IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ORDER OF MR JUSTICE PARKER

No CHRVF 98/0263/3

Royal Courts of Justice
Strand
London WC2

Friday, 23rd October 1998

B e f o r e:

LORD JUSTICE KENNEDY

LORD JUSTICE ALDOUS

LORD JUSTICE POTTER

- - - - - -

HURLEY

- v -

TAYLOR (HM INSPECTOR OF TAXES)

- - - - - -

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MR J MUNBY QC (Instructed by Solicitor for Inland Revenue) appeared on behalf of the Appellant

MR R ARGLES (Instructed by Messrs T G Baynes of Orpington, Kent) appeared on behalf of the Respondent

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J U D G M E N T
(As Approved by the Court)

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LORD JUSTICE KENNEDY: I will ask Lord Justice Aldous to give the first judgment.

LORD JUSTICE ALDOUS: The Revenue appeals against the judgment and order of Park J of 20th January 1998 and the taxpayer, Mr Anthony Cornelius Hurley, cross-appeals.

The appeal and the cross-appeal concern assessments raised by the Revenue in respect of income from the taxpayer's businesses for the years 1983/84 to 1992/93 inclusive. The taxpayer appealed to the General Commissioners against those assessments to income tax under clause I of schedule D and class 4 National Insurance contributions in respect of profits as a general dealer and in respect of a solarium business, car sales business and against assessments under clause VI of schedule D on profits from furnished lettings. The Commissioners allowed the appeal in respect of the assessments as a general dealer and in certain other aspects, but upheld in part the other assessments. The taxpayer was dissatisfied and requested the General Commissioners to state a case for the opinion of the High Court. They did. The matter came before Park J by way of that case stated. He held that the Commissioners had in part erred in law and remitted the matter back to be considered in the light of his judgment.

Pursuant to Section 34 (1) of the Taxes Management Act 1970, an assessment of tax can be made at any time, not later than six years after the end of a chargeable period to which the assessment relates. Such assessments relate to what can be conveniently called the in-time years. Section 50 (6) of the 1970 Act enables the Commissioners on appeal if it appears to them "that the appellant is overcharged by any assessment", to reduce it accordingly, "but otherwise such assessment shall stand good". It follows that a taxpayer can challenge an in-time assessment, but
when doing so has the burden of establishing that he has been
overcharged.

Section 36 (1) of the 1970 Act enables the Revenue to raise assessments outside the six year period laid down for in-date assessments. Such assessments are conveniently referred to as extended time assessments. They have to be made not later than twenty years after the end of the chargeable period to which the assessment relates and can only be made "for the purpose of making good to the Crown a loss of tax attributable to his [the taxpayer's] fraudulent or negligent conduct". It is accepted that when considering an extended time assessment, the burden of proof is on the Revenue to establish loss of tax due to fraudulent or negligent conduct.

Pursuant to Section 56 (6) of the Act an appeal to the High Court by way of case stated is limited to questions of law. The case for the taxpayer against the Commissioner's findings on the in-date assessments was that they were perverse in the sense that the conclusions of fact were such that no reasonable body of Commissioners could have reached the conclusion that they did. If established that amounts to an error of law (see Edwards (HM Inspector of Taxes v Bairstow and Harrison (1956) AC 14. That
authority establishes that to succeed it must be shown that the Commissioners acted in what is now called a Wednesbury unreasonable manner. In this case the judge held that the taxpayer could not surmount the heavy burden of establishing that the findings of fact were perverse or as I will refer to it as Wednesbury unreasonable.

As to the Commissioner's conclusion on the extended time assessments, the judge held that the Revenue had failed to discharge the onus on them or, if they had, he held that the decision of the Commissioners was Wednesbury unreasonable. He therefore allowed the appeal in relation to the extended time assessments and referred the matter back to the Commissioners for further consideration in the light of his judgment.

The facts were fully set out in the case stated [1998] STC at p204-212. Therefore I need not repeat

them. It is sufficient for me

to adopt this summary from the judge's judgment:

> "Mr Hurley, the taxpayer, is now in his mid-40s. He lives in Bromley. In the years in question he owned two fairly small businesses: a solarium business in Sidcup and a motor-dealing business which he conducted from home. He also received some income from lettings of properties. The customers of the solarium business usually paid in cash, and a lot of the dealings in the motor business were likewise transacted in cash. He produced audited accounts for both businesses, but he had no reliable record-keeping system.
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> The Revenue had investigated Mr Hurley's tax affairs in 1987, and a small settlement resulted. In (I think) 1991 a more substantial investigation commenced, and developed into a full-scale back duty inquiry. I have the impression that the Revenue were prompted to investigate Mr Hurley's tax affairs by information which they had obtained or statements which had been made to them in another investigation of a former friend of his, a Mr Stringer.
>
> At all events the Revenue drew up capital statements for Mr Hurley for the years from August 1982 to August 1992. Taking all the years together the figures as calculated by the Revenue produced a deficiency of over £160,000. The three largest contributions to it arose as follows.
>
> (i) In April 1986 Mr Hurley bought 5 Addison Road, Bromley. He moved there with his family and I think that he lives there still. The purchase price was £74,000 of which Mr Hurley borrowed £50,000 from Western Trust and Savings Ltd. So allowing for costs he must have put up more than £24,000 himself. Where did that money come from?
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> (ii) In October 1982 Mr Hurley bought 117 Amblecote Road, London, SE12. This property has always been let. As far as I know Mr Hurley still owns it. The price was £110,000, of which Mr Hurley borrowed £70,000 from Skandia Trust. So he produced over £40,000 from other sources. Where did that money come from?
>
> (iii) Two years later Skandia Trust required him to repay the loan for 117 Amblecote Road because, contrary to the conditions of the loan, he had let the property instead of living there. The repayment, with costs and accrued interest, cost £72,055. Where did that money come from?"

The taxpayer did not accept all the figures in the capital statement which showed a discrepancy exceeding about £164,000 and I shall have to deal with a number of matters relating to them later in this judgment. However he accepted that there was a substantial deficiency. That he said was made

up from loans from a Mr Stringer and his father Mr Cornelius Hurley. The Commissioners held that Mr Stringer had lent the taxpayer about £72,000 which had not been repaid, but did not accept the evidence of the taxpayer that his father had lent him about £118,000 of which about £54,000 had been repaid. The Commissioners found that in total about £36,000 had been lent to the taxpayer by his father of which just over £15,000 had been repaid. It was on that basis that they upheld the extended time assessments.

It was the Revenue's case that there was a discrepancy shown by the capital statements and that the explanation given by the taxpayer that he had received loans was not credible. In particular, the Revenue did not accept that the taxpayer's father had sufficient funds to provide the loans claimed. To meet that case the taxpayer gave evidence. His father, Mr Cornelius Hurley, had died before the hearing before the Commissioners and therefore could not give evidence. He had made a statement dated 4th December 1992 stating that he had been in possession of funds. That statement also confirmed certain loans and repayments. The taxpayer gave evidence of additional loans to those mentioned in the 4th December statement. To show that his father had sufficient money to fund the loans, the taxpayer also gave evidence as to sources amounting to over £123,000 from which the loans were funded. The Commissioners held that the taxpayer was not a credible witness and did not accept that Mr Cornelius Hurley had accumulated over £123,000 from which he could provide loans of £118,000 to the taxpayer.

Before the judge the taxpayer submitted that the Commissioners had failed to take into account a statement by Mr Cornelius Hurley dated 13th January 1994 in which he dealt at length with the loans that he had made and where the money came from. It followed, the taxpayer submitted, that the case should be remitted back to the Commissioners for further consideration in the light of the statement. The Revenue asserted and gave evidence to the effect that the statement of 13th January 1994 had not been put before the Commissioners and they submitted that it was now too late to do so. Affidavit

evidence was adduced by Mr Hurley and on behalf of the Revenue as to whether the statement was before the Commissioners. The judge said at page 224 A:

> "In the event I am now wholly satisfied that Mr Hurley did not read his father's statement to the commissioners. I do not suggest for a moment that he attempted to mislead me by his affidavit. He was mistaken. I believe that I know exactly how the mistake arose: Mr Hurley did read two other documents to the commissioners. One was a statement by his father on another matter to do with Mr Stringer, and the other was the part of Mr Argles' written submission which was directed to where the father got the money from.
>
> I confess that I have felt tempted to remit the case to the commissioners for the father's statement to be tendered to them in order that they can, if they think fit reconsider their decision in the light of it. I believe that if Mr Argles had been appearing for Mr Hurley at the relevant time the statement would have been put in, and that it was only because of Mr Hurley's lay inexperience that it was not.
>
> However, I have decided that it would be wrong for me to remit the matter in this way. There is a lot of authority that, if either party before the commissioners does not adduce some item of evidence, it would be an incorrect exercise of discretion for the High Court to give him a second chance. The cases include R A Bird & Co v IRC 1925 SC 186 at 191, 12 TC 785 at 794-795 per the Lord President (Clyde), Murphy (Inspector of Taxes) v Australian Machinery and Investment Co Ltd (Assessed in the name of De Bernales as agent) (1947) 30 TC 244 at 260 per Tucker LJ, Bradshaw v Blunden (Inspector of Taxes) (No 2) (1960) 39 TC 73 at 80 per Pennycuick J, Yuill v Wilson (Inspector of Taxes) [1980] STC 460 at 470-471, [1980] 1 WLR 910 at 920-921 per Lord Edmund-Davies in the House of Lords, and Kingsley v Billingham (Inspector of Taxes) [1992] STC 132 at 138 per Knox J. The present case may be a particularly hard one, given the exceptional circumstances in which the father's statement was not put in, but hard cases make bad law and I must resist the temptation to depart from the general principle laid down by the authorities to which I have referred."

Mr Argles who appeared for the taxpayer submitted that upon the evidence before the judge the statement of 13th January 1994 had been introduced into evidence before the Commissioners. He relied in particular on a document recording the notes that Mr Kelly, an inspector of taxes, had made during the proceedings before the Commissioners. In my judgment that submission of Mr Argles cannot be accepted. There is no mention in the note of Mr Kelly of a statement of 13th January 1994. Further, his notes are consistent and only consistent with the evidence that Mr Kelly gave, namely that

the statement was not introduced into evidence. The statement of 13th January 1994 was, in my view, so important that everybody would have remembered it. In particular, Mr Hurley would have referred to it during his evidence and in cross-examination if it had been before the court. He did not. The conclusion is supplied by paragraph 6 of the case stated which recorded the documents before the Commissioners made clear that it was not in evidence. There was, in my view, ample evidence for the judge to conclude as he did.

Mr Argles accepted that, as a general rule, a party who does not adduce an item of evidence will not normally be allowed by the High Court a second chance. However that general rule was, he submitted, subject to exceptions. To support that submission he referred us to the judgment of the Lord President, Lord

Clyde in R A Bird and Co v Commissioners of Inland Revenue [1924] 12 TC 785 at 795. There Lord Clyde said:

> "No doubt, if there has been misunderstanding, we would strain a point to put that right; and if the Commissioners had failed to include or to allude sufficiently to some topic that was brought before them by way of evidence we should remit to put that right."

Pennycuick J in Bradshaw v Blunden (HM Inspector of Taxes) (No 2) [1960] 39 TC 73 at 80 made a similar observation. He said:

> "It is a well-established and salutary rule that the parties to an appeal to the Court should not, in the absence of special circumstances, be enabled to go back to the Commissioners and call fresh evidence on issues which were raised in the original proceedings and as to which they had full opportunity of calling such evidence as they might be advised (see per Tucker LJ in the case of Murphy v Australian Machinery & Investment Co Ltd 30 TC 244 at page 260)."

To similar effect was the statement by Knox J in Kingsley v Billingham (HM Inspector of Taxes) [1992] STC 132 at 138:

> "There is nearly always a possibility that not all the evidence which can be produced has been produced, but there is a strong presumption in the administration of the law that the parties must bring forward the whole of their case at time of trial, and once a case has been decided unless there are compelling reasons to the contrary it should not be reopened."

Mr Argles submitted that the statement of Mr Cornelius Hurley of 13th January 1994 should be admitted at this stage as it was the proof of evidence that he would have given if he had survived. He also submitted we should take into account the fact that the taxpayer was at the hearing acting in person and was understandably disturbed at the death of his father. Further, the appeal before the Commissioners involved a large body of documentation raising a considerable number of complicated issues. Also when Mr Kelly's notes were considered it was not surprising that the taxpayer had made a mistake in the context of what was going on. This was, he submitted, a case where there was a "misunderstanding" of the type referred to by Lord Clyde.

I have considerable sympathy with any taxpayer who acts in person in a case such as this where there were complicated issues to be considered. However I do not believe that that is enough to excuse the failure to introduce a piece of evidence like this statement. The taxpayer knew that the loans from his father were a central issue in the case; perhaps the most important issue. The judge considered the facts and the law and his exercise of his discretion cannot be faulted. The submission of Mr Argles that we should admit the statement of 13th January and remit the case back for further consideration by the Commissioners in the light of that statement must be rejected.

I, therefore, go on to consider the appeal and cross-appeal.

The Appeal

The judge set out in his judgment seven propositions of law. He said at page 219 D:

> "I will first set out certain propositions of law, and then I will relate them to the facts of the case. My propositions of law are as follows.
>
> 1. By s 36 (1) of the Taxes Management Act 1970 an assessment to income tax can be made on a person outside the normal six years period (but subject to a maximum 20 years cut-off) `for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct`.

2. This requires the Revenue to show: (1) fraudulent or negligent conduct by the taxpayer; and (2) a loss of tax attributable to it.

3. On appeal to the commissioners the burden rests on the Revenue of establishing para 2 (1) and (2). If they do not discharge the burden the appeal should be allowed (see eg Hillenbrand v IRC (1966) 42 TC 617 at 623 per the Lord President (Clyde)). I will call this `the s 36 burden'.

4. The burden does not rest on the Revenue to any greater extent than the s 36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s 36. From then on s 50 (6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer to establish that the assessment is wrong (see eg Johnson v Scott (Inspector of Taxes) [1978] STC 48 at 53).

5. Reverting to the s 36 burden which rests on the Revenue, it may or may not be discharged simply by capital statements which show deficiencies. Whether it is so discharged or not depends on whether the taxpayer tenders any explanation of the deficiencies, and if he does, on how the commissioners view his explanation. In this context there is a difference between (i) the commissioners rejecting the explanation, and (ii) the commissioners not accepting the explanation.

Normally it makes no difference whether a tribunal says that it rejects some item of evidence or that it does not accept it, and the two expressions are often used indiscriminately. Where, however, the burden of proof is in issue the distinction between them can be important.

6. To be precise about a case where the Revenue produce and prove capital statements which show deficiencies:

6.1 If the taxpayer advances no explanation for the deficiencies the capital statements by themselves can, and usually do, discharge the s 36 burden (see Hudson v Humbles (Inspector of Taxes) (1965) 42 TC 380 at 386 per Pennycuick J, James v Pope (Inspector of Taxes) (1972) 48 TC 142 at 150 per Ungoed-Thomas J).

6.2 If the taxpayer advances an explanation but the commissioners reject it (that is, they positively disbelieve it) the capital statements by themselves can, and usually do, discharge the s 36 burden. Commissioners often have cases where the taxpayer gives evidence seeking to explain the deficiencies by reference to betting winnings. The commissioners listen to the evidence, including the cross-examination, and in many cases they reject it: they find it to be untrue. That, taken with capital statements which show deficiencies, is enough for the Revenue to discharge the s 36 burden. This judgment should not be understood as indicating that in my view whenever a taxpayer alleges that he won money by betting, the Revenue must produce specific evidence that he did not.

> What I have said in the above paragraph is subject to 7.1 below.
>
> 6.3 If the taxpayer advances an explanation but the commissioners, while not rejecting it, do not accept it either (that is, they are not satisfied on the balance of probabilities that it is untrue, but they are not satisfied on the balance of probabilities that it is true either - they are uncertain either way) the capital statements by themselves are not sufficient for the Revenue to discharge the s 36 burden. What I have said in this paragraph is subject to para 7.2 below.
>
> 7.1 If the commissioners reject the taxpayer's explanation and therefore conclude that the capital statements are themselves sufficient for the Revenue to discharge the s 36 burden, their decision may be challenged by the taxpayer on appeal to the High Court but only on the Edwards v Bairstow ground that a decision positively rejecting the explanation (as opposed to one merely not accepting it) was one which no reasonable body of commissioners could possibly reach.
>
> 7.2 If the commissioners, while not accepting the taxpayer's explanation, do not reject it either and therefore conclude that the capital statements are not themselves sufficient for the Revenue to discharge the s 36 burden, their decision may be challenged by the Revenue on appeal to the High Court, but only on the Edwards v Bairstow ground that a decision positively rejecting the explanation (as opposed to one merely not accepting it) was the only one which a reasonable body of commissioners could reach."

For myself I would accept those propositions in their entirety, in the context of this case, save for the third sentence in proposition 5, proposition 6.3 and the emphasis on the word "rejection" in proposition 7.2. At this stage in my judgment it is sufficient to outline why I do not accept those parts of the propositions as correctly stating general propositions of law. A conclusion by the Commissioners that they are unable to decide whether the taxpayer's explanation is true or false has the result that the explanation carries no weight. It follows that if the evidence as to the way the capital statements have been calculated and the statements themselves are convincing, the Commissioners could conclude that the Revenue had discharged the onus placed upon them by s 36 of the 1970 Act. In any proceeding the evidential onus can shift. For the extended time assessments, the statutory onus is placed on the Revenue. They sought to discharge it using capital statements and surrounding circumstances. That could, as the judge stated, be sufficient to discharge the onus in the absence of any acceptable

explanation. Whether the explanation was sufficient and whether the capital statements were sufficient was for the commissioners to decide.

The case advanced by the Revenue, as accepted by the Commissioners, was set out in 11.1 of the case stated. It is in this form:

> "The commissioners considered the oral and documentary evidence and the contentions of the taxpayer and the inspector. Their findings and reasoning are given below.
>
> (1) They found the accounts submitted to the Revenue by the taxpayer to be unreliable because of the deficiencies in the primary records. Although the car sales business was mainly conducted in cash, there was no written record of sales and some expenses were estimated. There was no separate record of takings for the Sundays solarium for the year ended 31 August 1989 and the takings figure was based on the total bankings. The commissioners had no evidence that the records maintained changed materially in other years although the taxpayer told them daily record sheets were introduced after value added tax registration. The exercise book in which the rents received were said to be recorded was not produced to the commissioners and they were not satisfied that the photocopy of the schedule of rents said to have been received was correct. They found that there could be receipts from the Sundays solarium, car sales and furnished lettings omitted from the accounts submitted to the Revenue. They preferred to base the assessments on the capital statements prepared by Miss T Bradshaw. The capital statements contained some estimates for bank balances in the absence of details not supplied by the taxpayer. The estimated figures were not challenged by the taxpayer. The personal and private expenditure of the taxpayer had been agreed between the parties at £10,819 for the year ended 31 August 1992. For each of the years ended 31 August from 31 August 1983 to 31 August 1991, the taxpayer's personal and private expenditure in the capital statements was estimated, scaling back by reference to the retail prices index the figure agreed for the year ended 31 August 1992. The taxpayer did not challenge those estimated figures and was unable to offer any evidence of any changes in the pattern of his personal and private expenditure to reflect any changes in his personal circumstances. In some years the capital statements showed expenditure in excess of income declared. The commissioners were not satisfied with all the taxpayer's explanations of how the excess expenditure had been financed. To the extent that the capital statements showed deficiencies resulting from capital growth and expenditure in excess of income declared and loans which the commissioners found to have been made to the taxpayer, the commissioners inferred that the taxpayer's accounts under declared his income. The commissioners found that the taxpayer had been guilty of fraudulent or negligent conduct and that the inspector was justified in making assessments under the provisions of s 36 of the Taxes

> Management Act 1970 for the years of assessment 1983-84, 1984-85, 1985-86 and 1986-87."

Paragraphs 11.2 and 11.3 set out the reasons why the Commissioners were not satisfied with all the taxpayer's explanations of how the excess expenditure was financed. In paragraph 11.2 the Commissioners set out their reasons for accepting that Mr Stringer had lent about £72,000 to the taxpayer. Paragraph 11.3 dealt with the evidence as to the loans said to have been made to the taxpayer by his father. The conclusion reached was -

> "The Commissioners did not accept that Cornelius Hurley had accumulated, over the years, £123,000 from which to provide loans to the taxpayer of £118,496.81."

They also did not accept all the evidence of the taxpayer as to

where his father obtained the funds said to have financed the loans. They went on to find that certain loans had been made between 1982 and 1991 totalling just under £36,000.

Having read part of paragraph 11.1 of the case stated, the judge came to his reasons for allowing the appeal. He said:

> "(e) Working backwards through this passage, the finding of fraudulent or negligent conduct is based on the inference that Mr Hurley's accounts under declared his income; the inference that he under-declared his income is drawn because the capital statements showed deficiencies; the capital statements showed deficiencies because the commissioners were `not satisfied' with all Mr Hurley's explanations of how the excess expenditure had been financed. What the commissioners mean (though they say it in a later paragraph which I examine in (g) to (k) below) is that they were not satisfied with his explanation that he borrowed money from his father. (They were satisfied with his further explanation that he borrowed money from Mr Stringer.)
>
> (f) I have no fault to find with this reasoning in so far as it is directed at the only question which arises for the in-date years: has Mr Hurley discharged the onus of showing that the assessments are wrong? But in my judgment the reasoning is not good enough if it is said also to be the route by which the Revenue satisfied the s 36 onus of showing that there was fraudulent or negligent conduct by Mr Hurley and that there was a loss of tax attributable to it. It would only be good enough for those purposes if (i) the commissioners positively rejected, ie disbelieved, Mr Hurley's explanation that he borrowed money from his father, and (ii) their decision to reject it was one which a reasonable body of commissioners could reach."

The judge concluded that the Revenue had not discharged the s 36 onus on them. Mr Munby QC, who appeared for the Revenue, submitted that the judge's distinction between non-acceptance and rejection was wrong in principle and fact. A finding that an explanation was not accepted meant that there was no proper explanation and, therefore, there was nothing to weigh against the prima facie case provided by the capital statements. In any case, the fine distinction sought to be drawn on the words was not apt when considering a case from the Commissioners. Further it was clear, reading the case stated as a whole, that the Commissioners had rejected, in the sense that the judge had used that word, that part of the taxpayer's explanation. Mr Argles supported the judge's conclusion.

In my judgment, the conclusion of the judge was erroneous for three reasons. First the distinction drawn by him between non-acceptance and rejection is artificial. A conclusion that a statement given in evidence as to what happened cannot be accepted means that the tribunal does not accept that what was said to have happened took place. Thus, the tribunal proceeds upon the basis that the event said to have happened did not take place. A conclusion that the evidence must be rejected may show the force of the tribunal's views, but the effect upon the factual matrix is the same. A finding that the tribunal did not accept that an event happened is
a conclusion there was no evidence which established on the balance of probabilities that it did take place.

Second the Commissioner accepted the capital statements and therefore without a cogent explanation the Revenue would discharge the s 36 onus on them. It follows that the statements raised a prima facie case which was not displaced by an explanation that was not accepted.

Third, I believe that the Commissioners at all times had in mind
where the onus lay. They were addressed on the subject for a

considerable period of time. The loans from the taxpayer's father and Mr Stringer were an essential element of the case. The Commissioners went further than deciding that they were uncertain as to whether the stated loans had been made by the taxpayer's father. The Commissioners held that the taxpayer had kept no records. There were no loan agreements and no interest paid. They did not accept the evidence as to the way Mr Cornelius Hurley came in to funds and specifically held that they did not accept that he had accumulated over the years just over £123,000 as was the case put forward by the taxpayer. They also concluded that they could not believe all the evidence of the taxpayer. From that they concluded that there were deficiencies shown in the capital statements which had been derived from undisclosed profits. They concluded that the failure to disclose was due to fraud or neglect. To my mind, reading the case stated as a whole, the Commissioners held that the capital statements established a prima facie case of underpayment due to fraud or neglect and the explanation given by the taxpayer as to loans had only displaced that prima facie case in part. Their conclusion was a finding of fact which could only be challenged if it was Wednesbury unreasonable.

The judge went on in his judgment to consider the submission that the finding of the Commissioners was Wednesbury unreasonable upon the assumption that the Commissioners had found positively that the father had not made the loans. He said at page 222:

> "If, however, it is said that the commissioners positively found that the father did not make loans of £118,000-odd - in other words that they positively rejected Mr Hurley's explanation as untrue - I believe that that is a finding which, on Edwards v Bairstow grounds, cannot stand. The commissioners did not consider that Mr Hurley was an inveterate liar: they accepted his evidence on the hotly contested issue of the Stringer loan. They accepted that the father made some loans to Mr Hurley, and loans of not insignificant amounts. An analysis of the case stated shows that most of the accepted loans must have been made in cash. Mr Hurley's case about how his father might have had enough money was not so implausible that it could not be true. The money was suggested to be made up of inheritances from the father's deceased mother and brother, savings from 40 years working in the London docks, compensation for an accident in the docks, and severance pay when the father relinquished employment with the National Dock Labour Board. None of those sources is inherently improbable, and an aggregate of £120,000 from them was perfectly possible. I agree that the commissioners did not have to accept that it had been proved that

> the £120,000 existed in the father's ownership; that is why Mr Hurley's appeal failed for the in-date years when the entire onus was on him. But I believe that the commissioners crossed the boundary of what they could legitimately conclude if they purported positively to find that the father never had the £120,000, and therefore the Revenue had discharged the s 36 burden of establishing that on the balance of probability Mr Hurley was guilty of fraudulent conduct."

The Commissioners are the fact-finding tribunal and the High Court cannot on appeal substitute its view for those of the Commissioners, even if it would come to a different conclusion from that which the Commissioners reached. The High Court can only interfere if there be an error of law and that means that the decision of the Commissioners must be held to be Wednesbury unreasonable.

In the present case the Commissioners saw and heard the witnesses and concluded that they did not accept the evidence of the taxpayer as to his sources of income. They preferred the evidence provided if by the capital statements. The existence of such evidence and the basis for the Commissioners' finding was recognised by the judge. However when he came to consider the extended time years, he appears to have decided that the allocation of the burden of proof transformed a case which was not appealable into one which was. The passages from his judgment which I have read are in my view a re-evaluation of the evidence which resulted in a substitution of the judge's views for those of the Commissioners. The Commissioners did not have to find that the taxpayer was an inveterate liar in order to disbelieve part of his evidence as to sources of income. The fact that the Commissioners believed that the taxpayer borrowed money from Mr Stringer and some money from his father does not make it perverse to conclude that he did not borrow from his father all the substantial sums which he said that he did. There was no need for the Commissioners to categorise as plausible or inherently improbable the evidence as to the sources of the father's income before coming to the conclusion that it had not been established that he had the money. That being so, it was open to them to come to the conclusion they did. Their decision was not in my view Wednesbury unreasonable.

The Cross-Appeal

Mr Argles submitted that in this case the Revenue had by its conduct assumed the entire burden of proof in justifying all the assessments under the appeal. Alternatively, he submitted, that the Revenue had by their conduct assumed the burden of proof showing that the capital statements were to be preferred and that the taxpayer's accounts were wrong. Those submissions were based on the fact that the Revenue had insisted, wrongly in Mr Argles' view, in opening the case before the Commissioners. That, he said, was the privilege of the person upon whom the burden of proof rested. Thus in this case the taxpayer should have been entitled to open his case on the in-date assessments and having been prevented from doing so the burden shifted to the Revenue.

To support his submission he referred us to Brady (HM Inspector of Taxes v Group Lotus Car Companies Plc and Lotus Cars Ltd [1987] 60 TC 359, and in particular a passage from the judgment of Mustill LJ at p 391. Having read that passage with care, I can find nothing in it which supports Mr Argles' submission. As stated by Mustill LJ, the statutory burden remains upon the person who has to bear that burden even though the evidential burden may shift.

It may be that the decision to allow the Revenue to open the whole

of the case was wrong. I will assume that it was although I am not convinced that the Commissioners did not rightly conclude that the matter was best opened by the Revenue. In my view they had the right to decide as they did. As appears from the General Commissioners (Jurisdiction and Procedures) Regulations 1994 which came into force on 1st September 1994, the Commissioners have a wide discretion. Regulation 15 (1) is in these terms:

> "(1) At the beginning of any proceedings the Tribunal shall, except where it considers it unnecessary to do so, explain the order of the proceedings which it proposes to adopt.
>
> (2) The Tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification and determination of the issues before it and generally to the just handling of the proceedings and, so far as appears to it appropriate, shall seek to avoid formality in

its procedure.

(3) The parties shall be heard in such order as the Tribunal shall determine and shall be entitled -

(a) to give evidence,

(b) to call witnesses,

(c) to question any witnesses including other parties who give evidence, and

(d) to address the Tribunal both on the evidence and generally on the subject matter of the proceedings."

I accept that at the relevant time those regulations were not in force. However I believe they reflect good practice of a body of Commissioners at the time. In my view the duty of the Commissioners was to ensure that there was a fair hearing and, in particular, the taxpayer knew what was put against him and that he had a proper opportunity to present his case. It seems that they gave him such an opportunity.

Whatever the decision as to who should open the case, it could not affect the burden of proof. The Commissioners had to decide the appeal before them according to the law. That meant that the 1970 Act, which laid down where the burden lies, had to be applied. If authority be needed for that, see the judgments in Jonas v Bamford (Inspector of Taxes) (1973) 51 TC 1 and Amis v Colls (Inspector of Taxes) (1960) 39 TC 148. I therefore do not accept, or should I say I reject, Mr Argles' submission on this matter.

Mr Argles also submitted that the decision of the Commissioners "that they prefer the capital statements" was Wednesbury unreasonable. He relied upon five matters. First that the figures for living expenses in the statement were demonstrably wrong. Second that the amount referred to as "drawings" could not in any reasonable view have formed part of the assumed income of the taxpayer. Third the Commissioners should have inferred that the Addison Road property was acquired out of profits made during the in-time years. The fourth and fifth matters related to computation. I shall

have to deal with each of those in turn.

The taxpayer started to live with his common law wife in November 1986 and from then she and their children became dependent on him. As stated in the case stated, his family consists of six children born during the period 1982 to 1992.

The conclusion of the Commissioners upon living expenses was contained in paragraph 11.1 of the case stated which I have already incorporated into this judgment. However for convenience I will repeat part of it:

> "The personal and private expenditure of the taxpayer had been agreed between the parties at £10,819 for the year ended 31 August 1992. For each of the years ended 31 August from 31 August 1983 to 31 August 1991, the taxpayer's personal and private expenditure in the capital statements was estimated, scaling back by reference to the retail prices index the figure agreed for the year ended 31 August 1992. The taxpayer did not challenge those estimated figures and was unable to offer any evidence of any changes in the pattern of his personal and private expenditure to reflect any changes in his personal circumstances."

Mr Argles rightly submitted that it was not right that the taxpayer had not challenged the estimated figures. He submitted that it was demonstrably wrong that there was no evidence of changes in the taxpayer's private and personal expenditure. The agreed figure for living expenses of just over £10,000 for 1992 could be a guide as to his expenses at the time when his wife was dependent on him, but his council tax, shopping, expenses and expenditure on clothes must have been different in the 1980s.

Mr Argles submitted, when, as in this case, there was demonstrably a change in personal circumstances a calculation using the

retail price index to produce yearly figures could not provide reliable figures. He submitted that once it was established that the personal circumstances of the taxpayer in 1992 were fundamentally different

to his personal circumstances prior to that date and in particular prior to November 1986, the burden rested on the Revenue to demonstrate that the estimated figures for the previous years were likely to be correct. That, he submitted, had not been done in this case. It was not reasonable or necessary to require the taxpayer to produce evidence that he had spent more or that he did not enjoy a more luxurious lifestyle in the years prior to August 1992. The burden was on the Revenue.

The burden was of course on the Revenue. However they asked for

details of his expenditure. He supplied it in 1992, but refused to do so for other years. He led no evidence that his expenses were less in the 1980s than in 1992. The fact that certain items of expenditure would be less in the 1980s than in 1992 does not mean that the total expenditure in any year was less. The Revenue therefore estimated the figure using the retail price index. That appears a reasonable thing to do in the absence of any other evidence.

The judge dealt with this matter at page 218 J:

> "The Revenue arrived at their figures for expenditure in two stages. First, they discussed and agreed with Mr Hurley the amount of his personal expenditure for the year to 31 August 1992. It was £10,819, and Mr Hurley signed the calculation that he accepted it. Second, for the nine previous years they scaled that figure back in proportion to the changes in the retail prices index. Mr Argles submitted that, because Mr Hurley had five children on 31 August 1992 whereas he had only one at the beginning of the years covered by the capital statements, his living expenses must have gone up by more than the increase in the retail prices index; therefore the commissioners should have scaled back from £10,819 by more than the changes in the index. In my view they might have done that, but they were not bound to. As Mr Carr (who appeared for the Revenue) pointed out, if a person's family gets bigger he may increase his expenditure, but equally he may change his style of life so as to keep his expenditure more or less constant. This was a matter for the commissioners, and I cannot see an error of law in their acceptance of the expenditure figures in the capital statements."

I accept the judge's reasoning that the Commissioners were entitled to conclude as they did. The Commissioners may have proceeded upon the misunderstanding that there had been no challenge to

the estimated figures. However there was no evidence that any change of circumstances would have resulted in a material difference in the estimated figures of the relevant years. That being so the Commissioners' conclusion was not so fatally flawed as to be Wednesbury unreasonable. I agree with the judge.

I can deal very shortly with Mr Argles' second and third attacks on the Commissioners' acceptance of the capital statements. Neither point was raised by the taxpayer at the extensive hearing before the Commissioners. I therefore cannot see that they can be faulted for not taking them into account. Certainly their conclusion cannot be said to be Wednesbury unreasonable.

I move on to the fourth attack which was based on computation. Mr Argles drew our attention to paragraph 12 of the case stated. He went on to consider the assessment of profits of the car sales business for the year 31st December 1988. He submitted that if it was reasonable for the surplus as of 31st August 1987 to be carried forward to produce the surplus as of August 1988, it was also reasonable for the surplus of 31st August 1989 which was £6,212 to be carried back to reduce the deficiency as at 31st August 1988. This, he submitted, would reduce the 1988 deficiency to nearly £29,000. It is quite clear from the case stated that the Commissioners decided not to do so. That was their decision. In my view it cannot be said that a reasonable body of Commissioners could not reasonably have come to that conclusion. In my view the way that they approached the matter cannot be said to be Wednesbury unreasonable.

The last and fifth attack also related to the capital statements. The assessments were determined and the amounts calculated not by reference to the surpluses recorded in the capital statements each year but by reference to the amounts returned by the respondent. Mr Argles submitted that if the capital statements were a reliable guide as had been held by the Commissioners, they should be a guideline for all the years under appeal and accordingly the assessments for these three years should be reduced

accordingly.

What actually happened is recorded in paragraph 14 of the case stated:

> "The commissioners' clerk wrote to the parties on 11th May 1996 setting out their findings and decisions given in paras 11, 12 and 13 [of the case stated]. Their clerk asked the parties to agree figures of assessment for each year under appeal on the basis of the commissioners' findings and decisions. As, after six weeks, the parties had not reported agreed figures of assessment to their clerk, the commissioners held a meeting on 26 July 1996 at which the taxpayer and the inspector were present. The inspector informed the commissioners that following their findings and decisions, the resulting assessments would be .... "

There is set out the figure. The case stated continued:

> "The taxpayer objected to the figures but only by saying that despite the inspector's explanation, he did not understand them. The commissioners determined the assessments in accordance with the figures set out above. Their clerk notified the parties in writing on 26 July 1996 of their final determination."

The question for this court is whether what they did was Wednesbury unreasonable. In my view it was not. They sent their decision to the parties. The Revenue came up with the figures and the taxpayer was given an opportunity to check them. He did so and did not comment. In those circumstances the decision they came to cannot be said to be Wednesbury unreasonable.

I come next to Mr Argles' submission that the conclusion reached on the in-date years was, as a whole, Wednesbury unreasonable. He submitted that no reasonable body of Commissioners could have concluded that the capital statements should be preferred. He submitted that, as a general proposition, the Commissioners' errors were due to their failure to pay sufficient regard to certain facts relating to the car sales business and the difference in the assessable profits of the solarium business for the years ending 1992 and 1990. He also submitted that their conclusions as to the facts were not right. There was, in his view, nothing inherently

implausible or improbable in the taxpayer's father inheriting money from his mother or brother which

might be lent to the appellant.

Also there was nothing improbable in the taxpayer's father receiving sums in respect of the accident he had as a dock worker. Further, he submitted that it was clearly not inherently implausible that he obtained the severance pay that was stated.

The judge was in my view right to reject a similar submission made to him. At page 217 of his judgment he said:

> "The Revenue proved their capital statements before the commissioners, leaving it to the commissioners to decide whether to accept Mr Hurley's explanations of where the extra money came from. There is ample authority that commissioners can uphold assessments based on properly prepared capital statements. Certainly for in-date years, and to some extent for extended time limit years as well (a matter which I address in the next part of this judgment), the Revenue do not need to back up capital statements by, for example, producing witnesses who say that they saw the taxpayer taking cash from a customer and putting it in his pocket rather than in the till. They can produce evidence like that, and if they have it available they probably will, but even without it the capital statements are likely to be enough, (see Hudson v Humbles (Inspector of Taxes) (1965) 42 TC 380, Hellier v O'Hare (Inspector of Taxes) [1990] STC 368, and R v Special Commissioners of Income Tax, ex p Martin (1971) 48 TC 1).
>
> In this case the Revenue's capital statements, coupled with the commissioners' non-acceptance of Mr Hurley's case that he borrowed large sums from his father, mean that, to the extent to which the commissioners did not accept his explanation of the deficiencies, he had not discharged the statutory onus of displacing the assessments."

The judge went on to consider whether the decision was Wednesbury unreasonable and held that it was not. I agree with him.

The Commissioners found that the taxpayer was not a credible witness. That being so they were entitled to accept parts of his evidence and reject other parts. The rejection of the taxpayer's evidence as to how his father accumulated funds and what was left were all findings of fact which a reasonable body of Commissioners could come to. It therefore cannot be said that it was Wednesbury

unreasonable to accept the capital statements. In my view the rest followed.

Finally, I come to matters of practice. Normally appeals by way of case stated are heard by a judge of the Queen's Bench Division. One of the few exceptions is appeals in tax cases. The result is that Chancery judges do not deal day in day out with the law applicable to such appeals. It is therefore incumbent on counsel to bring to the court's attention any case that has a bearing on any dispute as to the law. The most up-to-date statements of law may well be found outside the field of tax law.

For the reasons I have given, I would allow this appeal and dismiss the cross-appeal.

LORD JUSTICE POTTER: I agree. I have some sympathy for the position of the taxpayer in this case in the sense that I have no doubt that when, for whatever reason, he ceased to be legally represented before the General Commissioners he found himself conducting his own case in unfamiliar surroundings before a specialist tribunal in relation to matters governed by laws and procedures with which he was unfamiliar. The position was not rendered easier by the fact that the manner in which the Revenue sets about proving its case in hearings of this kind is to an extent the subject of conventional procedures governed by a burden of proof largely designed to alleviate the disparity of information available to the Revenue on the one hand and the taxpayer on the other, in relation to the taxpayer's own financial affairs.

Nonetheless, my sympathy is considerably circumscribed for two reasons. The first is peculiar to the facts of the case, and the second of more general application. As to the first, the taxpayer was advised and assisted in the presentation of his case until a point early in the hearing. He must have known that, given the content of the capital statements relied on by the Revenue, the real difficulty he was facing was that of convincing the General Commissioners as to the true source of the substantial funds

apparently at his disposal during the period under review, which were not accounted for in his business accounts submitted to the Revenue. There was no mystery or difficulty as to the kind of evidence he needed and, above all, his need for a first-hand account from his father, in as much detail as possible, in order to corroborate his assertion that it was his father's savings (kept under the bath) which were the source of his available funds. In thd final analysis, the matter largely stood or fell on that.

One of the grounds of appeal which has concerned us has been that a detailed statement supplied by the father was put before the Commissioners by the taxpayer but overlooked by them. The Commissioners' failure to consider and attach decisive weight to the statement has been advanced as a major complaint in the taxpayer's assertion that the decision was one no reasonable tribunal could have reached. Having studied the nature of the case and the record of proceedings, I have no doubt whatever that that was not so in the sense that it is plain that the statement was never before the Commissioners.

The alternative way that it is put is that the taxpayer reasonably believed it to be the case that the statement was put before the Commissioners and that therefore the matter should be remitted for reconsideration on the basis of a misunderstanding of the kind envisaged by Lord Clyde in remarks made by him in R A Bird and Co v Inland Revenue Commissioners [1925] SC 186 at 191. I have no hesitation in rejecting that argument also.

Mr Argles, in a lengthy and ingenious exercise, has sought to persuade us to remit on those grounds. But I see no good reason to do so. If the taxpayer was truly under that impression, then I think it was an unreasonable impression, judged by the standards of any litigant, represented or unrepresented. I find difficulty in avoiding a conclusion that for one reason or another the taxpayer did not think it necessary or to his advantage to use the statement.

The second reason for qualifying the sympathy I might otherwise feel for the taxpayer rests on my conviction that the he was fairly treated. The record shows that he was given every opportunity to present his case and was pressed as to various matters which, if addressed by him fully, might have added to the weight of his explanations. If he was at a disadvantage as a litigant in person, and no doubt in a broad sense he was, it was inherent in his position. In that respect I would quote the words of Knox J in Kingsley v Billingham (Inspector of Taxes) [1992] STC 132 at 138 in the course of which he stated:

> "Whether a person has professional representation before the Special Commissioners is a matter for the person to decide, but if he decides to dispense with professional representation, although a tribunal will other things being equal be anxious to prevent any unfair advantage being taken of his lack of experience and expertise, nevertheless the person subjects himself to the normal legal process and there is no transfer of responsibility from the litigant however unversed in the technicalities of the law he may be to the tribunal, in this case the Special Commissioner, of the obligations of each side to make their case before the tribunal."

I, too, would dismiss this appeal.

LORD JUSTICE KENNEDY: For the reasons given in both of the judgments which have been delivered, I would also dismiss the appeal.

Order: Appeal allowed with costs here and below. Costs re Legal Aid Act. Cross-appeal dismissed. Legal aid taxation. Leave to appeal was refused