The Personal Tax Planning Review

THE HUMAN RIGHTS ACT 1998: CAUGHT BETWEEN THE SCYLLA OF PARLIAMENTARY SOVEREIGNTY AND THE CHARYBDIS OF CITIZENS' RIGHTS

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Introduction

1. This article looks at whether or not taxpayers can rely on the right to a fair hearing under Article 6 of the European Convention of Human Rights ("the Convention") (as incorporated by the Human Rights Act 1998 ("HRA")) in order to force the Inland Revenue to disclose information, and if so how. It is in three parts. The first part examines the power of the Special Commissioners to obtain information under Regulation 10 of the Special Commissioners (Jurisdiction and Procedure) Regulations SI 1994/1811 (the "Special Commissioners Regulations").[2] The second part comprises an analysis of whether or not Article 6(1) of the Convention applies to civil tax matters before the Special Commissioners, and what the consequence of this is with regard to the production of information. Finally, the article examines the various ways in which Article 6 right based claims can be raised by taxpayers, who require information from the Inland Revenue.

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2 Although the arguments expressed in this article would apply equally to proceedings before the General Commissioners and, *mutatis mutandis*, to the General Commissioners (Jurisdiction and Procedure) Regulations SI 1994/1812, for simplicity, the article focuses on the Special Commissioners.

2. In tax appeals, the onus of proof is on the taxpayer to prove that the amendment to the self-assessment, for example, is wrong;[3] and as a general 'rule of thumb' it may be correct to say that the Inland Revenue rarely holds documents that the taxpayer will need to assert his case. However, regardless of whether or not this is correct as an empirical statement, the fact that disclosure against one particular party to a certain type of action may rarely be necessary is no justification for the exclusion of such a fundamental rule of civil litigation procedure in such matters. Indeed, it is considered that the dichotomous position in VAT tribunals[4] (where general disclosure is available against the Commissioners of Customs & Excise) refutes any such purported justification. Moreover, as far as the author is aware, as no other Government departments are excluded completely from the disclosure procedure, the Inland Revenue is isolated in its position. There clearly can be cases where the Inland Revenue holds information that could assist the taxpayer; and, whilst the Inland Revenue may be willing to disclose voluntarily in such instances, it is not just that disclosure should be dependent on its 'charity'.

The Scenario

3. Let one posit the following practical example of when a taxpayer may require information from the Inland Revenue. This example appears as a 'leitmotif' throughout the article as a way of elaborating how taxpayers may rely on the right to a fair hearing right under Article 6 to obtain information from the Inland Revenue.

   i. A company, SPQR Ltd, entered into transactions that seemed to be prima facie liable to tax under a certain provision of a certain Finance Act; and its accountants duly submitted computations relating to these transactions based upon this understanding of the legislation. After the assessments had become final and conclusive, the Special Commissioners decided in an appeal (*XYZ v Squelch*) by an unrelated company that no tax liability attached to the type of transactions entered into by SPQR Ltd.

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3 See s.50(6) Taxes Management Act 1970.

4 Under Regulation 20 of the Value Added Tax Tribunals Rules 1986, SI No. 1986/590.

ii. On the basis of the decision in *XYZ v Squelch*, SPQR Ltd attempt to claim relief under s.33 Taxes Management Act 1970 ("TMA") for the tax alleged to be overpaid on the ground that the assessment was excessive by reason of this error or mistake in its return. The Board refuse relief, contending that, although all the conditions and formalities for a valid claim have been satisfied, no relief will be given, because the "return was in fact made on the basis or in accordance with the practice generally prevailing at the time when [it] was made."[5] SPQR contends that it was not aware of a "practice generally prevailing", and that neither were its accountants. The relevant self-assessment form had been completed, *ex abundanti cautela*, on the basis that the transactions seemed to be liable to tax, because the accountants thought that this was the position. However, prior to *XYZ v Squelch*, there was no authority on the matter, and no published materials.

iii. In response, the Board explain that the internal guidance given to Inspectors of Taxes manifests the practice generally prevailing, but that this guidance cannot be shown to SPQR, due to the possibility that it may assist tax avoiders. SPQR's request for sight of this internal guidance is refused.

iv. SPQR appeals the decision of the Board refusing relief under s.33 TMA to the Special Commissioners.

Part One: the "Precept" Power Under Regulation 10 of the Special Commissioners Regulations

4. When in 1991 the draft Regulations that became the Special Commissioners Regulations were first outlined by the Inland Revenue, they kept the "precept rule" for obtaining further information, books and accounts (in a similar format to that which was to be found in section 51 TMA). As originally enacted, section 51 TMA (which came into force on 12th March 1970) provided that:

(1) The Commissioners may at any time before the determination of an appeal give notice to the appellant or other party to the proceedings (not being an inspector or the Board) requiring him within the time

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5 Section 33 (2A) (a) TMA (the 'proviso' to s.33). To constitute a "generally prevailing practice", the practice does not have to be "correct"; it must merely subsist.

specified in the notice-

(a) to deliver to them such particulars as they may require for the purpose of determining the appeal, and

(b) to make available for inspection by them, or by any officer of the Board, all such books, accounts or other documents in his possession or power as may be specified or described in the notice, being books, accounts or other documents which, in the opinion of the Commissioners issuing the notice, contain or may contain information relating to the subject matter of the proceedings.

(2) Any officer of the Board may, at all reasonable times, inspect and take copies of, or extracts from, any particulars delivered under subsection (1) (a) above; and the Commissioners or any officer of the Board may take copies of, or extracts from, any books, accounts, or other documents made available for their or his inspection under subsection (1) (b) above.

5. The justification given by the Inland Revenue for not introducing a separate discovery procedure was two-fold. First, that the precept rule was "familiar to accountants, the Inland Revenue and the Commissioners"; and secondly, that "it is well suited to tax appeals."[6] Each of these justifications will be evaluated in turn.

6. The original precept rule is of much greater antiquity than the rule in s.51, TMA, s.12(3), Income Tax Management Act 1964, or even s.54, Income Tax Act 1952 (all of which were in similar terms). According to the author's historical research, the original statutory predecessor to s.51 TMA is the precept rule that is set out in s.52 of the "Income Tax Act 1799".[7]

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6 "Procedural Rules for General and Special Commissioners", p.31. See paragraphs 16 and 17 below.

7 (39 George 3, c.13). The full title of the Act was "An Act to Repeal the Duties imposed by an Act made in the last Session of Parliament for granting an Aid and Contribution for the Prosecution of the War; and to make more effectual Provision for the like Purpose, by granting certain Duties upon Income, in lieu of the said Duties."

7. When the Income Tax Act 1799 was introduced,[8] two important changes were introduced to the localised system of administration that had been used for the tax known as the "Triple Assessment".[9] First, new bodies of commissioners were set up in the various tax divisions throughout the country. The individual commissioners, who would be responsible "for carrying into execution the general purposes of this Act" (under s.11), soon became known as the "General Commissioners".[10] The second change was the introduction of investigatory powers. In a similar way as to how relief (or exemption) was obtained under the Triple Assessment,[11] taxpayers were

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8 It received Royal Assent on the 17th January 1799.

9 The full title of the Act introducing the Triple Assessment tax was "An Act for granting to His Majesty an Aid and Contribution for the Prosecution of the War" (38 George 3, c16). It was passed on the 12th January 1798; and was an additional levy proportionate to the preceding year's Assessed Taxes (a group of taxes based on expenditure on, inter alia, male servants, horses and windows) that had been paid by an individual. It became known colloquially as the "Triple Assessment", as the rate of charge was, in many instances, three times the duty paid under the Assessed Taxes the previous year. Local commissioners, and their officials, the assessors and collectors, were responsible for the assessment and collection of this tax, subject to the intervention of central government represented by the surveyor, who was empowered to surcharge assessments that had been made by the local commissioners.

10 In an attempt to ensure that these individuals would be "persons of a respectable situation in life: as far as possible removed from any suspicion of partiality or any kind of undue influence." (*Hansard*, 3rd December 1798), a high monetary qualification was imposed (£10,000 personal estate; £300 per annum from real estate or "both commingled").

11 Although the tax itself was based on expenditure, one important modification of the previous taxes on expenditure was the introduction of provisions for exemption, abatement and reduction that were related to income. Thus, the tax was not a 'pure' expenditure tax, and it was not a 'voluntary' tax (or, at least, it was not intended to be a voluntary tax). The scheme of the tax was that the ultimate determinant of the amount of tax payable was income, rather than expenditure; and, as the tax was based, with retrospective effect, on the previous years expenditure, it could not be avoided by denuding oneself of luxuries. Section 4 of the Aid and Contribution Act 1798 provided, first, an exemption where an individual's annual income was less than £60 and, secondly, a graduated scale of relief up to £200 per annum, where the tax was not to exceed one-tenth of a person's total income. To obtain relief (or exemption), the taxpayer simply signed a declaration that, having calculated his income in accordance with the rules set out in the Act, his income did not exceed the relevant sum. A Schedule to the Act set out the rules that specified, first, how income was to be estimated and, secondly, which expenses were deductible. In an explanatory pamphlet to the Act, entitled "*Observations etc upon the act for taxing income: in which the principles and provisions of the act are fully considered, with a view to facilitate its execution, both with respect to persons chargeable, and the officers chosen to carry it into effect*" (Bunney & Gold, 1799), it was stated that, in essence, the taxes under the 1798 and 1799 Acts were the same but that the Triple Assessment was repealed because of "the sundry instances of evasion experienced in the execution of the former Act." At pp.2 to 3, it was stated:

simply required to deliver general returns of income, which did not specify details. But, in an attempt to reduce evasion, and in contradistinction to the Triple Assessment, the Act empowered the General Commissioners to seek further details of a taxpayer's income (and deductions) in the event that they were not satisfied with his general return.[12] Under s.52, a precept in a prescribed form could be issued.[13] This called for the details of the taxpayer's income under nineteen cases. It is this precept power under s.52 that is the statutory predecessor to Regulation 10 of the Special Regulations.

8. Notwithstanding the various administrative changes to the collection of tax mechanisms, such as the creation of the body that became known as the Special Commissioners in 1805[14] and the change of the role of the General

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> "The raising a large portion of the supplies necessary for the prosecution of the war within the year may be considered as the leading political object; and the Contribution of the tenth part of the Income of the Community as the principle of both measures. . . . In the last Act, Income was the ultimate means of reducing an assessment founded on the amount of former assessments; in the present, it is made the primary means of ascertaining the assessment: both lead to the same end; of assessing every part of the community to the amount of one tenth of the Income possessed by them; but pursue different modes to obtain that end."

12 Part (B) of the Schedule to the Act provided two alternate Statements of Income. For those with incomes under £200 (or who wished to declare that their income was less than £200), the declaration was as follows:

> "I do declare, That my Income estimated according to the Directions and Rules of an Act, passed in the Thirty-ninth Year of the Reign of His present Majesty, intituled . . ., doth not exceed the sum of [*in all Cases where the Income exceeds Sixty Pounds, and does not amount to Two Hundred Pounds, add also*] and that I am willing to pay the sum of ..... for my Contribution for One Year, from the Fifth Day of April to the Fifth Day of April the same being not less than One Part of my Income, estimated as aforesaid, to be paid according to the Directions of the said Act."
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> For those who wished to declare that their income was over £200, the amount of income was not included in the declaration and the individual simply declared that he was willing to pay a particular sum and that that sum "is not less than One Tenth Part of my Income".

13 "In the form marked (F) in the Schedule annexed to this Act." Form (F) entitled Precept of the Commissioners required to be delivered to the Commissioners "a Schedule of Particulars of Property from which your Income, chargeable under the said Act, ought to be estimated, with the Amount of Deductions to be made therefrom."

14 Section 30 of the "Act to repeal certain Parts of an Act, made in the Forty-third Year of His present Majesty, for granting a Contribution on the Profits arising from Property, Professions, Trades, and Offices; and to consolidate, and render more effectual, the Provisions for collecting the said Duties" (45 George 3, c49) introduced "Commissioners for the special Purposes of this Act", who soon became known as Special Commissioners.

and Special Commissioners from an investigatory to a judicial function, the precept power as the means for the Commissioners to obtain information existed almost unchanged from 1799 to 1970. In essence, the only difference between the 1799 precept power and the precept power under s.51 of the TMA (as originally enacted) is that the latter included a power to compel the production of documents, as well as information. As, when the draft Special Commissioners Regulations were put forward by the Inland Revenue, the precept power had existed almost unchanged for nearly 200 years, its justification of 'familiarity' is difficult to rebut.

9. However, the second of the Inland Revenue's justifications, namely that the precept rule (in a form that excluded the Inland Revenue from its ambit) is particularly well suited to tax appeals is easier to refute. The original 1799 precept clearly was not designed with litigation in mind. It was not a discovery power, but was, in essence, a power requiring taxpayers to complete the equivalent of self-assessment forms. Moreover, as when it was introduced, it was the role of the General Commissioners to make assessments, having undertaken the investigation that is now the task of Inspectors of Taxes, it was utilised by the General Commissioners *qua* investigator, not *qua* judicial body.

10. With regard to the virtual replication of the precept power in s.51 TMA under Regulation 10 of the Special Commissioners Regulations, it is necessary to examine the background to the introduction of Regulation 10 in 1994 in order to evaluate whether the nature of the tax appeals system was such that the retention of the precept rule, rather than the introduction of a general power of discovery, was the optimal approach to be adopted when procedural rules for both the General and Special Commissioners were enacted.

11. At the time that TMA was enacted, there were no procedural rules before the Commissioners.[15] This lack of rules received considerable criticism, in particular from the Council on Tribunals (with whom the General and Special Commissioners were under a statutory duty to consult on rules of procedure (under the Tribunals and Inquiries Act 1966)). For example, in its Annual Report for 1975/1976 (HC 236), the Council said, at paragraph 77:

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15 It is understood by the author that the "Notes for parties to Appeals or other Proceedings before the Special Commissioners" were first issued in April 1979. The notes, which were prepared by the Special Commissioners, had no binding force and were issued merely for the guidance of those who were parties to proceedings before the Special Commissioners.

"we raised the following points with the Board of Inland Revenue-

(a) There should be a comprehensive code (or codes) of procedure for proceedings before the Special Commissioners, so that the relevant provisions would be in a readily accessible and easily amenable form. (We criticised the lack of a code as long ago as 1964.)[16]

(b) The Commissioners should be empowered to order the discovery of documents and to order pleadings."[17]

12. Throughout the period 1975 to 1983, the Council on Tribunals continued to raise the issues of discovery and the lack of a procedural code in its Annual Reports.[18] However, although various consultation papers were issued and assurances given by the Inland Revenue as to the introduction of a procedural code, no actual changes were made in this period.

13. In March 1983, the Lord Chancellor proposed reforms of the Special Commissioners. These reforms included transferring responsibility for the

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16 See paragraph 10 of the Annual Report for 1964 and paragraph 42 of the Annual Report for 1966.

17 It is clear that the Council on Tribunals means discovery in the "High Court sense", i.e. against both parties to an appeal.

18 For example, in its Annual Report for 1976/77 (HC 108), the Council noted that the Board of Inland Revenue had put a consultation paper to the professional bodies on, inter alia, the issue of discovery of documents; and that as this consultation paper had met with a 'mixed' response from the professional bodies to whom it was referred, the Inland Revenue decided to produce a further consultation document. The 1987/88 Annual Report (HC 102) levelled numerous criticisms at the General Commissioners, in particular. It said, at paragraph 2.3:

> "no other tribunal under our supervision still falls so far short in certain fundamental respects of the principles advocated as long ago as 1957 in the seminal Report of the Franks Committee on Administrative Tribunals and Enquiries."

and continued, at paragraph 2.16:

> "We have pressed in the past for the provision of comprehensive procedural rules comparable to those under which most other tribunals under our supervision operate. It must be stressed that the application of procedural rules is by no means incompatible with the informality of approach which is valued by many General Commissioners; but rules would provide a structure for hearings and should assist in reducing the present inconsistencies in practice. Our understanding is that the introduction of rules is to be considered by Ministers for legislation in the coming year. We urge that provision enabling them to be made be no longer delayed."

appointment of Special Commissioners from the Treasury to the Lord Chancellor and introducing procedural rules, which would be modelled loosely on High Court practice.[19] Such reforms of the Special Commissioners were included in the Finance Bill 1983. However, after the announcement of the General Election, the proposals were dropped. Similar proposals were again announced in March 1984.[20] In reply to a Parliamentary Question, the Lord Chancellor indicated that he had agreed to take over responsibility for the Special Commissioners from a day to be appointed by him. Paragraph 4, Schedule 22, Finance Act 1984 inserted s.57B (with effect from 1st January 1985) into TMA to enable the Lord Chancellor to make rules governing the procedure of the Special Commissioners. Section 57B(1)(a) introduced a general power to introduce rules "as to the procedure of the Special Commissioners and the procedure in connection with the bringing of matters before them." The power under s.57B was, however, never exercised.

14. In his 1991 Budget speech, the Chancellor of the Exchequer announced that a consultative paper would be published in respect of the conduct and administration of tax appeals. The main impetus for change was the recommendations by both the Council on Tribunals and the Keith Committee that costs awards should be available and the criticism by the former that no formal rules of procedure existed. The Chancellor said:

> "I am concerned that the system of income tax appeals can sometimes operate unfairly, in particular because there is no provision for the award of costs. My noble and learned Friend the Lord Chancellor and I want to deal with criticisms by the Council on Tribunals about the absence of proper rules for hearing tax appeals. We shall be publishing a consultative paper which will include proposals about the award of costs where either party has acted unreasonably."[21]

15. On the 14th November 1991, a consultative document entitled "Procedural Rules for General and Special Commissioners" was issued by the Lord Chancellor's Department and the Inland Revenue jointly. The paper looked at both the General and Special Commissioners, although it is understood that there was no input from either of these bodies, or indeed from any

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19 Inland Revenue Press Release, 30th March 1983.

20 Inland Revenue Press Release, 29th March 1984.

21 Hansard, 19th March 1991, Column 170.

professional bodies concerned with taxation.[22] The aim was to ensure that the draft procedural rules met the three cardinal characteristics identified by the Franks Committee as essential to the functioning of a tribunal system, namely openness, fairness and impartiality, whilst ensuring that the informality of the appeal proceedings, particularly before the General Commissioners, was preserved.[23]

16. At Chapter 6, it was said:

> "These [draft procedural rules] have regard to the Report from the Council on Tribunals on Model Rules of Procedure for Tribunals. The main differences relate to the particular structure of the Taxes Acts and of the tax appeal system. These are:
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> . . .
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> - the proposals keep the "precept rule" for obtaining further information, books and accounts (at present section 51 TMA), rather than introduce a separate discovery procedure, as this is familiar to accountants, the Inland Revenue and the Commissioners and is well suited to tax appeals."[24]

17. Draft procedural rules for the General and Special Commissioners were annexed to the paper. Rule 4 of the draft Special Commissioners (Procedure) Rules provided:

> (1) The Tribunal may at any time before the determination of any proceedings give notice to any party, other than the Board or an inspector, directing him within the time specified in the notice –
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> (a) to deliver to it such particulars as it may require for the purposes of determining the proceedings, and
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> (b) to make available for inspection by it, or by an officer of the Board, all such books, accounts or other documents in his possession or power as may be specified or described in the notice, being books, accounts or other documents

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22 See B Sabine, "Procedural Rules for General and Special Commissioners", *British Tax Review* [1992] Vol. 2 82 at 82.

23 See Inland Revenue press release, 14th November 1991.

24 At page 31.

> which, in the opinion of the Tribunal, contain or may contain information relating to the subject matter of the proceedings.
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> (2) Any officer of the Board may, at all reasonable times inspect and take copies of, or extracts from, any particulars delivered under paragraph (1)(a) and the Tribunal or any officer of the Board may take copies of, or extracts from, any books, accounts or other documents made available for inspection under paragraph (1)(b).[25]

18. The exclusion of the Inland Revenue from the ambit of this rule enabling the Tribunal to obtain information received considerable criticism. For example, in its response, the Law Society's Inland Revenue Law Committee said:

> "We see no reason why a power should not be available to the taxpayer against the Inland Revenue, to compel the Inland Revenue to reveal such matters as alleged general rates of gross profit or general business practice."[26]

and, in its response, the British Bankers' Association said:

> "in order to preserve the impartiality of the appeals procedure, the Commissioners should also be granted the power to obtain information from the Inland Revenue, for their own or the taxpayer's use."[27]

19. The Council on Tribunals in its 1991/92 Annual Report[28] said at 1.48:

> "A second major departure from the drafting approach of Model Rules lay in the retention of the "precept rule" for obtaining further information, books and accounts, currently embodied in section 51 of the Taxes Management Act 1970, in place of the separate discovery procedure set out in the Model Rules. Accordingly, the draft procedural rules made provision for the tribunal to give notice

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25 Rule 3 of the draft General Commissioners (Procedure) Rules was identical, absent that "collectors" were also excluded from the Commissioners' information and the Rules had a distinct penalty procedure.

26 *Response by the Law Society's Inland Revenue Law Committee to the Lord Chancellor's Department and the Inland Revenue's Consultative Document*, p.4.

27 Letter dated February 1992.

28 HC 316.

> to any party directing him to deliver to it such particulars as it might require for the purpose of determining the proceedings and made available for inspection by it, or by an officer of the Commissioners of Inland Revenue, of specified books, accounts or other documents in his possession, which, in the opinion of the tribunal, contained or might contain information relating to the subject matter of the proceedings. As the consultative document pointed out, provision along these lines was familiar to accountants, the Inland Revenue and the Commissioners and was "well suited to tax appeals"; and on that account we could see no disadvantage in principle. However, we noted that the relevant draft rules proposed to except from the ambit of the notices the Commissioners of Inland Revenue, inspectors or tax collectors, and we queried why this exception should be made. We noted that the consultative document emphasised elsewhere the virtues of even-handedness, but failed to maintain this in these draft rules. Indeed, we thought that the exceptions made in the application of these rules in favour of the Commissioners of the Inland Revenue and tax inspectors gave the appearance of emphasising the close links between General Commissioners and the Inland Revenue which has consistently been at the heart of our pressure for change. We are strongly of the view that even-handedness is essential in such matters."

20. As, in particular, s.57B would have enabled the Lord Chancellor to make rules governing the procedure of the Special Commissioners only, s.57B would have required amendment to enable the rules to be introduced in the form drafted. Consequently, Schedule 16, Finance (No. 2) Act 1992 repealed section 57B, with effect from 16th July 1992, and inter alia, inserted s.46A and s.56B into TMA 1970 to enable the Lord Chancellor to make regulations about the practice and procedure to be followed in connection with appeals before both the General and Special Commissioners. The intention was to introduce the procedural reforms suggested in the 1991 consultation paper, and the draft rules annexed thereto.

21. Section 56B(2) provided that:

> "the regulations may in particular include provision –
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> . . .
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> (b) for requiring any party to an appeal to provide information and

> make documents available for inspection by the Commissioners or by officers of the Board;
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> . . .
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> (d) as to evidence generally in relation to appeals".

22. Thus, the enabling power would have allowed the introduction of Regulations wider than the extant draft Rules. It is considered that Regulations could have been passed under this sub-section that would have allowed the Commissioners to require the Inland Revenue, as well as the taxpayers, to provide information to them (albeit that Regulations that would have allowed an exchange of information between the Inland Revenue and taxpayers would have been ultra vires, as s.56B would enable only the introduction of Regulations that allowed the information produced by the Inland Revenue to be examined by the Commissioners, not by taxpayers).

23. Meanwhile, the draft Regulations continued amendment. In November 1993, the Lord Chancellor's Department circulated a fourth draft of the rules, which still excluded the Inland Revenue from the ambit of the information powers of the tax tribunals. The Lord Chancellor's Department indicated that the implementation date for the Regulations had been set back in order to allow the Commissioners time to acquaint themselves with the new procedure, but that the Regulations in the form of the fourth draft (with a few minor amendments) would come into effect in April 1994.[29]

24. However, on the 11th March 1994, the Finance Bill 1994 was published, and it included a provision (clause 239) to allow "the regulations relating to the General Commissioners, or the Special Commissioners, or both, to provide that the Commissioners may require party to an appeal, including the Inland Revenue, to provide information relevant to determination of a taxpayer's liability."[30] On the 17th March, the Financial Secretary, Stephen Dorrell, said in relation to clause 239:

> "[it] deals with the asymmetry that currently exists in terms of the requirement that can currently be placed on a taxpayer to produce information in support of an appeal, but which currently cannot be

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29 The main change was that, rather than excluding "the Board or an inspector" from the ambit of the Tribunal's power to require documents or information, the reference is now to "the Inland Revenue".

30 See the Explanatory Notes to the Bill.

> placed on the Inland Revenue. We propose that powers should allow the Lord Chancellor to make rules to provide that the special commissioners or general commissioners can require any party to an appeal, including the Inland Revenue, to produce information relevant to the appeal.
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> It is our intention, subject to due process, to proceed immediately in relation to the special commissioners to give them the power to require any party, including the Inland Revenue, to produce information relevant to an appeal. We do not propose to move immediately on the provisions for general commissioners, but I am attracted to the provision of a similar power to general commissioners in the context of the much more adjudicative nature of the role that will exist for them after the introduction of simplified assessing."[31]

25. In reply to a question as to why he had not been persuaded to move on the General Commissioners at this stage, the Financial Secretary explained that the intention was to enable the General Commissioners to require the Inland Revenue to produce information after the system of self-assessment (which he referred to as "simplified assessing") had been introduced. This was because:

> "Once the primary responsibility rests on the taxpayer, the entire Inland Revenue body, especially the general commissioners, will assume a more reactive than proactive role."[32]

26. Absent this question, there was no debate in respect of clause 239; and the Financial Secretary concluded:

> "My sole purpose in initiating what I hoped would be a short debate on clause 239 was to point out that it has been generally welcomed because it enhances the power not of the Inland Revenue, but of the taxpayer, by providing the taxpayer with the opportunity to suggest to the special commissioners - in the first instance - that the Inland Revenue should be required to produce information, which has not previously been possible."[33]

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31 Standing Committee A, Thirteenth Sitting, Thursday 17th March 1994, col. 754.

32 *Ibid.*, at col. 755.

33 *Ibid.*, at col. 756.

27. The Council on Tribunals noted the change to the regulation-making powers and commented in its Annual Report for 1993/94[34] at paragraph 2.186:

> "The provisions in the Regulations dealing with Commissioners' powers to obtain information are not even-handed as between the Inland Revenue and the taxpayer. Essentially they reproduce the "precept rule" in section 51 of the Taxes Management Act 1970. However, the Finance Act 1994 changed the regulation-making powers to allow for an even-handed approach, and the Lord Chancellor's Department assured us that it was the intention, as soon as reasonably practicable, to amend the Regulations to allow Special Commissioners to require the Inland Revenue to disclose information in the same way as they can any other party. No firm decision has yet been made about a similar provision for General Commissioners. We consider that the position for General Commissioners should be the same as for Special Commissioners. While it is true that General Commissioners hear mostly "delay" cases, where the only information is within the taxpayer's knowledge, they may also at the taxpayer's option hear "contentious" cases as well. We think it would be wrong to allow the exercise of that option to be affected by the consideration that discovery against the Inland Revenue would be available in proceedings before the Special Commissioners but might not be available before General Commissioners. We understand that further consideration will be given to this issue."

28. *Clause 239 was ordered to stand as part of the Bill and it became s.254,* Finance Act 1994. Section 254 amended s.56B TMA by substituting the phrase "the Commissioners or by officers of the Board" in s.56B(2)(b) with "specified persons" (so that it read: "The regulations may in particular include provision for requiring any party to an appeal to provide information and make documents available for inspection by specified persons") and inserting s.56B(2A), which provided that "specified persons" means: (a) the Commissioners; (b) any party to the appeal; and (c) officers of the Board. Section 56B(2), Finance Act 1994 received Royal Assent on the 3rd May 1994.

29. The Special Commissioners Regulations (and the General Commissioners (Jurisdiction and Procedure) Regulations SI 1994/1812) were made on the

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34 HC 22.

6th July and laid before Parliament on the 14th July 1994.[35] They passed under the negative parliamentary procedure and received no discussion in either House. Moreover, they passed without comment by the Joint Committee on Statutory Instruments.[36] They commenced on the 1st September, with the Inland Revenue specifically excluded from Regulation 10.

30. Thus, the history of the introduction of the Special Commissioners Regulations shows that the only entity that considered that the retention of the s.51 type precept rule in tax appeals was the best course was that body that was excluded from its ambit, namely the Inland Revenue. In virtually every year between 1964 and 1993, the Council on Tribunals, in its Annual Reports, strongly criticized the lack of a procedural code before the General and Special Commissioners, and in particular the fact that neither body was empowered to order the discovery of documents. With regard to the exclusion of the Inland Revenue from the ambit of the precept rule in the draft Regulation 10, the Government (unless there was a volte-face at some time between May and July 1994), various taxpayers' representatives, and the Council on Tribunals expressed strong disagreement. Yet, for reasons unknown to the author, the precept rule was maintained in the Special Commissioners Regulations in the 'teeth of' s.25, Finance Act 1994 and the unequivocal statements of the Financial Secretary in the House of Commons that such an asymmetrical power should (and would) be replaced with a power that would enable Special Commissioners to require any party to an appeal to produce information relevant to that appeal.

31. It is considered that a symmetrical precept power would be well suited to tax appeals. The requirement that it is the Special Commissioners who determine whether or not the information is needed for the purpose of determining any of the issues in the proceedings would preclude spurious requests to the Inland Revenue for information by taxpayers. An even-handed power would not merely give the appearance of impartiality, but, in

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35 The General and Special Commissioners (Amendment of Enactments) Regulations 1994 (SI No. 1813) were also laid before Parliament on the 14th July 1994. These Regulations are complementary to the Special Commissioners Regulations and the General Commissioners Regulations; they amend certain provisions in primary and secondary legislation concerned with procedural and jurisdictional matters in proceedings before the General and Special Commissioners.

36 Although the committee is precluded from considering the substantive merits of statutory instruments, one of its tasks is to consider the technical issue as to whether the instrument is made intra vires the enabling legislation. It is considered that the recent amendment to the enabling legislation should have received consideration.

those cases where information is required from the Inland Revenue, would ensure that justice is not dependent on the benevolence of the Inland Revenue.

Part Two: the Application of Article 6 to Civil Tax Matters

32. In the event that the Inland Revenue refuses to disclose documents in its possession that the taxpayer considers are germane to his appeal, then the right to a fair trial under Article 6 of the Convention may be relevant.[37]

33. The relevant part of Article 6(1) provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

34. There are two issues that need to be examined in order to determine whether the right under Article 6 may be of assistance to the aggrieved taxpayer. The first is whether an appeal in respect of a tax assessment can be categorised as a "determination of civil rights and obligations"; and the second issue is whether the right to a "fair and public hearing" includes a right to disclosure of relevant documents by the State.

A Determination of Civil Rights and Obligations

35. There is no specific definition of the term 'civil rights and obligations' in the Convention; and the Strasbourg institutions have held that the term has an autonomous Convention meaning, with the consequence that the classification of the right in the defendant State's jurisdiction is not determinative (although it is not "without importance").[38] In their early jurisprudence, both the European Commission on Human Rights ("ECnHR") and the European Court of Human Rights (the "ECtHR"), in broad terms, interpreted the term 'civil rights and obligations' as being

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37 Article 14, in conjunction with Article 6, on the ground that the taxpayer is discriminated against in comparison to, for example, a taxpayer before the VAT Tribunal may also be in issue, but only the 'primary' right under Article 6 is considered in this article.

38 Per the European Court of Human Rights in *König v Federal Republic of Germany*, Series A, No.27 (1979-80) 2 EHRR 170 at 193 (paragraph 89).

coterminous with 'private' rights and obligations, with the consequence that public law matters were excluded from Article 6(1) protection. However, the Strasbourg institutions have not adopted an analytical approach and recently have started to allow within Article 6(1) certain matters that would be classified as justiciable public law matters in the United Kingdom, on the ground that such matters involve rights of a 'pecuniary' nature.[39] There seems, however, to be an exception to the evolving rule that public law matters of a pecuniary nature are 'civil', namely tax disputes. The ECnHR has consistently held that Article 6(1) does not apply to tax proceedings[40], on the ground that a tax dispute is a public law matter that is not determinative of private law rights; and the recent case, before the ECtHR, of *Ferrazzini v Italy* [2001] STC 1314 suggests that indicating that the relevant tax dispute is 'pecuniary' in nature is unlikely to assist in tax matters.

36. In *Ferrazzini*, the taxpayer complained that there had been a violation of Article 6(1) on account of the length of the three sets of tax proceedings[41] to which he was a party. The main issue was whether the right to a fair trial under Article 6(1) of the Convention applied to tax proceedings. Despite the established case law cited by the Italian government that Article 6(1) does not apply to (non-criminal) disputes relating to tax proceedings, the ECtHR considered that the matter was not incompatible *ratione materiae* with the provisions of the Convention and that therefore the taxpayer's claim was admissible.

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39 See, for example, *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293, where the ECtHR said at 320 (paragraph 40): "The Court notes that the applicants' right under the arbitration award was "pecuniary" in nature, as had been their claim for damages allowed by the arbitration court. Their right to recover the sums awarded by the arbitration court was therefore a "civil right" within the meaning of Article 6, whatever the nature, under Greek law, of the contract between the applicants and the Greek State (see, mutatis mutandis, *Editions Périscope v France* (Series A no. 234-B) (1992) 14 EHRR 597, para. 40)."

40 See *X v France* (1983) 32 DR 266 (where the ECnHR stated that 'Article 6.1 does not apply to proceedings relating to tax assessments'); and *X v Austria* (1980) 21 DR 246 at 247 (where the ECnHR said that even though the fiscal measures in question had repercussions on the trader's business, as "they find their basis in specific provisions of public law supporting an economic policy. . . . the granting or refusal of such reimbursements will not affect any of the trader's rights to perform his private activity"). There are over 30 decisions of the ECnHR, where the ECnHR has held that Article 6(1) does not apply to ordinary tax proceedings. See the electronic database of judgments, decisions and opinions of the ECnHR and ECtHR - the "HUDOC" database: http://www.ECtHR.coe.int/

41 Ten years and two months for a single level of jurisdiction with regard to the first set of proceedings; and nearly thirteen years with regard to the other proceedings.

37. Before the Grand Chamber of the ECtHR, the applicant stressed the pecuniary aspects of his claim, and contended that the financial aspects of the proceedings connoted a 'civil right'. The Court reiterated that simply indicating that a matter is pecuniary in nature is not sufficient for it necessarily to be a civil right and thereby fall within the parameters of Article 6(1). It noted three areas where, even though a pecuniary interest was involved, the right was not a civil right: first, political rights and obligations;[42] secondly, public law employees' rights[43]; and, thirdly, aliens' rights not to be expelled.[44] The ECtHR then went on to consider whether due to "changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the state, the scope of Article 6(1) should . . . be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions." It held (by a 12 to 6 majority decision) that it should not, and said at 1320*g*:

> "In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the state into the 'civil' sphere of the individual's life. The court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant."

38. It is considered that, with respect, the reasoning of the majority decision of the ECtHR is perverse for a number of reasons. The first of these is in relation to the *travaux préparatoires*. In his dissenting opinion, Judge Lorenzen (joined by Judges Rozakis, Bonello, Stráznická, Bîrsan and Fischbach) raised a number of cogent arguments as to why Article 6(1) should apply to proceedings concerning tax assessments; and, in particular, he

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42 See *Pierre-Bloch v France* (1997) 26 EHRR 202 at 232-233.

43 See *Pellegrin v France* (1999) 31 EHRR 651 at 665.

44 See *Maaouia v France* (2000) 9 BHRC 205 at 213. Although, as the ECtHR has frequently indicated, "civil right" is an autonomous concept, such that the classification in domestic law is not determinative, it is of interest that in each of these three cases where a restrictive interpretation of civil right was given, the defendant State was France, which has a distinct *droit administratif*. Whilst it was not a determinative factor in the decisions, the author wonders whether had the respondent State been the United Kingdom a different result may have ensued.

analysed the *travaux préparatoires* relating to Article 6.[45] These show that it seems not to have been the intention of the draftsmen that disputes in the field of administration should be excluded forever from the scope of applicability of Article 6(1). In fact, the exclusion of disputes between individuals and governments on a general basis was primarily due to difficulties at that time in making a precise division of powers between, on the one hand, administrative bodies exercising discretionary powers and, on the other hand, judicial bodies; and it was intended that a detailed study of the problems relating to 'the exercise of justice in the relations between individuals and governments' should be carried out and the parameters of Article 6 would then be re-examined in the light of such study. No such study was ever carried out; and Judge Lorenzen concluded at 1323*f:*

> "Against that background it is understandable that the Convention institutions, in the first years after the Convention came into force, applied Article 6 § 1 under its civil head on a restrictive basis in respect of disputes between individuals and governments. On the other hand, it is hard to accept that the *travaux préparatoires* dating more than 50 years back and partly based on preconditions that have not been fulfilled or are no longer relevant should remain a permanent obstacle to a reasonable development of the case-law concerning the scope of Article 6 - in particular to areas where there is an obvious need to extend the protection granted by that Article to individuals."

39. Secondly, in reaching its decision, the majority of the ECtHR took into account the fact that Article 1 of the First Protocol reserves the right of states "to enact such laws as they deem necessary for the purpose of securing the payment of taxes."[46] This suggests that one of the factors that seems to have influenced the ECtHR's decision is that it considered it to be politically expedient not to interfere with States' fiscal policy (probably because this is closely linked with States' economic policy, a matter which is outside the Convention). Yet, although there may be sound policy reasons for not interfering with a State's substantive tax strategy, it is considered that it is specious to argue that this policy justification should prevent taxpayers from receiving procedural protection with regard to their disputes

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45 See also the joint dissenting opinion of the Judges Ryssal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing in *Deumeland v Germany* (1986) 8 EHRR 448 at 452-453, and the concurring opinion of Mr Sperduti in *Salesi v Italy* (1993) 26 EHRR 187.

46 At 1320*h*.

with the Inland Revenue. Article 6(1) is simply a procedural guarantee that primarily secures access to court; it does not, and can not, in any way restrict States' powers to place whatever substantive fiscal obligations it chooses on its taxpayers. Moreover, even if a tax is not 'fair', it should be administered fairly.

40. Thirdly, the ECtHR has gone out of its way to include tax matters within the protection under the criminal head of Article 6.[47] If, as the majority in *Ferrazzini* suggested, the exclusion of civil tax matters from the ambit of Article 6 is required in order to preserve States' prerogative in fiscal matters, then this justification should apply equally to tax matters where a 'criminal' charge is in issue.[48]

41. It is considered that, notwithstanding *Ferrazzini*, there is a possibility that the UK courts will not determine necessarily that Article 6(1) can not apply to 'pure' tax appeals.[49] Section 2 HRA enables domestic courts to develop an indigenous body of human rights law, that is influenced, but not bound by Strasbourg jurisprudence, and it may be that the UK courts will take the opportunity to extend taxpayers' rights beyond those recognised by Strasbourg. Indeed, the General Commissioners have been advised to proceed on the basis that Article 6(1) applies to all proceedings before them;[50] H. H. Stephen Oliver QC, Presiding Special Commissioner and President of the VAT and Duties Tribunal, writing extra-judicially, said that "the issue [whether a tax assessment affects a person's civil rights and obligations] is not closed despite the apparently negative reaction of the Court of Human Rights in *X v France*";[51] and Sir Nicolas Bratza, Judge of the ECtHR, writing extra-judicially, said that, as the Convention provides a floor rather than a ceiling for rights:

> "it is perfectly possible that the courts of this country will provide

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47 See, for example, *Bendenoun v France* (1994) 18 EHRR 54, *JB v Switzerland* (2001) 3 ITLR 663, and *Georgiou v United Kingdom* [2001] STC 80.

48 This is 'criminal' in the Convention sense, not the domestic law sense. See H Foster and M Whitehouse, "Civil VAT evasion; a crime by any other name?", *Tax Journal*, 23rd July 2001, pp. 5-8 for an analysis of the distinction in the context of *Han & Yau v Commissioners of Customs and Excise* [2001] STC 1188.

49 I.e. claims under the statutory mechanism against a determination of liability.

50 See C Wallworth, "Do Taxpayers Have Human Rights?", *Tax Journal*, 15th June 2000, pp. 284 to 287 at p.285.

51 "The Human Rights Act in Prospect: Some Reflections", *British Tax Review* [2000] No. 4, pp. 199-210 at p. 200.

> greater protection for human rights under the [HRA] than is strictly required by case law emanating from Strasbourg. . . . In the commercial field it is thus possible to envisage that the courts of this country will disregard some of the more controversial case law of the Convention organs and, in particular, the well-established principle that the requirements of fair trial in Article 6 of the Convention have no application to proceedings . . . concerning fiscal matters." [52]

42. It is considered that the United Kingdom courts should be receptive to an argument that, as in the United Kingdom tax disputes are dealt with by means of the civil courts, rather than in a separate administrative system (in contradistinction to most other EU countries),[53] there can be no doubt that a dispute concerning an assessment of tax does not involve examining a public law prerogative or discretion, but is simply an 'ordinary' proceeding in a judicial rather than an administrative setting. Pecuniary interests of individuals are directly affected by the enforcement of fiscal laws; and it is considered that there are no 'special' circumstances that justify excluding tax matters from the protections that individuals are now entitled to, by reason of the incorporation of the Article 6 right under the HRA, in other disputes with the United Kingdom Government.

The Right to A Fair Hearing

43. If a tax tribunal can be persuaded that the Article 6(1) guarantee to the right to a fair hearing applies with regard to civil tax matters, then it is necessary to examine whether this right enables the provision of information from the Inland Revenue. The right under Article 6(1) involves:

(a) access to a court;

(b) an independent and impartial adjudicating body; and

(c) substantively fair proceedings.

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52 "The Implications of the Human Rights Act 1998 for Commercial Practice", *European Human Rights Law Review* 2000 (1) pp.1 to 13 at p. 4.

53 As the VAT Tribunal recognised in *Coleman and others v Commissioners of Customs and Excise* [1999] V & DR 133 at 149I, the rulings of the ECnHR that "civil rights and obligations" does not cover tax assessment claims have been confined to countries where tax law is part of the administrative, as opposed to the civil, system of justice.

44. The last aspect of the right, the right to substantively fair proceedings, is a broad concept. It comprises the right to be heard, 'equality of arms', access to information to prepare the case effectively, and a reasoned decision. The ECtHR authorities show that where documents are withheld by the State and not made available to the particular citizen, then a violation of Article 6 may result.[54]

45. In *Feldbrugge v Netherlands* (1986) 8 EHRR 425, the applicant, whose statutory sickness allowance was stopped on the basis that she was fit to work, complained that the appeal procedures open to her did not comply with the fair trial guarantees in Article 6(1). In particular, the welfare tribunal had concluded that the applicant had been fit for work on the basis of the medical reports, but these reports were not made available to her, with the result that she had not been able to comment on them. The ECtHR concluded that the procedure "was clearly not such as to allow proper participation of the contending parties, at any rate during the final and decisive stage of that procedure."[55] As the welfare tribunal, inter alia, did not allow the appellant to consult the evidence of the medical reports, the proceedings "were not attended, to a sufficient degree, by one of the principal guarantees of a judicial procedure."

46. In *McGinley and Egan v United Kingdom* (1998) 27 EHRR 1, veterans of nuclear tests in the Pacific alleged that documents showing that they had been subjected to deleterious levels of radiation had been suppressed by the United Kingdom Government, thereby breaching their right to a fair trial. The ECtHR rejected the claim, but said, in a strong statement of principle, that:

> "if there were a case that the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which would have assisted them in establishing before the Pensions Appeal Tribunal that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6(1)."

47. Article 6 does not, however, require States to enact particular evidential rules; it simply requires that, viewed as a whole, the trial be fair. This is

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54 Other than the two cases below see also *McMichael v United Kingdom* (1995) 20 EHRR 205; and *Kerojavi v Finland* [1996] EHRLR 66.

55 At 437 (paragraph 44).

illustrated by two cases before the ECtHR.

48. In *Schenk v Switzerland* (1988) 13 EHRR 242, Schenk was convicted of incitement to murder his wife. Part of the evidence heard against him was a tape recording of a telephone conversation, which had been recorded without his knowledge. He claimed, inter alia, that making that recording and using it as evidence contravened Article 6(1) of the Convention and made the trial unfair. The ECtHR held, dismissing the application, that the use of the disputed recording in evidence did not deprive Schenk of a fair trial and did not contravene Article 6. Unlawfully obtained evidence, such as an unauthorised recording of a telephone conversation might be admissible in court proceedings where the court relied on a set of additional corroborating evidential elements in order to determine the guilt of an accused. The ECtHR said that Article 6 did not lay down any rules on the admissibility of evidence, as this was primarily a matter for domestic law; all it had to ascertain was whether the trial as a whole was fair.

49. The ECtHR took a similar approach with regard to "civil rights and obligations" in *Dombu Beheer BV v Netherlands* (1994) 18 EHRR 213. In this case, the applicant company registered in the Netherlands, brought civil proceedings against a bank, also registered in the Netherlands, over the existence of an oral agreement made allegedly between the then managing director of the company and a branch manager of the bank. The managing director was no longer employed by the company, but was not permitted by the national court to testify (on the basis of a rule prohibiting parties to proceedings to be heard as witnesses), whereas the branch manager was allowed to give evidence on the grounds that he was not formally or in fact a party to the proceedings. The applicant company's claim failed. Before the ECtHR, it complained that the principle of 'equality of arms' had been breached, violating its right to a fair hearing within the meaning of Article 6(1) of the Convention. The ECtHR held, by five votes to four, that there had been a violation of Article 6(1). In reaching this decision, the ECtHR said at 229 (paragraph 31):

> "The Court notes at the outset that it is not called upon to rule in general whether it is permissible to exclude the evidence of a person in civil proceedings to which he is a party. Nor is it called upon to examine the Netherlands law of evidence in civil procedure *in abstracto*. . . . The Court's task is to ascertain whether the proceedings in their entirety were 'fair' within the meaning of Article 6(1)."

50. The Court went on to examine what a fair hearing in a civil matter entailed, and said at 229 (paragraph 32):

> "Contracting States have greater latitude [over the concept of a fair hearing] when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. Nevertheless, certain principles concerning the notion of 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case law. Most significantly for the present case, it is clear that the requirement of 'equality of arms', in the sense of a fair balance between the parties applies in principle to such cases as well as to criminal cases. . . . 'Equality of arms' implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. It is left to the national authorities to ensure in each individual case that the requirements of a 'fair hearing' are met."

51. As Article 6 does not lay down particular rules as to the disclosure of evidence, it can not be argued that the exclusion of the Inland Revenue from the ambit of Regulation 10 of the Special Commissioners Regulations necessarily breaches taxpayers' Convention rights per se. It is necessary to determine whether, in a particular case, the refusal of the Inland Revenue to disclose documents would prejudice the taxpayer's right to a fair hearing under Article 6. It is considered that, in the hypothetical scenario outlined in paragraph 3 above, SPQR Ltd would not be in a position to prepare its case effectively without advance disclosure of the information sought. Without the Inland Revenue disclosing the information supporting its contention that there was a 'practice generally prevailing', then it would be difficult for the company to rebut the Inland Revenue's contention that such a practice existed at the relevant time. Although it could consider issuing a witness summons on the appropriate Inland Revenue official, it would have no opportunity to review the documents before the hearing at which they were produced. In these circumstances, it could be argued that there would be no 'equality of arms', in that SPQR's inability to obtain advance disclosure of the evidence supporting the Inland Revenue's case would place it at a substantial disadvantage *vis-à-vis* the Inland Revenue; and that, therefore, proceeding before the Special Commissioners on such a basis would breach SPQR's right to a fair trial under Article 6.

Part Three: Utilisation of the Human Rights Act 1998

52. It is necessary to understand how the HRA operates, before considering its utilisation in SPQR's case as an exemplar. The HRA introduces three major changes to the UK legal system:

(1) all UK legislation (whenever made) must be read and given effect in a way which is, so far as is possible, compatible with the Convention rights (s.3(1));

(2) if construction in accordance with the Convention rights is not possible, then the UK courts may declare that a provision of primary or secondary legislation is incompatible with a Convention right (s.4); and

(3) all public authorities are required to act in accordance with Convention rights, unless prevented from doing so by legislation (s.6).[56]

53. The rule under s.3 HRA that UK legislation must be read and given effect in a way which is, so far as is possible, compatible with the Convention rights is a 'strong' principle of interpretation in that words can be read into statutes or omitted or given an artificial meaning. During the Bill's passage through the House of Lords, the Lord Chancellor rejected an amendment that would have qualified the word 'possible' with the term 'reasonably'. This suggests that an unreasonable, but possible, interpretation that is compatible with the Convention rights is to be preferred to a non-compatible, but reasonable interpretation. The onus is on the Courts to provide a judicial interpretation that is in accordance with the Convention

56 Public authorities includes the Inland Revenue, HM Customs and Excise, and the Special and General Commissioners.

rights, even if this requires a 'strained' construction of the legislation.[57] The rule of *stare decisis* does not apply to pre-HRA interpretations of statutory provisions where, post HRA, a Convention right may be in issue, as in such circumstances, it is overridden by s.3 HRA.

54. However, s.3 HRA does not affect the validity, or continuing operation of any incompatible primary legislation; and, similarly, a declaration of incompatibility under s.4 will not invalidate the offending law and will have no effect on the parties in the specific case. Thus, if in a particular case, the UK legislation can not be read in a way that is compatible with the Convention rights, then the UK legislation will prevail over the Convention. The court may issue a declaration of incompatibility, but it is up to the Government to choose whether or not to amend the offending legislation.[58]

55. Moreover, although all public authorities are required to act in accordance with Convention rights, unless prevented from doing so by legislation, in the HRA, public authorities does not include Parliament itself.[59] Thus, the passing of an 'incompatible' Act of Parliament can not be challenged on the ground that a public authority has thereby acted in a way that is incompatible with a Convention right.

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57 In *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, Lord Hope of Craighead said at 374*h* –375c:

> "It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary. In *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 966 Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher* [1980] AC 319, 328 that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689, 700 that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach will now have to be applied in this country when issues are raised under the Act of 1998 about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention."

58 Under section 6(6) HRA, it is not unlawful to fail to amend incompatible statutory legislation or make a remedial order.

59 See s.6(3) HRA.

Subordinate Legislation

56. The position with regard to subordinate legislation is more complicated. Although a statutory instrument that is made in accordance with the prescribed procedure, and within the powers conferred by the parent Act, is as much a part of the law as the statute itself and the legal effect of validly enacted delegated legislation is the same as if it were contained in an Act of Parliament, one important distinction, in the context of the HRA, is that, unlike primary legislation, subordinate legislation is not made by Parliament, but by individuals or bodies empowered by statute or some other source and then is laid before Parliament.

57. During the debates on the Human Rights Bill, two alternative approaches to the interpretation of secondary legislation were rejected. The first was that subordinate legislation should be treated in the same way as primary legislation[60], namely that neither could be struck down by the courts on the ground of incompatibility with a Convention right.[61] The consequence of this approach would have been that if, in a particular case, either primary or secondary UK legislation could not be read in a way that is compatible with the Convention rights, then the UK legislation would prevail over the Convention rights. The court would be able to issue a declaration of incompatibility, but it would be up to the Government to choose whether or not to amend the offending legislation. The rationale of the proposal was that, without so limiting the legislation, the courts would be empowered to examine the substantive merits of the subordinate legislation itself, rather than simply be confined to reviewing its procedural legitimacy.

58. According to the Parliamentary Secretary, Lord Chancellor's Department, Geoffrey Hoon, in relation to the issue of subordinate legislation that is inevitably incompatible with Convention rights:

> "The nature of the primary legislation under which an order is made

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60 There were three amendments tabled by the Opposition in the House of Commons. Amendment No. 17 sought to amend what became s.3(2)(c) so that all incompatible subordinate (as well as primary) legislation would continue to have continuing force and effect. Amendment No. 11 sought to insert the following phrase into what became s.4(4)(b): "and save for making a declaration of incompatibility as aforesaid a court shall not otherwise strike down any subordinate legislation by reason of its incompatibility with a Convention right."; and Amendment No. 12 sought to insert an additional phrase into what became s.4(4) to indicate that the courts could not strike down subordinate legislation.

61 A similar amendment also was tabled in the House of Lords. See Hansard (HL) 18th November 1997 at cols. 541 to 545.

> may be such that any subordinate legislation will necessarily be in conflict with convention rights. If the courts were to have the power to strike down such subordinate legislation, it would, at least indirectly, amount to a challenge to the primary legislation itself. That would place the courts at odds with Parliament."[62]

59. The second alternative approach was that all subordinate legislation could be struck down. This was rejected, on the ground that if the primary legislation required subordinate legislation to be made in an 'incompatible' way, then striking down the secondary legislation would amount to an indirect attack on the primary legislation and would therefore compromise the sovereignty of Parliament.

60. According to James Clappison MP, such a power would have the consequence that "the Courts will be able to strike down subordinate legislation that is unobjectionable on existing grounds of ultra vires[63]" and it would thus create a constitutional precedent, changing the role of the court in such cases to an appellate jurisdiction looking at the substantive merits of the subordinate legislation. The Parliamentary Secretary said that the Bill would not confer on the courts any greater or different powers in respect of subordinate legislation than they already possessed. He said that:

> "it is inherent in the public authority provisions in clause 6 that Ministers will be acting unlawfully if they make subordinate legislation that is incompatible with a Convention right, unless the parent statute requires the subordinate legislation to take that form. . . . If it is the will of Parliament that something should be done that is incompatible with a Convention right, Parliament must be prepared to say so in primary legislation."[64]

61. In reply to a question whether the provision will have retrospective application, the Parliamentary Secretary said that "it will apply to legislation in force once the Human Rights Act is itself in force."[65]

62. It is considered by the author that the 'middle course' that the Government adopted has the following consequences with regard to subordinate

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62 Hansard (HC) 3rd June 1998 at cols. 427 to 428.

63 *Ibid.*

64 *Ibid*, 433.

65 *Ibid.*

legislation passed after 2nd October 2000 (the date that sections 6 and 7 HRA came into force). If the subordinate legislation can not be read compatibly, but such incompatibility is mandated by the enabling primary legislation, then it is lawful and can not be struck down by the Courts. This is because s.6(2)(a) provides that if as a result of a provision of primary legislation, "the authority could not have acted differently", then s.6(1), which provides that it is unlawful for a public authority to act in an incompatible way, does not apply to the act. The public authority that made the incompatible subordinate legislation had no discretion to act compatibly; and so s.6(1) does not apply to the act of its making the subordinate legislation. The only 'remedy' available to the aggrieved citizen would be a declaration of incompatibility.[66] If, in contradistinction, the primary legislation grants a wide discretion, such that the author of the subordinate legislation could either make compatible or incompatible subordinate legislation, then it can not rely on the s.6(2)(a) defence, as the primary obligation did not necessitate the making of incompatible subordinate legislation. It considered that, notwithstanding that to an extent this would involve Courts looking at the substantive merits of the subordinate legislation, such subordinate legislation could be struck down.[67]

Pre-October 2000 Subordinate Legislation

63. With regard to validly enacted subordinate legislation made before October 2000, the position is more complicated. Under s.7(1) HRA:

> "a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -

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66 Under s.4(5) HRA "court" for the purpose of s.4 means the High Court and beyond. Thus, in particular, the Special Commissioners have no power to make declarations of incompatibility. Exactly what will occur in the event that, in a particular case, the Special Commissioners are unable to comply with their s.3 obligation to construe either primary legislation or mandated subordinate legislation in a way that is compatible with the Convention rights is not clear. It is considered that, although they would be bound to decide the case in a 'non-compatible' way, the Tribunal would draw attention to the incompatibility in its judgment.

67 It would still be open to Parliament to introduce primary legislation to retrospectively validate the offending subordinate legislation in a way that would preclude removal of the offending provision (see, for example, *National & Provincial, Leeds Permanent and Yorkshire Building Societies v United Kingdom* [1997] STC 1466), but it is considered that in most cases political pressure would prevent this.

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal[68],

(b) or rely on the Convention right or rights concerned in any legal proceedings."

64. Although s.7(5) provides that proceedings under s.7(1)(a) must be brought "before the end of (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances", there is no specific time limit with regard to s.7(1)(b).

65. Section 22(4), which came into force on 9th November 1998 (when the HRA received Royal Assent) provides that s.7(1)(b) "applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section (i.e. 2nd October 2000)." It is not known why s.22(4) was introduced in such a format. It received no comment in any of the debates in either chamber of Parliament.

66. As neither s.6 nor s.7 has retrospective effect,[69] on a literal reading of s.6, an act committed by a public authority pre-October 2000 can not be "unlawful", and so can not be challenged under s.7(1)(b), regardless of s.22(4).[70] However, it seems that the intention of the Government is that, by necessary implication, s.6(1) applies to acts by public authorities, whenever committed, in proceedings of the kind detailed in s.22(4). The Explanatory Notes to the Human Rights Bill state in respect of s.22(4) that:

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68 Under Rule 7.11 of the Civil Procedure Rules 1998, a claim under s.7(1)(a) in respect of a judicial act may be brought only in the High Court. Any other claim under s.7(1)(a) may be brought in any court.

69 This was confirmed by the House of Lords in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326. See Lord Hobhouse of Woodborough at 397*c*.

70 Section 22(4) came into force on 9th November 1998 (when the HRA was given Royal Assent), but ss.6 and 7 did not come into force until 2nd October 2000 (by the Human Rights Act 1998 (Commencement No 2) Order, SI 2000/1851 Art. 2). This 'lacuna' was considered by the House of Lords in *ex parte Kebilene*. Their Lordships held that since Parliament had expressly provided that the central provisions of the HRA were to take effect not on enactment, but at such date as the Secretary of State might appoint, it would be contrary to the legislative intention to treat those provisions as having effect from enactment. The reasoning of their Lordships was held to be erroneous in *R v Kansal (No. 2)* [2002] 1 All ER 257, but it is considered that the decision in *Kansal* does not affect this element of the decision in *Kebilene*. The issue of retrospectivity was also considered, in a tax context, in *R v Allen* [2001] STC 1537.

> "This means that it will be possible for an individual to rely on Convention arguments after commencement in any civil or criminal action brought by a public authority irrespective of when the events took place or whether the proceedings had already started. Otherwise, however, acts of public authorities committed before [section 7] comes into force will not be capable of challenge."

67. In an article,[71] Francis Bennion quotes a letter that he received from the Home Office explaining the operation of s.22(4):

> "Subject to what I say below, the Act has effect only in relation to acts and omissions occurring after, or omissions dating from when, the Act comes into force. This is the position as far as the institution of civil or tribunal proceedings challenging the act or omission of a public authority is concerned. The position is different in a case where proceedings have been instituted by a public authority. Although section 6(1) only applies to acts committed after commencement, section 22(4) makes clear that section 7(1)(b) (and by necessary implication section 6(1)) is applicable in proceedings of the kind detailed in section 22(4) as if those sections had been in force before commencement. The outworking of this is that from the commencement of the Act, it will be possible to raise in one's defence in any proceedings before a court or tribunal brought by a public authority, or in an appeal (including a case-stated or judicial review) from a decision of a court or tribunal in such proceedings, any Convention argument available under the Act irrespective of whether the act or failure to act giving rise to the Convention argument took place before or after the Act comes into force."

68. Thus, it is considered that an aggrieved individual, who wishes to bring 'free-standing' proceedings in order to strike down pre-October 2000 subordinate legislation that is not mandated by enabling primary legislation, on the ground that the making of the subordinate legislation was an unlawful act, would find that he could not rely on his Convention right to challenge the lawfulness of the act (as the making of the subordinate legislation took place before October 2000). He would not be able to assert the Convention

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71 "*Section 22(4) of the Human Rights Act 1998*", 1999 (7) 7 CLW 16/99.

right in a private action either as an applicant or defendant.[72] All such an individual could do is use the Convention right as a shield to defend himself in the event that proceedings (reliant on the incompatible subordinate legislation) were brought against him by or at the instigation of a public authority.[73]

69. In the context of tax appeals, this has the consequence that a taxpayer who appeals, for example, the amendment of his self-assessment return to the Special Commissioners will be precluded from arguing that any incompatible pre-October 2000 subordinate legislation is unlawful, as s.6 only has retrospective effect with regard to proceedings initiated by the Inland Revenue.

70. This is unless it could be argued that such proceedings are brought "at the instigation of" the Inland Revenue, in that it is the Inland Revenue's amendment that necessitates the appeal. Although 'instigate' can mean 'incite', it is considered that, in this context, a more natural reading would be 'initiate'. It would be absurd if an *ex post facto* examination of whether the amendment was so 'unreasonable' that it incited an appeal against it could be carried out in order to determine whether or not s.6(1) has

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72 There is a longstanding dispute between "verticalists" (who argue that the centrality of the role of public authorities in the HRA means that it only governs the behaviour of the State in relation to its citizens) and "horizontalists" (who argue that the HRA can apply to disputes between private individuals). See, for example, M Hunt, "*The Horizontal Effect of the Human Rights Act 1998*" [1998] PL 423; and G Phillipson, "*The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper*" [1999] 62 MLR 824. The author does not wish to enter into this debate in this article.

73 This reasoning is, however, subject to the argument that the failure of the maker of incompatible subordinate legislation (that is not mandated by the enabling power) to revoke that legislation is itself an unlawful act. Section 14 Interpretation Act 1978 provides that a power to make statutory instruments shall be construed as including a power to revoke, amend or re-enact them subject to the same conditions as applied to their making; and under s.6(6), an "act" includes a failure to act. However, the position is complicated by s.6(6)(a), which provides that a failure to act does not include a failure "to introduce in, or lay before, Parliament a proposal for legislation." For an analysis of this argument, see D Squires, "*Challenging Subordinate Legislation under the Human Rights Act*" [2000] 2 EHRLR 116-130 at 120-122.

retrospective effect by virtue of s.22(4).[74]

Application to SPQR Ltd

71. On the assumption that SPQR's inability to obtain the information from the Inland Revenue concerning the practice generally prevailing would breach its right to a fair trial under Article 6 with regard to the forthcoming proceedings before the Special Commissioners, the question then arises as to the most efficacious way that SPQR Ltd could rely on its Convention right. Both the Inland Revenue and the Special Commissioners constitute public authorities and so potentially HRA based claims could be brought against either (or both).

72. The first option would be for SPQR to claim against the Inland Revenue under s.7(1) HRA on the ground that the particular unlawful act is the refusal of the Inland Revenue to provide the information sought. Although the Inland Revenue may attempt to rely on s.6(2)(b) and claim that "as the result of one or more provisions of primary legislation, it could not have acted differently", it is considered that this argument could be refuted as there is no primary legislation that precludes the Inland Revenue disclosing non-confidential information, merely subordinate legislation that does not enable it to be required to disclose such information to the Special Commissioners.

73. Potentially, such a claim could be brought either in the High Court or before the Special Commissioners. In SPQR's circumstances, the best forum for raising this issue would seem to be a preliminary hearing before the Special

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74 The word "proceedings" in s.22(4) is not, as such, defined in HRA; and its cases: ex *parte Kebilene; R v Lambert* includes "appeals") was considered by the House of Lords in three criminal meaning (and, [2001] 3 WLR 206 and *Kansal.* It was also considered by the Court of Appeal in *R v Benjafield* [200113 WLR 75 (This case was recently heard by the House of Lords (24th January 2002 [20021 UKHL 2), and their Lordships followed the decision in *Kansal).* In *Kansal,* their Lordships acknowledged that their decisions in these cases are not consistent with each other, but the suggestion by Lord Lloyd of Berwick that the question of whether the House of Lords should depart from the view of the majority in *Lambert* should be referred to a panel of seven Lords of Appeal in Ordinary was not accepted. A detailed analysis of their Lordships' speeches in the three cases is out with the scope of this article. However, in short, applying the reasoning of their Lordships to a tax context, it is considered that if proceedings are brought by the Inland Revenue post October 2000 then, under s.7(l)(b), HRA, Convention rights may be relied upon by the taxpayer to challenge, for example, incompatible pre-October 2000 subordinate legislation at each stage of an appeal, regardless of which party is successful at each stage.

Commissioners, at which SPQR could request a direction that the Inland Revenue disclose the relevant information in order that the s.33 appeal proceedings could be disposed of "expeditiously, effectively and fairly."[75] However, under s.8(1) of the HRA, a court (which for this purpose includes a tribunal[76]) may only grant such remedy as is within its powers (and which it considers just and appropriate). Thus, unless the Special Commissioners have power to order the Inland Revenue to disclose the requisite information to SPQR Ltd (and, absent an HRA based argument, this article is predicated on the view that they do not), then that is not a remedy that they can grant.[77] It is considered that to claim successfully against the Inland Revenue to force disclosure of the requisite information, it would be necessary for SPQR Ltd to bring free-standing proceedings in the High Court. Although the High Court would have power to grant a mandatory order requiring the Inland Revenue to disclose the information, the disadvantage of this route is the cost (and time) of having to institute separate proceedings in the High Court before the s.33 appeal can be heard by the Special Commissioners.

74. The second option would be to contend before the Special Commissioners that Regulation 10, or more precisely, the exclusionary clause in Regulation 10, is unlawful. Section 56B, as amended by s.254 Finance Act 1994, enabled the Lord Chancellor to make Regulation 10 in a form that would have been compatible with SPQR's Convention right; and the clear statements of the Financial Secretary in the House of Commons show that

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75 See Regulation 9(3)(a) of the Special Regulations.

76 See s.8(6), HRA and s.21(1), the latter of which defines "Tribunal" as "any tribunal in which legal proceedings may be brought".

77 Moreover, the Special Commissioners could not award damages to the taxpayer. Damages may only be awarded by a court which has power to award damages (or other form of compensation) in civil proceedings. In determining whether to award damages (or the amount of any award), the court is directed to take into account the principles applied by the ECtHR in relation to the award of compensation under Article 41 of the Convention (s.8(4) HRA). According to the White Paper on the Human Rights Bill, "the court or tribunal will be able to grant the injured person any remedy which is within its normal powers to grant and which it considers appropriate and just in the circumstances. What remedy is appropriate will of course depend on the facts of the case and on a proper balance between the rights of the individual and the public interest." (paragraph 2.6) *Rights Brought Home: The Human Rights Bill* (1997) CM 3782. In deciding what is a 'just and appropriate' remedy, the courts are not limited to the range of substantive remedies, but may also consider other powers that have remedial effect. Section 7(11) allows the remedial powers of the Tribunal to be extended by the Minister responsible for that tribunal, either in respect of the actual remedies the tribunal is able to grant or the grounds upon which an existing remedy may be granted. However, as far as the author is aware, this power has not been exercised in relation to any tribunal, and, in particular, it has not been exercised by the Lord Chancellor in relation to the Special Commissioners.

it was the intention of the Government that Regulation 10 would be enacted in such a form. Thus, by making Regulation 10 in an incompatible way, the Lord Chancellor acted unlawfully, as the enabling power not only enabled that the Regulation be made in a compatible form, but directed that it should be. However, as the analysis in paragraphs 63-70 above shows, such a claim can not be made. Here the act, namely the making of incompatible subordinate legislation that was not mandated by the primary enabling legislation, took place before s.6(1) came into force and so it can not be unlawful under that sub-section. Section s.22(4) does not assist as the appeal is brought by SPQR Ltd, not the Inland Revenue.

75. Moreover, in the event that the Special Commissioners refused to treat the offending part of Regulation 10 as ultra vires, then, although this failure of the Special Commissioners to treat the offending part of Regulation 10 could itself be an unlawful act, it would seem that the s.6(2)(a) defence would apply. Due to a provision of primary legislation, namely s.22(4) HRA (which only applies s.6(1) retrospectively to proceedings brought by a public authority), the Special Commissioners were bound to treat the 'unlawful' act of making the incompatible Regulation 10 as lawful for the purpose of s.7(1)(a) and so could not have acted differently.

76. Thus it is considered that the only viable approach is a construction argument, and argue that the Special Commissioners Regulations can (and must) be construed by the Special Commissioners in a compatible way. There are two alternative ways that the construction argument can be run. The first is to argue that Regulation 10 must be interpreted by deleting the words "not the Inland Revenue", so that the Inland Revenue falls within its parameters. As indicated in paragraph 53 above, s.3(1) requires an unreasonable, but possible, interpretation, which is compatible with Convention rights to be endorsed over a non-compatible but reasonable interpretation; and, in reaching a possible interpretation, it allows for words to be omitted. It is considered that one possible (albeit 'unusual') interpretation would be to interpret s.56B TMA so that s.56B(1) not merely enabled any Regulations made under its power to provide that the Special Commissioners may require any party to an appeal, including the Inland Revenue, to provide information relevant to the determination of a taxpayer's liability, but stipulated (as read in accordance with the statements of the Financial Secretary)[78] that if and when such a Regulation was made,

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78 It is considered that the strict parameters imposed by *Pepper v Hart* [1993] AC 593 on when it is permissible to cite Hansard as a guide to arriving at the legal meaning of an enactment do not apply when striving for a 'compatible' meaning of legislation, post October 2000.

then it must be in such a format. Any Regulation passed under s.56B must be construed in accordance with s.56B, so that, to the extent that Regulation 10 is not in accordance with the enabling power (as so interpreted), it can be ignored when it itself is interpreted. It thus can be argued that deleting the words "not the Inland Revenue" is a compatible interpretation of subordinate legislation, namely Regulation 10, that is required by the enabling primary legislation.

77. The alternative construction argument is to contend that Regulation 4 can be read in such a way that it 'overrides' the restriction in Regulation 10. Regulation 4 provides that:

> (1) A Special Commissioner prior to the hearing of any proceedings, for the purpose of enabling the parties to prepare for the hearing or assisting a Tribunal to determine any of the issues in those proceedings, may on the application of a party or of his own motion, give such directions as he thinks fit.
>
> (2) A Tribunal hearing those proceedings may, for the purpose of assisting the determination of any of the issues in those proceedings, on the application of a party or of its own motion, give such directions as it thinks fit.

78. It is considered that, absent a s.3 HRA means of interpretation, the normal or reasonable reading of this Regulation is that the Special Commissioners may give such directions as they "think fit" only if they have power to grant such directions. Thus, the general discretionary power can not be read so as to expand the power of the Special Commissioners to grant directions that they otherwise would be precluded from granting. The normal interpretation would be that the power under Regulation 4 can not override the explicit restriction on the Commissioners powers to obtaining information and documents from the taxpayer only under Regulation 10. However, it is considered that under s.3 HRA the overriding interpretation is a possible one; and if, as in SPQR's circumstances, it is a compatible one, then it is to be preferred to the reasonable interpretation.

79. Whilst both of the above constructions are tantamount to questioning the vires of the offending part of Regulation 10 and (thus, in effect, treating the 1994 Act of making the Special Commissioners Regulations as unlawful),

it is considered that as s.3 HRA is a "strong adjuration"[79] it not merely allows but requires such 'radical' means of interpretation to be used when otherwise a Convention right may be breached.

Conclusion

80. It is clear that, contrary to suggestions in various newspaper reports, the HRA is not a catholicon. Particularly in the civil tax sphere, the prospects of success with regard to HRA based claims are not high, as there are two hurdles to overcome with regard to any procedural challenges to the tax appeal system. The first is to persuade the tax tribunal that, even if the subject matter of the case is purely the liability of a person to tax, the dispute falls within the ambit of Article 6 and that therefore the taxpayer is entitled to the fair trial guarantees under the Article. Whilst the author is of the view that the Special Commissioners should be sympathetic to an argument that in the United Kingdom a tax dispute does involve a "civil right", and that there is scope, under s.2 HRA to interpret the phrase in such a way, the decision in *Ferrazzini* acts as a considerable impediment to such an interpretation.[80] Secondly, even though it is considered that UK courts (and tribunals) have been granted a power to review validly made subordinate legislation in order to determine whether it is compatible with Convention rights, the procedural restrictions on this power mean that this power only can be exercised in relation to pre-October 2000 subordinate legislation in strictly limited circumstances. The way that the HRA operates means that steering the middle ground between the Scylla of Parliamentary sovereignty and the Charybdis of citizens' rights will not be an easy task for the judiciary. It may have the consequence that radical new interpretations of existing legislation will ensue, with meanings contorted to ensure compatibility with the Convention rights.

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79 Per Lord Cooke of Thornden in *ex parte Kebilene* at 373*f*.

80 The decision in *Ferrazzini* also hinders other procedural challenges to the tax appeals system, such as, for example, the inability of the Special Commissioners to award costs (save in the limited case where a party has "acted wholly unreasonably" (under Regulation 21 of the Special Commissioners Regulations)).