A HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)—18, 19 AND 29 JULY 1994

B COURT OF APPEAL—29 AND 30 JANUARY AND 13 FEBRUARY 1996

Regina *v.* Commissioners of Inland Revenue *ex parte* Unilever plc
Regina *v.* Commissioners of Inland Revenue *ex parte* Mattessons Wall's Ltd.[1]

C

Corporation tax—Losses—Relief—Time-limit—Judicial review—Claims for relief against other profits of same period—Claims refused—Whether estimated figures delivered within two-year time-limit constituted claims—Express claims made after expiry of time-limit—Previous late claims admitted without question—Whether Revenue wrongly refused claims—Income and Corporation Taxes Act 1970, *s* 177(2) *and* (10), *Taxes Management Act* 1970, *s* 1, *Income and Corporation Taxes Act* 1988, *ss* 393(2) *and* (11) *and* 393A(10).

D

E U and M made trading losses for accounting periods comprising the calendar years 1987 and 1988 and, in U's case, also 1986. They sought to set those losses against profits of other descriptions in the same periods, but made express claims for set-off only after expiry of the prescribed two-year time-limit (s 393(11) Income and Corporation Taxes Act 1988, previously s 177(10) of the 1970 Act). During the two years U and M had, in response F to questionnaires issued by the Inspector of Taxes, given estimates of net profit figures in which actual loss relief figures had not been specified as such but had been taken into account in the calculations. After the two years U and M had made tax returns and supplied computations which showed the actual loss relief figures and which were treated as claims for loss relief.

G The Revenue refused the claims. U and M applied for judicial review and filed affidavit evidence which showed that on a substantial number of previous occasions late claims for loss relief had been made to which the Revenue had raised no objection. It was common ground that the Revenue had always had a discretion to accept late claims for loss relief, either under s 1 Taxes Management Act 1970 or under s 393A(10) of the 1988 Act (as H inserted by s 73 Finance Act 1991).

The Queen's Bench Division held, allowing U's and M's applications, that, while the claims were not validly made within the two-year time-limit, because the responses to the questionnaires did not indicate such claims, the I Revenue had wrongly refused to admit the claims because:—

(1)(a) over a twenty-year period the Revenue had represented 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

[1] Reported (QBD) [1994] STC 841; (CA) [1996] STC 681.

mistaken view formed genuinely by the applicants that the time-limits would not be enforced; A

(b) that conduct did amount to a representation or otherwise operated sufficiently to make it unfair and in the context of the case an abuse of power for the Revenue to take a windfall of tax by relying upon breach of a regulatory time-limit which had 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; B

(c) as a regulatory rule was involved, it was sufficient that the applicants had been misled by previous conduct that amounted to substantial acquiescence, as opposed to a more positive and clear assurance: C

HTV Ltd. v. *Price Commission* [1976] ICR 170, *Regina* v. *Inland Revenue Commissioners* ex parte *Preston* [1985] AC 835: 59 TC 1, *Regina* v. *Commissioners of Inland Revenue* ex parte *MFK Underwriting Ltd. & Others* [1990] 1 WLR 1545: 62 TC 607, and *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.* [1994] 2 LRC 414 considered. D

(2) alternatively, it would have been wholly unreasonable for the Revenue not to have exercised their discretion to enlarge time in respect of all the claims.

Per curiam: habitually it is becoming the practice in cases of all kinds in judicial review to include every conceivable document, and to argue the law and case interminably in the affidavits, but the right course is to set out only relevant facts in affidavits and to allow oral argument at trial, assisted by skeleton arguments, as otherwise there is a real risk of obfuscation. E

The Crown appealed. F

Held, in the Court of Appeal, dismissing the Crown's appeal, that:

(1) on the unique facts the rejection of the claims in reliance on the time-limit, without clear and general notice, was so unfair as to amount to an abuse of power; G

(2) the issue as to whether the decision not to exercise the discretion to extend or waive the time-limit was in all the circumstances so unreasonable as to satisfy the public law test of irrationality did not raise a separate point but, on the footing that it did, that decision was so unreasonable as to be, in public law terms, irrational; in all save exceptional circumstances the Revenue is the best judge of what is fair, but the detailed history of the case had no parallel and the circumstances were, literally, exceptional; it could not rationally have been concluded that the legitimate interests of the public would be advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standards would be vindicated, by a refusal to exercise the discretion in favour of the claimants. H I

Council of Civil Service Unions v. *Minister for Civil Service* [1985] AC 374, *Regina* v. *Inland Revenue Commissioners* ex parte *Preston* [1985] AC 835: 59 TC 1, *Regina* v. *Commissioners of Inland Revenue* ex parte *MFK Underwriting Agents Ltd. and Others* [1990] 1 WLR 1545: 62 TC 607, *Gallic Leasing Ltd.* v. *Coburn* [1991] 1 WLR 1399: 64 TC 399, *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.* [1994] 2

A LRC 414, *Regina* v. *Commissioners of Inland Revenue* ex parte *Matrix-Securities Ltd.* [1994] 1 WLR 334: 66 TC 587, and *Regina* v. *Secretary of State for Education* ex parte *London Borough of Southwark* [1995] ELR 308 considered.

B

Unilever plc and Mattessons Wall's Ltd. applied for judicial review of decisions of the Commissioners of Inland Revenue to refuse claims for set off of trade losses on the ground that the claims had not been made within the two year period provided for in s 177(10) Income and Corporation Taxes Act
C 1970 and s 393(11) Income and Corporation Taxes Act 1988 respectively.

The companies' applications were heard in the Queen's Bench Division before Macpherson J. on 18 and 19 July 1994 when judgment was reserved. On 29 July 1994 judgment was given against the Crown, with costs.

D The facts are set out in the judgment.

Robert Venables Q.C. and *James Kessler* for the Companies.

Alan Moses Q.C. and *Rabinder Singh* for the Crown.

E The following cases were cited in argument in addition to the cases referred to in the judgment:—*Regina* v. *Jockey Club* ex parte *RAM Racecourses Ltd.* [1993] 2 All ER 225; *Allied Marine Transport Ltd.* v. *Vale Do Rio Doce Navegacao S.A.* [1985] 1 WLR 925; [1985] 2 All ER 796; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680; *Regina* v. *Tower Hamlets London Borough*
F *Council* ex parte *Chetnik Developments Ltd.* [1988] AC 858; [1988] 1 All ER 961; *Central Estates (Belgravia) Ltd.* v. *Woolgar (No. 2)* [1972] 1 WLR 1048; [1972] 3 All ER 610.

G The following cases were referred to in the skeleton arguments but not cited in oral argument:—*Regina* v. *Attorney General* (ex parte *Imperial Chemical Industries Plc*) 60 TC 1; *Regina* v. *Commissioners of Inland Revenue* ex parte *S. G. Warburg & Co. Ltd.* TC Leaflet 3398; [1994] STC 518; *Regina* v. *Secretary of State for Health* ex parte *United States Tobacco International Inc.* [1992] QB 353; [1992] 1 All ER 212; *Regina* v. *Commissioners of Inland Revenue*
H ex parte *Matrix-Securities Ltd.* 66 TC 587; [1994] 1 WLR 334; [1993] STC 774; *In re Findlay* [1985] AC 318; [1984] 3 All ER 801; *Regina* v. *Secretary of State for Transport* ex parte *Richmond-Upon-Thames London Borough Council and Others* [1994] 1 WLR 74; [1994] 1 All ER 577; *Woodhouse A.C. Israel Cocoa Ltd. S.A. & Another* v. *Nigerian Produce Marketing Co. Ltd.* [1972] AC 741; [1972] 2 All ER 271; *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera*
I *Ecuatoriana* [1983] QB 529; *British Oxygen Co. Ltd.* v. *Minister of Technology* [1971] AC 610; *Wells and Others* v. *Minister of Housing and Local Government and Another* [1967] 1 WLR 1000; [1967] 2 All ER 1041.

Macpherson J.:—Since I do not believe in unnecessary suspense, I indicate at once that these applications succeed. They are combined applications for judicial review made by Unilever plc (Unilever) and Mattessons Wall's Ltd. (Wall's). The arguments raised are the same in respect of each company. The accounting years in the Unilever case are 1986, 1987 and 1988. In the Wall's case 1987 and 1988 are involved. Accounts in every case were drawn up to 31 December. In the case of Unilever trading losses were suffered which were considerable:

1986 — £9,669,597
1987 — £16,500,476
1988 — £24,750,175

In the case of Wall's the trading losses were:

1987 — £25,305,403
1988 — £19,340,990

There may be some adjustments to be made to these figures, but they appear to be substantially accepted by the Inland Revenue ("the Revenue") as proved trading losses.

Where a company suffers a trading loss it may "use" that loss in one of three ways:

(i) The loss may be set off against trading income from the trade in later accounting periods.

(ii) The loss may be set off against profits of any description accruing in the same accounting period as the loss.

(iii) The loss may be set off against profits of any description in the same accounting period and, within strict limits, earlier accounting periods.

The first set-off is still probably available to the applicants, subject to time-limits. But the applicants wish to set off these losses against same-year profits. The Revenue contend that such set-off is not available to the applicants because no express claim to set off was made within the statutory time-limit, namely within two years after the end of the accounting period in which the loss was suffered.

The applicants' set-off claims are made under s 177(2) of the Income and Corporation Taxes Act 1970 (for the years 1986 and 1987) and s 393(2) of the Income and Corporation Taxes Act 1988 (for the year 1988). Section 177(10) of the 1970 Act provides 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."

A similar provision is contained in the 1988 Act.

It should be noted at once that there is no dispute between the parties that the Revenue has always had a discretion to accept late claims for loss relief, either under the "care and management" provision of s 1 of the Taxes Management Act 1970 or under the Income and Corporation Taxes Act 1988

A which provides (by s 73 of the Finance Act 1991) that the period within which a claim must be made may be such further period as the Board (i.e. the Board of Inland Revenue) may allow.

Furthermore, it is accepted that there has never been any statutory provision which requires a claim for loss relief to take any particular form. The
B Commissioners have always had power to determine the form in which such a claim should be made (see s 42(5) of the Taxes Management Act 1970). But surprisingly the power has never been exercised, so that a simple letter or note upon any document submitted to the Revenue within the relevant two years stating, for example, " ... loss relief is claimed" without any further particu-
C lars as to amount, would be enough to entitle the taxpayer to claim relief and to reduce the taxable profits by the agreed or accepted amount of the loss.

Of course it is right, as Mr. Moses Q.C. submits, that Parliament has laid down a time-limit so that the limit cannot simply be ignored. But, in my judgment, it is also right, as the applicants argue, that the main purpose of
D the statutory regime is to allow Inspectors to be alerted to the fact that relief is to be claimed, and, if Inspectors insist upon it, to require claims to be made within the time-limit of two years, always subject to their discretion to allow further time. Nobody could complain if their Inspector indicated that he would require claims within the relevant two years. But in this case, apart from one 1990 indication to which I will return, there never was, until these
E instances arose and ultimately Mr. Fisher wrote his letter on 24 February 1992, an indication that the Revenue would positively require claims to be made always in time under s 177(2).

If these applications were to fail, the position would be that the applicants would be made liable for large sums of tax which would certainly not
F have been extracted if those few words had been added to the tax questionnaires sent in each year, or if a postcard had been sent in respect of each company each year indicating (where relevant) that a loss relief claim was to be made. Certainly, in general terms, in view of the Revenue's admitted inaction in respect of 30 (or more) late claims, I am unable to see any merit in the Revenue's approach.

G

I detect no prejudice to the Revenue should the applicants succeed. The appropriate tax (allowing for loss relief) will be paid, with interest compensating for any delay (if there has been any). Of course the "extra" tax will not be recoverable. But to decide the case against the applicants would effectively
H bring a large windfall to the Revenue and would result, in my judgment, in a penalty against the applicants for a comparatively venial breach of the statutory procedures. Such a result would not, in my judgment, achieve justice, and I am happy to be able to conclude that two of the applicants' arguments prevail, so that the loss relief will assist them in connection with all the relevant years.

I

In the end there are three issues to resolve. The fourth, which concerns waiver, does not, in my judgment, arise. I am not persuaded that there could have been or was any waiver properly so-called in this case. Mr. Venables Q.C. himself virtually accepted that this was so.

I turn then in a moment to the three issues. Before doing so I register a mild protest which I hope will be heeded, although my experience in this Division does not encourage me to think that it will be. The documents, and in particular some of the affidavits in this case, are very much overloaded. Habitually it is becoming the practice in cases of all kinds in judicial review to include every conceivable document, and to argue the law and the case interminably in the affidavits. A look, for example, at Mr. Tinsley's affidavits shows that the first one is 22 pages, 78 paragraphs long. That might just be tolerable, but the second one (including a five-page appendix) runs to no less than 41 pages and 115 paragraphs crammed with argument. If applicants wish to set their cases out like this we can perhaps dispense with advocacy. But, in my judgment, the right course is to set out only relevant facts in affidavits and to allow oral argument at trial, assisted by skeleton arguments. Otherwise there is a real risk of obfuscation. In the present case, in my judgment, the relevant points are comparatively uncomplicated. I propose to deal with them with as much economy of words as possible.

1. Were the claims in fact validly made within two years? Or (as put by Mr. Moses) did the documents sufficiently indicate within the two-year period to the Inspector that the relevant claims were being made?

With some reluctance I must find that the Respondents' argument prevails upon this issue.

The full history of the taxation of the Unilever group of companies is fully set out in the documents, and it would be most tedious to rehearse it here.

The argument is in effect that over the years a combination of that which was set out in relevant annual corporation tax questionnaires, coupled with later clear indication in full tax computations that losses were to be taken into account, made it obvious that losses were frequently taken into account in the questionnaires when a figure for net taxable profits after allowing for loss relief was there set out. It would, therefore, be pedantic to ask for more by way of a claim.

The purpose of the questionnaires was, however, to produce figures upon the basis of which estimated assessments could be raised. So it can be argued that at that stage the calculations by which the figures were reached were of no direct concern to the Inspectors. The questionnaires did not show, either by inclusion of the actual loss relief figures, or by a simple indication such as I have referred to above, that the losses were taken into account in the net profit figures. Quite bluntly, the fact is that the questionnaires did not, in my judgment, in fact indicate relevant claims, although the figures did enshrine the relevant losses, in forms designed by the Revenue, which contained no column for those losses to be shown. In any individual case the Inspector would not be directly alerted to the fact that loss relief was being claimed until the tax computation was received, which was in many cases outside the two-year limit. I am unable to accept that the whole picture involving all the companies over the years can lead to a conclusion that in any individual case the claim can be said to have been positively made.

Furthermore, *Gallic Leasing Ltd.* v. *Coburn*[1] [1992] 1 All ER 336 shows what had to be set out as an " ... irreducible minimum of information which

[1] 64 TC 399.

A a claim to be valid as a claim ... must contain" in the context of group relief. In my judgment, it could not in the instant cases be left to the Inspectors to divine from the questionnaires that claims were being or were to be made. The irreducible minimum would, in my judgment, have involved either explicit inclusion of the relevant figure for loss in the questionnaire, or an express indication from whatever source that the relief was being claimed
B in a particular case.

Thus I am not persuaded that relevant claims can be spelt out of the documents. On the other hand, the questionnaire system has its relevance in considering issues number 2 and number 3 (below), because I do accept that the applicants themselves believed that the combination of questionnaires
C and later tax computations was enough to inform the Inspector or Inspectors that claims were being made without the need for any formal statement to that effect. I bear strongly in mind the fact that no particular form of claim has ever been produced by the Revenue and that the questionnaires were in fact the Revenue's product.

D 2. Are the Respondents bound to treat the claims as validly made because they adopted a course of conduct which led the applicants reasonably to believe that there existed a practice, acceptable to the Respondents, of allowing member companies of the Unilever group to make claims informally? Or have the Respondents acquiesced in such a practice adopted by the applicants so that it would be unfair in the circumstances to
E resile from that practice without giving proper notice that the time-limits would be sought to be enforced?

Or (as put by Mr. Moses) by reason of the conduct of the Inspectors in allowing past claims out of time, are the Revenue prohibited as a matter of
F law from disallowing subsequent claims because they were out of time, at least until clear notice was given that observance of time-limits was required?

The usual practice of the Unilever group companies, and certainly of Unilever itself, has been to set off trading losses against other profits of the current year. There is some dispute about the number of occasions when alternative options were chosen. There is also dispute about the number of
G occasions when late claims to set off were accepted by Inspectors without further ado. There is debate also about the amount of tax "lost" to the Revenue because of lack of challenge of late claims. The latter figure is on any view large (£1,809,000, see Mr. Fishers's second affidavit, para 20). It is furthermore accepted from Mr. Fisher's calculations that a considerable per-
H centage of the tax computations of the group showing a trading loss were not submitted within two years (para 10 of Mr. Fisher's second affidavit), and that there are probably 30 examples of "unexplained" late acceptance.

Mr. Tinsley's figure (see para 75 of his second affidavit) is about 40 identified cases. The argument and evidence as to these figures plainly need
I not be set out in full. Mr. Tinsley, however, points out that in percentage terms the amount of what he calls the "late company profits" represents a high percentage of the total, namely 62 per cent., so that it can surely be said that on that basis the computations of the group were often submitted late and in large amounts and were accepted.

Whatever may be the true or final numbers in this case the fact is, in my judgment, that the Revenue did over a period of about 20 years allow significant or substantial numbers of late claims through without reaction in any individual or specific case to the lateness of the claim. Mr. Tinsley positively asserts that the Unilever group taxation department were led to believe that no point would be taken, provided that the figures were ultimately acceptable, and provided that the Revenue's questionnaire system was followed, so that assessments could be raised early, upon the information in the questionnaires, and adjusted later, often after the two-year period, when the computations were put in. Mr. Tinsley has been the Unilever group corporation tax presiding genius for many years.

I am not impressed by the argument that because a number of Inspectors were involved individually with separate companies, so the impact of the "oversight" of late claims is lessened. The returns were all made to the same department of the Revenue which dealt with the group's affairs, either in London or later in Liverpool. I cannot accept that it can be said that a course of conduct adopted by individual Inspectors does not bear generally upon the Unilever group's perception of the Revenue's attitude to their claims as a whole.

It should further be noted as an important feature of the case that the oversight or inaction of the Revenue in connection with late claims is never satisfactorily explained by those who have made affidavits in this case. Simply for example, Mr. Robert Mountain (bundle 3, page 34) says that he:

> " ... can only assume that when an Inspector failed to draw the lateness of a claim under section 177(2) to the attention of the company concerned, he must have overlooked the lateness of the claim or regarded the matter as not worth pursuing because of the size of the amount involved."

Some of the amounts were certainly small but others were very large. If the Inspectors were prepared simply to overlook them, how can Unilever be blamed for believing that time was not of the essence? The same theme recurs in other evidence from other Inspectors. It is repeatedly said that there was no practice of accepting late claims, and that those which were accepted must have been overlooked (see Mr. Neil Spencer, page 57, Mr. Alan Isaac, page 61, and Mr. David Burrows, page 64). The applicants assert and argue that in layman's terms they were at least lulled into a sense of false security by substantial inaction on the part of the Revenue. The question is whether the applicants can assert a legal right to upset the 1992 refusal to accept these relevant losses because of the Revenue's inaction.

In parenthesis I note the fact that in 1981 (GCF2([1])) there was correspondence with Mr. Tinsley as to general delay in the submission of tax computations. Also in 1990 Mr. Fisher and Mr. Tinsley did themselves correspond in the same vein, showing Mr. Fisher's concern with delay and the possible need to list open appeals.

In connection with one single company (Unilever UK Central Resources Ltd.) in somewhat special circumstances involving rental income, an Inspector did say (11 May 1990) that the company should " ... note the need

([1]) Second affidavit of Mr. Graeme Fisher, District Inspector of Taxes.

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". However, these instances are plainly outweighed by the evidence of other acquiescence in late claims, and those letters cannot in context, in my judgment, be taken as evidence that the habit of acquiescence was to be discontinued. Indeed, Mr. Moses did not specifically so argue.

The applicants' case is simply put. Mr. Venables says that it is a fundamental principle of law that public bodies must exercise their statutory powers and perform their duties fairly and reasonably and must not in any way abuse their powers.

He relies in particular upon the Court of Appeal's decision in *HTV Ltd.* v. *Price Commission* [1976] ICR 170, and asserts that in the instant case his clients have been treated unfairly and that in that sense the Revenue has abused its powers, because it would plainly be unfair and unjust to allow them to refuse these claims, particularly where the requirement breached is procedural and where there is no prejudice suffered by the Revenue or the general body of taxpayers.

Mr. Venables refers also (as does Mr. Moses) to the important decision of the House of Lords in *In re Preston*[1] [1985] AC 835, in which the vital parts of the *HTV Ltd.* judgments are reproduced. In *Preston* Lord Templeman's speech also included references to *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Businesses Ltd.*[2] [1982] AC 617 and I quote an extensive passage of that speech starting at page 863[3]:

> "The speech of my noble and learned friend, Lord Scarman, was to the same effect and he made observations as to the principle of fairness. At p. 650, Lord Scarman referred to the remedy of mandamus as one which has:
>
> 'been recognised by the judges as a remedy for certain forms of abuse of discretion, upon the principle that the improper or capricious exercise of discretion is a failure to exercise the discretion which the law has required to be exercised: ... '
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> In considering the statutory provisions applicable to the commissioners, Lord Scarman said, at p. 651:
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> 'They establish a complex of duties and discretionary powers imposed and conferred in the interest of good management upon those whose duty it is to collect the income tax. But I do not accept that the principle of fairness in dealing with the affairs of taxpayers is a mere matter of desirable policy or moral obligation. Nor do I accept that the duty to collect "every part of inland revenue" is a duty owed exclusively to the Crown ... I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of

(1) 59 TC 1. (2) 55 TC 133. (3) 59 TC 1, at pages 35A/38C.

taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.' A

He concluded at p. 652: 'I am, therefore, of the opinion that a legal duty of fairness is owed by the revenue to the general body of taxpayers.'

Mr. Brodie, on behalf of the appellant, submitted that if, as Lord Scarman announced in the *Self-Employed* case [1982] A.C. 617, the commissioners owe a duty of fairness to the general body of taxpayers, the commissioners must equally owe a duty of fairness to each individual taxpayer. I agree, but a taxpayer cannot complain of unfairness merely because the commissioners decide to perform their statutory duties including their duties under section 460 to make an assessment and to enforce a liability to tax. The commissioners may decide to abstain from exercising their powers and performing their duties on grounds of unfairness, but 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. The commissioners possess unique knowledge of fiscal practices and policy. The commissioners are inhibited from presenting full reasons to the court for their decisions because of the duty of confidentiality owed by the commissioners to each and every taxpayer. B C D

The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or from exercising their powers an abuse of power by the commissioners. E F

In most cases in which the court has granted judicial review on grounds of 'unfairness' amounting to abuse of power there has been some proven element of improper motive. In the leading case of *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 the Minister abstained from exercising his statutory discretion to order an investigation because he feared the consequences of the investigation might be politically embarrassing. In *Congreve* v. *Home Office* [1976] Q.B. 629 the Minister exercised his power to revoke television licences because he disapproved of the conduct of the licence holders, albeit they had acted unlawfully. In *Laker Airways Ltd.* v. *Department of Trade* [1977] Q.B. 643 the Minister exercised his statutory discretion to give directions with regard to civil airways with the ulterior motive of making it impossible for one of the airlines to pursue a course of which the Minister disapproved. In these cases judicial review was granted because the Ministers acted 'unfairly' when they abused their powers by exercising or declining to exercise those powers in order to achieve objectives which were not the objectives for which the powers had been conferred. The question of 'fairness' was considered in *H.T.V. Ltd.* v. *Price Commission* [1976] I.C.R. 170. G H I

In that case the Price Commission misconstrued the counter inflation price code and changed its mind as to the treatment of exchequer levy as an item in the costs of television companies allowable for the purpose of increasing their advertising charges within the limits prescribed by the code. The effect of the change of mind of the Price

Commission was to deprive the companies of an increase of advertising charges which they were plainly intended to enjoy and which they badly needed in order to remain financially viable. Lord Denning M.R. said, at pp. 185–186:

> 'It has been often said, I know, that a public body, which is entrusted by Parliament with the exercise of powers for the public good, cannot fetter itself in the exercise of them. It cannot be estopped from doing its public duty. But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no overriding public interest to warrant it. So when an army officer was told that his disability was accepted as attributable to war service, and he acted on it by not getting his own medical opinion, the Minister was not allowed to go back on it: see *Robertson* v. *Minister of Pensions* [1949] 1 Q.B. 227. And where an owner, who was about to build on his land, was told that no planning permission was required, and he acted on it by erecting the building the Minister was not allowed to go back on it: see *Wells* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 1000 and *Lever Finance Ltd.* v. *Westminster (City) London Borough Council* [1971] 1 Q.B. 222. Very recently where a man was issued with a television licence for a year, then, although the Minister had power to revoke it, it was held that it would be a misuse of that power if he revoked it without giving reasons or for no good reason: See *Congreve* v. *Home Office* [1976] 2 W.L.R. 291.'

In the first three cases cited by Lord Denning M.R. the authorities acted in a manner for which, if the authorities had not been emanations of the Crown, the applicants would have enjoyed a remedy by way of damages or an injunction for breach of contract or breach of representations. In the third case of *Congreve*, as I have indicated, the decision was 'unfair' because the Minister was actuated by an irrelevant motive.

In the *H.T.V.* case [1976] I.C.R. 170 my noble and learned friend, then Scarman L.J., said, at p. 189:

> 'Agencies, such as the Price Commission, must act fairly, if they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as is sought in this case, by declaring the meaning of the statute and the duty of the agency ... It is a commonplace of modern law that such bodies must act fairly ... It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness.'

Scarman L.J. after considering the Price Commission's change of mind, said at p. 192, that 'the commission's inconsistency has already resulted in unfairness, and, unless corrected, could cause further injustice. First, it gives rise to a real possibility of an erosion of profit margin ... ' Next, if, as the Price Commission contended, the Exchequer levy was excluded in 1976 but included in 1973 then the television companies would be

unable to obtain a fair increase in advertising charges corresponding to increases in costs between 1973 and 1976:

> 'The commission, to avoid being unfair, must either include or exclude Exchequer levy as a cost upon both sides of the comparison. Since it has made clear that, in the absence of a ruling to the contrary, it intends to exclude it when calculating current profit margins, the commission must also exclude it when calculating the profit margin at April 30, 1973. I am not completely sure that it intends so to do if it succeeds in this litigation ... The commission has acted inconsistently and unfairly; and on this ground, were it necessary, I would think H.T.V. are also entitled to declaratory relief.'

In the *HTV* case [1976] I.C.R. 170, the 'unfairness' of the decision was due not to improper motive on the part of the Price Commission but to an error of law whereby the Price Commission misconstrued the code they were intending to enforce. If the Price commission had not misconstrued the code, they would not have acted 'inconsistently and unfairly'. Of course the inconsistent and unfair results to which Scarman L.J. drew attention were themselves powerful support for the contention that the Price Commission must have misconstrued the code.

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 or duties. However, the *H.T.V.* 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. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the commissioners have been guilty of conduct equivalent of a breach of contract or breach of representations on their part.

The sole question which now falls to be determined is whether upon the true construction of the correspondence which passed between the appellant and Mr. Thomas in 1978, the commissioners, acting by Mr. Thomas, purported to contract or purported to represent that they would not thereafter re-open the tax assessments of the appellant for the years 1974–75 and 1975–76 if he withdrew his claims for interest relief and capital loss for those years."

A Within that statement of the law lies the difference between the parties. Mr. Moses in various ways argues that the Revenue are entitled to implement the statutory provisions and that *prima facie* where Parliament has decided that there should be relief but that a time-limit should apply, enforcement of that time-limit cannot be complained of unless there exists conduct or words amounting to a clear, unambiguous representation devoid B of qualification to the effect that the time-limits can be ignored. Unfairness of itself, in layman's terms, says Mr. Moses, is not enough. The Court must look for conduct which is equivalent to breach of conduct or breach of representation. Silent acquiescence over 25 years with lack of insistence upon time-limits on what he calls sporadic occasions is not enough.

C Mr. Moses relies strongly upon the actual words used by Lord Templeman in *Preston*, and he also relies, for example, upon the words of Bingham L.J. and Judge J. in *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd. and Others*(1) [1990] 1 WLR 1545, at pages 1570 and 1573. Bingham L.J. stressed that it would not be(2):

D > " ... fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation."

Judge J. said that(3):

> "Abuse of power may take the form of unfairness. This is not mere 'unfairness' in the general sense. Even if 'unfair', efficient performance E of the statutory obligations imposed on the revenue will not, of itself, amount to an abuse of power."

It should, however, in my judgment be noted that both *Preston* and *MFK* dealt with instances of agreement or assurances as to the actual tax F treatment of those involved and not the enforcement or non-enforcement of regulatory time-limits. I heed, of course, the force of the words used but must apply them sensibly in the context of the present case.

The question is upon which side of the line the present cases fall? Are the applicants to be excluded from relief because they cannot bring themG selves within Lord Templeman's strict words or are they within those principles entitled to similar treatment to that suggested by Lord Donaldson M.R. in *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.*(4) case referring first to Lord Fraser of Tullybelton's speech in *Attorney-General of Hong Kong* v. *Ng Yuen Shiu*(5):

H > "'When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, *so long as implementation does not interfere with its statutory duty*' (my emphasis).

> I do not attach any importance to the use of the word 'promise'. It suffices that the public authority has, on a reasonable consideration of I its words or past conduct, led the complainant to believe that it will continue to act in a particular way unless and until it gives notice to the

(1) 62 TC 607. (2) *Ibid*, at page 644D/E. (3) *Ibid*, at page 647F/G.
(4) [1994] 2 LRC 414. (5) [1983] 2 AC 629.

contrary. But it has also to be said, as it was said by Bingham L.J. in *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd.* [1990] 1 WLR 1545, 1569G, that the 'promise' or words and/or conduct must indicate an intention to act in a particular way clearly, unambiguously and without any relevant qualification. This is particularly important when assessing past conduct. For example, if a Local Authority grants all of a batch of applications for taxi licences, it is not an indication, clearly or unambiguously or at all, that it will grant all or any of some future applications. Circumstances may have changed or the future applications may lack merits comparable with those of the earlier applications. Where I venture to think that Bingham L.J.'s judgment may be misunderstood is when at page 1569H he said: 'If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness'. This is plainly right, but there is a risk that it may be read as importing into the public law concepts of private law. A similar caveat needs to be entered in relation to Lord Templeman's speech in *Regina* v. *Inland Revenue Commissioners* ex parte *Preston* [1985] AC 835, 866H–876B. The test in public law is fairness, not an adaptation of the law of contract or estoppel."

There must be a "clear representation" as Steyn L.J. stressed in that same case, page 83. But fairness amounting to an abuse of power in the circumstances of a particular case, bearing in mind the nature of the statutory provision, is at the root of the matter.

I have come firmly to the conclusion that in the present case Mr. Venables' argument prevails. Both orally and in writing he and Mr. Moses have clearly put the opposing arguments. If I do not do justice to all that has been written, it can be seen by any Court dealing with this case in the careful written submissions of counsel. Oral argument followed closely that which was set out for the Court's assistance.

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 Ltd.* v. *Inland Revenue Commissioners*[1] [1994] STC 272, be a matter of impression. I believe that a jury of reasonable men and women would be per-

[1] 66 TC 587.

A suaded 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 Respondents assert 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 B 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.

The matter does not, however, end there, although my judgment upon that issue does dispose of the case. For good measure I am also persuaded C that if the breaches of the time-limit could be relied upon at all, it would have been wholly unreasonable for the Revenue not to have exercised its discretion to enlarge time in all these cases.

I have already indicated that everybody accepts that such a discretion D exists. Its implementation is covered by Revenue Company Taxation Instructions (see RB1, page 282, bundle 5). It is true that the instruction indicates that " ... claims to loss relief made after the statutory time limit should normally be refused" but the instruction continues:

> "Special consideration should however be given to cases falling within any of the following categories:—
>
> E
>
> (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 F its agents being told that the claim should be put in proper form."

By the time that these claims were refused, the claims were in fact clearly made in the relevant tax computations, albeit outside the recommended period of time set out in the instructions. Furthermore, I certainly accept that the applicants did believe that their questionnaires adequately enshrined their G claims and that the time point would not be taken. Otherwise, surely they would have "shown their working" or made a simple statement of claim.

It should in this context and generally be noted that it is a feature of the case that the correspondence and minutes all show that the Unilever group's relationship and co-operation with the Revenue were plainly good and cor- H dial. Mr. Tinsley has been involved for many years with the Revenue and, for example, it can be seen from the minutes of a meeting held on 15 January 1992 (page 272, bundle 5) that Mr. Tinsley told Mr. Fisher that he did believe that there had in fact been adequate notification of claim and that the *Gallic Leasing Ltd.* v. *Coburn*[1] case supported that belief. Mr. Fisher disagreed and said that he had " ... some personal sympathy with Unilever's I position, but at the end of the day, they had overlooked the need to claim, and this is an area where the Revenue maintains a consistent line". The latter contention seems hard to justify even on the Revenue's figures for

(1) 64 TC 399.

cases where the time-limits were not enforced over the period of 20 years of co-operation.

In these circumstances, I do not believe that the jury of reasonable men and women to whom I have already referred would find otherwise than I do, namely that failure to exercise discretion in these cases was anything other than unreasonable to the point of irrationality. If any prejudice at all was evidenced, another conclusion might be possible. But, as I have said perhaps too often, there is no prejudice to the Revenue, and an unjust burden would fall upon the applicants because of breaches of a regulatory time-limit should discretion not be exercised in their favour. I can truly see no reason why discretion should not be exercised in favour of the applicants. Thus, the decision was truly irrational.

As soon as the Revenue gave notice in 1992 of insistence upon the time-limit, of course the situation was in an instant for the future changed. But I am unable to see anything other than unfairness should the applicants' claim fail on the central issue or should discretion not be exercised in their favour. Abuse of power and irrationality are of course colourable and unpleasant labels. But they are the labels which the law has developed and which apply, in my judgment, in this case. They do not connote any bad faith as such, and I hope that my decision will not harm the long-term co-operation which happily existed between taxpayer and Revenue in this case.

In all the circumstances I must, however, allow these applications. The relevant relief will now be discussed with counsel.

Applications allowed, with costs.

The Crown's appeal was heard in the Court of Appeal (Sir Thomas Bingham M.R., Simon Brown and Hutchison L.JJ.) on 29 and 30 January 1996 when judgment was reserved. On 13 February 1996 judgment was given unanimously against the Crown, with costs. Leave to appeal to the House of Lords was refused.

Alan Moses Q.C. and Rabinder Singh for the Crown.

Robert Venables Q.C., James Kessler and Amanda Hardy for the taxpayers.

The following cases were cited in oral argument in addition to the cases referred to in the judgment:—*Regina* v. *Commissioners of Inland Revenue* ex parte *National Federation of Self-employed and Small Businesses Ltd.* 55 TC 133; [1982] AC 617; *Regina* v. *Secretary of State for the Home Department* ex parte *Brind and Others* [1991] 1 AC 696; *Central Estates (Belgravia) Ltd.* v. *Woolgar (No. 2)* [1972] 2 All ER 610; *Caffoor & Others* v. *Commissioner of Income Tax, Colombo* [1961] AC 584; *Amalgamated Investment & Property Co. Ltd.* v. *Commerce International Bank Ltd.* [1982] QB 84; *Hiscox* v. *Outhwaite* [1992] 1 AC 562.

The following cases were referred to in the skeleton argument but not cited in oral argument:—*Regina* v. *Attorney General* (ex parte *Imperial Chemical Industries PLC*) 60 TC 1; [1987] 1 CMLR 72, *Regina* v. *Commissioners of Inland Revenue* ex parte *S. G. Warburg & Co. Ltd.* TC Leaflet 3398; [1994] STC 518, *Regina* v. *Devon County Council* ex parte *Baker & Another* [1995] 1 All ER 73, *In Re Findlay* [1985] AC 318; *Regina* v. *Secretary of State for Transport* ex parte *Richmond-Upon-Thames London Borough Council and Others* [1994] 1 WLR 74; *Woodhouse A.C. Israel Cocoa Ltd.* v. *Nigerian Produce Marketing Co. Ltd.* [1972] AC 741; *Allied Marine Transport Ltd.* v. *Vale Do Rio Doce Navegacao (The Leonidas)* [1985] 1 WLR 925; *British Oxygen Co. Ltd.* v. *Minister of Technology* [1971] AC 610; *Regina* v. *Ministry of Agriculture Fisheries and Food* ex parte *Hamble (Offshore) Fisheries Ltd.* [1995] 2 All ER 714; *Wells and Others* v. *Minister of Housing and Local Government & Another* [1967] 1 WLR 1000.

Sir Thomas Bingham M.R.:—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 the Income and Corporation Taxes Act 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 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 Income and Corporation Taxes Act 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 s 1(1) of The Taxes Management Act 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 s 393A(10) of the Income and Corporation Taxes Act 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 s 1 of the Taxes Management Act 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 J. of Cluny, 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(1).

I

In *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.* Lord Templeman observed(2):

> "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 1960's 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

(1) Pages 208–220 *ante*. (2) [1994] 2 LRC 414, at page 430.

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 £24.75m) 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 s 393(11) of the Income and Corporation Taxes Act 1988 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 1,247 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 (£4.1m out of a total of £16.6m. If the calculation is made starting in 1979, set-off losses notified after 2 years represented 36 per cent. of all set-off losses). From the late 1960's 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 £17m.

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 Ltd.) 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 I 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 I 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 s 393(2) of the Income and Corporation Taxes Act 1988 to set off trading losses against Sch 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 Q.C., for Unilever, contended that a claim for loss relief sufficient to satisfy s 393(2) of the Income and Corporation Taxes Act 1988 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 page 846f([1])) 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 Ltd.* v. *Coburn*([2]) [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 s 393(2) and (11) of the Income and Corporation Taxes Act 1988 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 s 393(2) by delivering the completed schedules.

IV

The Judge summarised his first and main ground for granting Unilever relief, at pages 852h to 853b([3]) 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*([4]) 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.

([1]) [1994] STC 841. ([2]) 64 TC 399.
([3]) [1994] STC 841; Pages 218F–219B *ante*. ([4]) 59 TC 1.

A 3. Abuse of power can, as Lord Mustill indicated in *Matrix-Securities Ltd.* v. *IRC*[1] [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 B 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 C the facts of this case."

Mr. Alan Moses Q.C., 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:

D (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 E 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 *Regina* v. *Inland Revenue Commissioners* ex parte *MFK Underwriting Agents Ltd. and Others*[2] [1990] 1 WLR 1545 before it could be held unfair for the Revenue F to do their 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.

G (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 they had done so knowingly. They could not acquiesce in or waive any non-compliance of which they 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 H 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*[3] at page 1573B, *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 inconsis- I tency prejudicial to the taxpayer (c.f. *HTV Ltd.* v. *Price Commission* [1976] ICR 170). The "court cannot in the absence of exceptional circumstances decide to be unfair that which the commissioners by taking action against the

(1) 66 TC 587. (2) 62 TC 607. (3) [1990] 1 WLR 1545.

taxpayer have determined to be fair" (*Regina* v. *Inland Revenue Commissioners* ex parte *Preston*[1] [1985] AC 835 at page 864E, *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 s 42(5) of the Taxes Management Act 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 1960's 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,

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[1] 59 TC 1.

A "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 B 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 C 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" computa- D tions 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 1970's or early 1980's and a claim disallowed at that time, there would have been a loss to Unilever. But the loss would have been minimal com- E pared 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 £17m additional tax to the Crown. If this tax is due it can F 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 con- G sider 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.

H

In my opinion the Judge's conclusion was correct.

V

As the Judge pointed out, his decision on the foregoing issue was, if cor- I rect, 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 their 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 exerciseable 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.

Simon Brown L.J.:—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.

A 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 B quantum subsumed the value of their claims, they did not in fact alert the Revenue to these matters. *Gallic Leasing Ltd.* v. *Coburn*(1) [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 identi- C fied or identifiable profits for an identified accounting period"—*per* Lord Oliver, at page 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 Q.C. submits that in the absence (here acknowledged) of bad D faith or improper motive the Revenue cannot in law properly be found guilty of abuse of power unless the taxpayer established 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 con- E cerned (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 *Regina* v. *Inland Revenue Commissioners* ex parte *MFK Underwriting Agents Ltd. and Others*(2) [1990] 1 F WLR 1545, *Regina* v. *Jockey Club* ex parte *RAM Racecourses Ltd.* [1993] 2 All ER 225, and *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.*

Such a claim, Mr. Moses submits and I would accept, Unilever cannot here make good: the fundamental requirement for an unqualified and unam- G biguous 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.

H 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 *Regina* v. *Inland Revenue Commissioners* ex parte *Preston*(3) [1985] AC 835, at page 864E: I

"... the Commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes. And if the Commissioners

(1) 64 TC 399. (2) 62 TC 607. (3) 59 TC 1.

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." A

And then, at page 866G:

"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 ... " B C

That essentially was the approach of the Divisional Court in *MFK* and in turn of the House of Lords in *Regina* 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*[1], "mere 'unfairness' in the general sense". D E

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 *Regina* v. *Secretary of State for Education* ex parte *London Borough of Southwark* [1995] ELR 308, at 320: F G

"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 H I

(1) [1990] 1 WLR 1545, at page 1573B; 62 TC 607, at page 647G.

A 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 transpos-
B able 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.
C 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
D *Wednesbury*[1] 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 *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] AC 374, at page 410G. The flexibility necessarily inherent in that guiding principle should not be
E 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
F 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 M.R., said in *Regina* v. *Independent Television Commission* ex parte *TSW Broadcasting Ltd.*: "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
G 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
H 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.

I

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

(1) [1948] 1 KB 223.

within a stipulated time limit will be strictly penalised, even when repeatedly overlooked in the past—see for example *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] QB 529 with regard to late payment of charterparty 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 *Regina* v. *Tower Hamlets London Borough Council* ex parte *Chetnik Developments Ltd.* [1988] AC 858 and *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners*(1) [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

(1) 65 TC 265.

A 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
B 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
C 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
D s 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 s 393(11)'s continuing skeletal form—rather surprisingly not fleshed out by the Revenue's exercise of their s 42(5) power—one can
E readily see that in the absence of an agreed scheme of close co-operation 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 Q.C. resisted the temptation to urge that this provision should be regarded as directory
F 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 arrange-
G ments 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.

H 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
I 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 31 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 J. of Cluny, 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.

Hutchison L.J.:—I have had the opportunity of considering in draft the judgments of the Master of the Rolls and Simon Brown L.J. 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.

Sir Thomas Bingham M.R.:—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

A 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.

B *Appeal dismissed, with costs. Leave to appeal refused.*

[Solicitors:—Solicitor of Inland Revenue; Messrs. Beachcroft Stanleys.]