the completed schedules.

IV

The judge summarised his first and main ground for granting Unilever relief at pages 852 h to 853 b of his judgment in these terms:

"I am convinced that for the following reasons the applicants succeed.

1. Over a long 20-year period the Revenue did in my judgment represent clearly by their conduct and their acquiescence that the two-year time limit was not rigidly being enforced. Even if their conduct was not intended to operate upon the applicants' minds, they did plainly, if unwittingly, foster the mistaken view formed genuinely by the applicants that the time limits would not be enforced.
2. Such conduct did amount to a representation in Preston terms, but even if it did not, it operated sufficiently to make it unfair and in the context of this case an abuse of power for the Revenue to take a windfall of tax by relying upon breach of a regulatory time limit which has caused no prejudice to the Revenue after years of acquiescence in such breaches and (until 1991–92) no general indication that the time limits must always be followed.
3. Abuse of power can, as Lord Mustill indicated in *Matrix-Securities Limited v IRC* [1994] STC 272 at 294, [1994] 1 WLR 334 at 358, be a matter of impression. I believe that a jury of reasonable men and women would be persuaded and impressed, as I am, that in all the circumstances the whole of the picture in the present case does smack of such abuse, given that the applicants' evidence that they were in fact misled is genuine. Nobody suggests that this is not the position. The Crown asserts that it matters not whether the applicants felt misled or not absent a more positive and clear assurance than can be discerned upon the facts. In my judgment where a regulatory rule is involved, acquiescence or what Mr Moses called 'silence' is enough, provided that the acquiescence is substantial, as in my judgment it plainly was upon the facts of this case."

Mr Alan Moses QC, for the Revenue, subjected the judge's decision on this point to a close and searching criticism. The main lines of his criticism may, I hope, be fairly summarised as follows:

- (i) The Revenue's public duty is to collect taxes imposed by Parliament in accordance with

the will of Parliament. A taxpayer's entitlement to deduct trading losses from same-year profits is not absolute: it is subject to the making of a claim within the statutory time-limit. It is not for the Revenue, or the taxpayer, or the courts to override a clear statutory time limit on the ground that it is unnecessary or merely regulatory.

(ii) There was no clear, unambiguous and unqualified representation by the Revenue, oral or written, such as was held to be necessary in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Limited* [1990] 1 WLR 1545 before it could be held unfair for the Revenue to do its duty. The Revenue's conduct, on 30 occasions over 20 years, could not be relied on as making such a representation. In any event, the conduct relied on was silence and inaction, in failing to point out and disallow late claims, and in private law such conduct would not found an estoppel unless there was a duty to speak, which here there was not.

(iii) If the Revenue were to be held to have acquiesced in or waived any failure by Unilever to comply with the time limit for making loss-relief claims, it had to be shown that it had done so knowingly. It could not acquiesce in or waive any noncompliance of which it was unaware. Here the evidence was that on the 30 critical occasions the Revenue had simply failed to notice that the claim was late. It was clear on the evidence that the Revenue had followed no settled policy or practice of accepting late claims.

(iv) "Unfairness" in public law is not used in a loose general sense (*MFK Underwriting* at 1573 B, per Judge J). Where substantive unfairness is alleged, it is necessary to show a recognised form of unfairness, such as departure from a ruling on which the taxpayer has relied or inconsistency prejudicial to the taxpayer (c.f. *HTV Limited v Price Commission* [1976] 1CR 170). The "court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair" (*R v Inland Revenue Commissioners ex parte Preston* [1985] AC 835 at 864 E, per Lord Templeman).

I would in general terms accept almost all these points, which reflect high authority and rest on sound legal principle. But I am very uneasy at the conclusion which the argument is said to compel in this case. Unilever is, I think, entitled to make a number of points on the facts of the present case:

(1) The courts have not previously had occasion to consider facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards.

(2) The taxpayer's entitlement to deduct trading losses from other profits in the same year, although provided by statute, gives effect to a very basic principle. A tax regime which did not provide such an entitlement could scarcely be regarded as equitable. A right of set-off against earlier or later accounting periods is less fundamental. But a tax on a corporation's profit which did not permit account to be taken of trading loss would be offensive to ordinary notions of fiscal fairness.

(3) While a statutory provision is not to be overridden or disregarded simply because it is regulatory, it is not irrelevant in considering the overall picture that the provision is regulatory. It is one thing for the Revenue to forgive tax which Parliament has ordained shall be collected; it may be quite another for the Revenue to neglect a statutory time limit which, given the Revenue's dealings with a particular taxpayer, lacks any useful purpose.

(4) While the Revenue did not formally exercise its power under section 42 (5) of TMA 1970

to determine the form in which a claim for loss-relief should be made, it did (by sending Unilever blank profit estimate schedules from the 1960s onwards) indicate the basic information it required at the first stage. When the form was amended and elaborated in 1988, following discussion between the parties, information was sought on other reliefs but not loss relief.

(5) Had the Revenue indicated a wish to be told when trading losses were being deducted from profit in the estimated profit schedules Unilever could have complied without difficulty, cost or inconvenience. Giving this information would have involved no disadvantage to Unilever and no advantage to the Revenue.

(6) The consensual procedure described above operated harmoniously for years, to the benefit of Unilever which avoided liability to pay interest and involvement in legal proceedings, and to the benefit of the public, which received timely payment of all the tax fairly due.

(7) Unilever's almost invariable practice of setting off trading losses against other profits in the same year would not have come as a surprise to the Revenue. As an Inspector observed in correspondence, after the dispute had arisen,

"I would accept that the evidence shows that Unilever generally take relief for losses in the current year whenever possible. As a mainstream CT paying Group, it would be surprising if they did not."

(8) The evidence does not suggest that either Unilever or the Revenue consciously disregarded the time limit. If Unilever thought about it at all, it probably thought that submitting net figures in the estimated profit schedules was tantamount to making a claim. The Revenue, it would seem, simply failed to spot the 30 claims notified out of time, although it would have been clear when calculating the final assessment that the computation and the initial estimate of profit were based on essentially the same calculation. This mutual oversight might be surprising if it had been thought to affect the liability of the taxpayer or the fair and efficient collection of the public revenue. Plainly, neither party was thinking in those terms, very understandably on the facts.

(9) Even if it be accepted that the Revenue was under no legal duty to Unilever to draw attention to the time-limit when the first "late" computations claiming loss relief were received, the Revenue would no doubt have done so had it noticed the delay and regarded it as significant. Had it done so, Unilever would doubtless have annotated the estimated profit schedules to the minimal extent necessary to make a claim. Had the point been taken in the 1970s or early 1980s and a claim disallowed at that time, there would have been a loss to Unilever. But the loss would have been minimal compared with the sums now in issue. If the Revenue's argument is correct, Unilever is seriously prejudiced by the fact that the point is taken now and not before.

(10) On an objective but untechnical view, it would be hard to regard Unilever as owing £17 million additional tax to the Crown. If this tax is due it can fairly be regarded as an adventitious windfall, accruing to the Crown through the understandable error of an honest and compliant taxpayer, shared over many years by the Crown.

These points cumulatively persuade me that on the unique facts of this case the Revenue's argument should be rejected. On the history here, I consider that to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power. Although our attention was drawn to the correspondence summarised in section II above, it was not seriously argued that that correspondence amounted to such notice. It

was in any event too late by then for Unilever to make a timely claim in relation to the two earlier accounting years.

In my opinion the judge's conclusion was correct.

V

As the judge pointed out, his decision on the foregoing issue was, if correct, enough to decide the case, subject to any question of discretion. But he went on to hold that the Revenue's decision not to exercise its discretion in Unilever's favour was in all the circumstances so unreasonable as to satisfy the public law test of irrationality. I do not think that in truth this raises a new point, but I will follow the judge in treating it as such.

Unknown to Unilever at the time, the Revenue had issued an instruction to inspectors on late claims. So far as relevant the instruction read:

"Claims to loss relief made after the statutory time limit should normally be refused. Special consideration should however be given to cases falling within any of the following categories:—

(a) Where the company may reasonably believe that an acceptable claim has been made although it falls short of the standard required. If there is no evidence that the company or its agents were told that more formal notice was required within the time limit, a late claim may be admitted if it is presented within a reasonable period of the company or its agents being told that the claim should be put in proper form."

A very senior officer of the Revenue also deposed that relief might be authorised on a late claim where, for instance, the Revenue had seriously misled the taxpayer as regards its obligations. It cannot be said that the present case falls squarely within either of these exceptions. A general discretion cannot, however, be defined so as to preclude the possibility of its exercise in cases not envisaged at the time of definition, and a general public law discretion must in the ordinary way be exercisable in favour of the citizen when its non-exercise would involve serious unfairness or injustice to him.

The threshold of public law irrationality is notoriously high. It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have been treated differently. And in all save exceptional circumstances the Revenue is the best judge of what is fair. It has not, however, been suggested that the detailed history described above has any parallel. The circumstances are, literally, exceptional. I cannot conceive that any decision-maker fully and fairly applying his mind to this history, and in particular to factors (1) to (10) listed in section IV above, could have concluded that the legitimate interests of the public were advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standards was vindicated, by a refusal to exercise discretion in favour of Unilever. I share the judge's conclusion that this refusal, if fully informed, was so unreasonable as to be, in public law terms, irrational.

I would dismiss the appeal.

Lord Justice Simon Brown:

The facts of this appeal are fully set out in the judgment of the Master of the Rolls and need not be repeated here. As it seems to me, three central questions arise:

1. Whether the taxpayers' claims for same-year loss relief (the claims) were made in time. If so, the taxpayers succeed upon their cross-appeal (which logically precedes the appeal). If not:
2. Whether an administrative decision can be impugned for unfairness other than results from reneging on an unambiguous representation giving rise to a legitimate expectation that it will be honoured. If so:

3. Whether the Revenue's decision here under challenge was so unfair as to constitute an abuse of power.

1. In time?

As the Master of the Rolls has explained, the annual estimates took account of the taxpayers' losses but not in such a way as to indicate to the Revenue whether in any given year a particular company had incurred such a loss which it was setting off against profits. In short, although the taxpayers' estimates reflected both their right to claim and their intention to claim, and in quantum subsumed the value of their claims, they did not in fact alert the Revenue to these matters. *Gallic Leasing Ltd v Coburn (Inspector of Taxes) [1991] 1 WLR 1399* construes the equivalent statutory time provision in respect of group relief claims as favourably as conceivable to the taxpayer but suggests that there is required "at least...a claim by an identified claimant to relief against identified or identifiable profits for an identified accounting period" — per Lord Oliver at 1406H. The taxpayers' estimates did not achieve that here: a claim is not made at least until the Revenue are able to recognise it as such.

2. Legitimate expectation or nothing?

Mr. Moses QC submits that in the absence (here acknowledged) of bad faith or improper motive the Revenue cannot in law properly be found guilty of abuse of power unless the taxpayer establishes all the elements giving rise to a challenge based on a substantive legitimate expectation.

These elements are, first, that the applicant (here the taxpayer) must have put all his cards face upwards on the table, second, that the body concerned (here the Revenue) made a representation which was clear, unambiguous and devoid of relevant qualification, third, that the applicant was within the class of people to whom the representation was made or that it was otherwise reasonable for him to rely upon it, and fourth, that the applicant did indeed rely upon it to his detriment — see *R v IRC ex parte MFK Underwriting Agents Ltd [1991] WLR 1545*, *R v Jockey Club ex parte RAM Racecourses Ltd [1993] 2 AER 225*, and *R v ITC ex parte TSW* (Court of Appeal unreported 5th February 1992; House of Lords unreported 26th March 1992).

Such a claim, Mr. Moses submits and I would accept, Unilever cannot here make good: the fundamental requirement for an unqualified and unambiguous representation is missing, there being, as Unilever acknowledge, no conscious practice or policy on the part of the Revenue to allow late claims. A representation cannot be unwittingly given, least of all a representation that late claims will continue to be accepted unless and until prior notice is given to the contrary.

Is then the taxpayers' inability to bring their challenge within the four corners of this particular category of legitimate expectation fatal to their case? In so submitting, Mr. Moses relies in part upon certain dicta in the leading authorities and in part upon the principle of legal certainty. The dicta principally relied upon are from Lord Templeman's speech in *Preston v IRC [1985] AC 835* at 864:

"The Commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes. And if the Commissioners decide to proceed, the court cannot in the absence of exceptional circumstances decide to be unfair that which the Commissioners by taking action against the taxpayer have determined to be fair."

And then at page 866:

"In the present case, the appellant does not allege that the Commissioners invoked section 460 for improper purposes or motives or that the Commissioners misconstrued their powers and duties. However, the HTV case and the authorities there cited suggest that the Commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other

than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation... Such a decision falls within the ambit of an abuse of power...”

That essentially was the approach of the Divisional Court in MFK and in turn of the *House of Lords* in *R v Inland Revenue Commissioners ex parte Matrix-Securities Ltd* [1994] 1 WLR 334 in deciding in each case whether or not the respective assurances or rulings there given could or could not lawfully be departed from when the Revenue came to assess the taxpayers' liabilities. It was implicit in those decisions, submits Mr. Moses, that only representations such as would bind a party in private law proceedings would found an abuse of power challenge on grounds of unfairness. “This is not,” Judge J. pointed out in MFK, “mere ‘unfairness’ in the general sense.”

As to the principle of legal certainty, Mr. Moses urges the importance of the courts intervening only in accordance with established legal principles. Such principles apply generally, are ascertainable by those who seek to order their affairs with reasonable certainty, and are clear also to public administrators. Provided only and always that the courts confine unfairness challenges to those meeting the clear requirements now established by the authorities — and in particular the line of Revenue cases — that principle is respected. If, however, the courts hold that unfairness of some other and more generalised character can vitiate a decision, then the principle is violated and the courts are inescapably drawn into making decisions based essentially on impression and outside any established or recognisable parameters of legality. Mr. Moses cites in this regard a passage from Laws, J's judgment in *R v Secretary of State for Education ex parte London Borough of Southwark* [1995] ELR 308 at 320:

“I am quite sure that the courts... have not imposed on public bodies substantial duties to consult others merely as a knee-jerk response to the facts of the particular case, without regard to principle. If they did, we should have palm tree justice; or, to employ another overworked aphorism, the duty to consult would be as long as the Chancellor's foot. It is important to have in mind that while this area of the law is pre-eminently concerned with fairness — notoriously a concept giving rise to different views as to its application in practice — we are obliged, sitting here, to pay due respect to another principle: the principle of legal certainty. It would be intolerable if our jurisprudence did not make it reasonably clear to public administrators, whose task extends not to a single case but to the management of a continuing regime, when the law obliges them to consult persons or bodies affected by their decisions, and when it does not.”

That case concerned, of course, legitimate expectations of a procedural nature, as to whether the authority owed a duty to consult, but its emphasis on the importance of legal certainty is, submits Mr. Moses, readily transposable to substantive fairness challenges of the present kind. Only by strict adherence to the MFK test as to the necessary foundations for any such challenge can judicial review in this area be kept within controllable limits.

The argument is, I recognise, an important one, and not only for the Revenue. But forcefully though it was advanced, I believe it must be rejected. Of course legal certainty is a highly desirable objective in public administration as elsewhere. But to confine all fairness challenges rigidly within the MFK formulation — requiring in every case an unambiguous and unqualified representation as a starting point — would to my mind impose an unwarranted fetter upon the broader principle operating in this field: the central *Wednesbury* principle that an administrative decision is unlawful if “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” — per Lord Diplock in *CCSU v Minister for Civil Service* [1985] 1 AC 374 at 410. The flexibility necessarily inherent in that guiding principle should not be sacrificed on the altar of legal certainty.

“Unfairness amounting to an abuse of power” as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson, MR, said in *R v ITC ex parte TSW* :

“The test in public law is fairness, not an adaptation of the law of contract or estoppel”.

In short, I regard the MFK category of legitimate expectation as essentially but a head of *Wednesbury* unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based.

Still less is it necessary to force such a challenge into the straightjacket of a private law plea of misrepresentation, waiver, acquiescence or some form of estoppel. It may no doubt be helpful to consider whether a person could in private law act with impunity in the manner complained of as unfair in public law proceedings: people's conduct and relationships are, after all, generally regulated in private law according to accepted tenets of fairness. But one must beware of placing too great reliance upon any suggested parallels: they may mislead more than assist.

Not least will this be so when considering the effect of time limits. These indeed are treated variably even in private law. Sometimes the failure to act within a stipulated time limit will be strictly penalised, even when repeatedly overlooked in the past — see for example *Scandinavian Trader Tanker Co. v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 with regard to late payment of charter party hire charges. Other times the law holds that time is not of the essence — see for example *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 with regard to rent review clauses.

And there is this too to be said. Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens. This approach is exemplified in cases such as *R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd* [1988] AC 858 and *Woolwich EBS v IRC* [1993] AC 70, and reflected in Lord Mustill's reference in *Matrix-Securities* to “the spirit of fair dealing which should inspire the whole of public life”.

Whilst, therefore, I for my part accept that the Revenue's conduct here complained of would probably not fall foul of any constraining principle of private law (not even that of estoppel by convention), I cannot regard that as decisive of the case in their favour.

Any unfairness challenge must inevitably turn on its own individual facts. True, as Lord Templeman made clear in *Preston*, it can only ever succeed in “exceptional circumstances”. True, too, the court must always guard against straying into the field of public administration and substituting its own view for that of the administrator. In these circumstances I am very ready to accept that rare indeed will be the case when a fairness challenge will succeed outside the MFK parameters. It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the Revenue will properly be stigmatised as having acted so unfairly as to have abused their powers — here their power to accept late claims. But I am satisfied that there exists no legal inhibition to such a conclusion. The great question is whether it is the appropriate conclusion here and to that I now turn.

3. Abuse of power?

The Master of the Rolls has identified in ten numbered paragraphs the various circumstances which cumulatively persuade him that on the unique facts of this case the Revenue are properly to be regarded as having abused their powers. I agree with every word of his analysis and am quite unable to improve upon it in any way.

I would, however, in just a very few sentences indicate what seem to me the two central and interlocking features of the evidence here which to my mind serve to distinguish this case from MFK and *Matrix-Securities* in a way that justifies this court, wholly exceptionally as I recognise, adopting a more flexible approach to what constitutes vitiating unfairness than was suggested by those cases.

The first critical feature of the evidence is the clear and consistent pattern of Unilever's claims being invariably allowed in the past irrespective of whether they were in time or late. Thirty claims which the Revenue accept were recognisable as late claims were allowed over a period of 25 years; none was ever refused. I accept, as did the judge below, that Mr. Tinsley believed (albeit wrongly) that Unilever's estimates adequately enshrined their claims. And certainly by the end he

can hardly have doubted that for whatever reason Unilever's position was secure: whether because the Revenue shared his belief that the claims were in time or because they thought it inappropriate to enforce the limit, he had no need to consider.

The second important feature of the evidence is the demonstrable pointlessness of imposing a two year time limit on the particular facts of this case — given, that is, the two stage procedure (described by my Lord) agreed and faithfully followed by both parties over the same 25 year period. That procedure fully met the needs of each and achieved for the Revenue not merely as much as but in truth substantially more than they would have achieved had Unilever formally complied with the time limit but been less obliging in processing their substantive claims and returns. It is, indeed, on the particular facts of this case idle to pretend that strict compliance with section 393(11) would have involved other than the pedantic observance of an arid technicality utterly devoid of advantage to anyone.

It is necessary to stress, however, that that would not ordinarily be so. Notwithstanding section 393(11) 's continuing skeletal form — rather surprisingly not fleshed out by the Revenue's exercise of their section 42(5) power — one can readily see that in the absence of an agreed scheme of close cooperation such as was adopted by the parties here, a time limit could well play an important part in promoting the efficient and expeditious processing of tax collection. No doubt it was for that reason that Mr. Venables QC resisted the temptation to urge that this provision should be regarded as directory only.

I describe these two features of the evidence as “interlocking”. It seems to me no mere chance that the Revenue overlooked, whether carelessly or intentionally, no fewer than 30 identifiably late claims. If that was due to carelessness it was no doubt because, in the context of their special arrangements with Unilever, the Inspectors concerned were really not interested in policing formal compliance with a time provision that would have availed them nothing. Assuming, however, late claims were being accepted intentionally, this again was presumably because formal compliance with the two year rule was not worth securing.

These are the considerations that seem to me so clearly to distinguish this case from MFK and Matrix-Securities . There the question was whether the respective taxpayers should benefit from the Revenue's erroneous rulings or assurances as to their true tax liability. Should they be entitled to hold the Revenue to these assurances so as to pay less tax than was properly due? Here by contrast the question is whether Unilever must forfeit their undoubted right to have claimed same-year loss relief merely because of a failure to achieve strict compliance with the time limit. Mr. Moses submits that it is irrelevant to examine what, if any, purpose this time limit served in the particular circumstances of this case. He further submits that there is no material distinction to be drawn between this sort of procedural provision and the substantive right of relief to which it gives rise; nothing, therefore, to distinguish this case from MFK and Matrix- Securities . I disagree. The situations seem to me wholly different.

With effect from 31st March 1991 the legislation was amended to provide that these claims must be made within two years or such further period as the Revenue may allow. That, Mr. Moses accepts, does no more than make explicit a discretion already implicit in the “care and management” provision.

The ultimate question therefore arising is whether the Revenue could properly refuse to allow the further period required to admit these claims. For my part, I see that as a single question, the self-same question as asking whether the Revenue were legally prohibited from disallowing these late claims.

I acknowledge Mr. Moses' point that it was perhaps unhelpful for the judge below to introduce the jury concept into the process of answering this question. I can think, however, of no surer guide than Macpherson of Cluny, J. when it comes to determining the border between on the one hand mere unfairness -conduct which may be characterised as “a bit rich”but nevertheless understandable — and on the other hand a decision so outrageously unfair that it should not be allowed to stand.

Mature reflection would, I believe, have led the Revenue here to recognise this decision as falling within the latter category: as a plainly wrong exercise of discretion. That at all events is certainly how I regard it. I too would dismiss this appeal.

Lord Justice Hutchison:

I have had the opportunity of considering in draft the judgments of the Master of the Rolls and Lord Justice Simon Brown. I wish to say no more than that I am in complete agreement with their conclusions and their reasoning and that accordingly I agree that this appeal should be dismissed.

THE MASTER OF THE ROLLS: After preparing our judgments in this case, we received from the Inland Revenue an affidavit with a number of exhibits. One of the exhibits was a statement by a Mr. R E Hall, an Inspector who worked in the Inland Revenue's district City 15 between 1972–1975 and dealt with some of the Unilever accounts. He records in his statement that the District Inspector in charge of the district at the time told him that for the Unilever companies there were no time limits on either side, and that Unilever would accept assessments outside the six year time limit. Mr. Hall says that he inferred that the Inland Revenue did not take time limit points against Unilever, and that the District Inspector's comments applied to claims generally.

It may be that Mr. Hall's statement throws some light on how the practice which we describe in our judgments appears to have grown up of disregarding the two year time limit. We are nonetheless mindful that Mr. Hall's account relates to a period a very long time ago. It is lacking in particularity and it is not supported by any documents. Moreover, it is challenged by the District Inspector in charge of the district at the time.

In those circumstances, we have not thought it right to modify our judgments in any way, particularly having regard to the conclusions we have reached. We will, therefore, simply thank the Inland Revenue for alerting us to the existence of this material, and express our commendation of the Inland Revenue for recognising their duty to the Court and acting in a manner which does them great credit.

For the reasons contained in the judgments which have been made available in writing, the appeal will be dismissed.

Appeal dismissed; leave to appeal to the House of Lords refused.

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