WHEN THE REVENUE ACT "IRRATIONALLY" THEY TOO WILL SUFFER JUDICIAL REVIEW

Robert Grierson[1]

R v IRC, ex parte Unilever plc and related application, QBD

Comment

PTPR readers will be interested to explore the decision of Macpherson J in *R v IRC, ex parte Unilever plc and related application* on 29th July 1994 (reported at [1994] STC 841, QBD), being apparently the first case where judicial review has actually been granted against the Inland Revenue on the grounds of unreasonableness/irrationality/unfairness other than that derived from some proven element of improper motive on the part of the Revenue. The jurisdiction had been affirmed, but not exercised, in a line of cases from *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260, HL to *Matrix Securities v IRC* [1994] STC 272, HL.

Readers will also be intrigued to learn of the Revenue's internal instructions to inspectors on when to allow out-of-time claims for loss-relief.

The case is important in laying to rest the principle that, in an application for judicial review against the Revenue, unfairness, other than that derived from "some proven element of improper motive" on the part of the Revenue, is confined to cases where, were the Revenue a private defendant, the action complained of would constitute a breach of representation being a representation giving rise to a

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private law estoppel, or would constitute a breach of contract. This principle was derived from the speeches of Lords Templeman and Scarman in *Preston v IRC* [1985] STC 282. The phrase "some proven element of improper motive" appears in the speech of Lord Templeman at [1985] STC 293c. Lord Templeman continues at 293j-294a and 294g-295a:

> "In the first three cases [*Robertson v Minister of Pensions* [1949] 1 QB 227, *Wells v Minister of Housing and Local Government* [1976] 1 WLR 1000 and *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222] cited by Lord Denning MR [in *HTV Ltd v Price Commission* [1976] ICR 170 at 185-186] the authorities acted in a manner for which, if the authorities had not been emanations of the Crown, the applicants would have enjoyed a remedy by way of damages or an injunction for breach of contract or breach of representations. In the third case of *Congreve* [*v Home Office* [1976] QB 629], as I have indicated, the decision was "unfair" because the Minister was actuated by an irrelevant motive.
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> In the present case, the taxpayer does not allege that the commissioners invoked s.460 for improper purposes or motives or that the commissioners misconstrued their powers and duties. However, the *HTV* case and the authorities there cited suggest that the commissioners are guilty of "unfairness" amounting to an abuse of power if by taking action under s.460 their conduct would, in the case of an authority other than Crown authority, entitle the taxpayer to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the taxpayer should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the taxpayer because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for "unfairness" amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."

Lord Scarman states at [1985] STC 299c-d:

> "For instance, as my noble and learned friend points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel."

The facts and dispute

The first applicant, Unilever plc, was the parent company in a large international group. The facts and issues of the second application, brought in relation to a subsidiary company of the first applicant, were not materially different.

Due to the complex nature of Unilever's affairs, the Revenue and Unilever plc adopted a practice whereunder the Revenue sent a questionnaire to the applicant seeking an estimate of its likely taxable profits. In supplying such an estimate Unilever plc would simply deduct from estimated total profits the amount of expected trading losses, the statement of the estimated amount of loss relief not being separately provided for in the questionnaire. The Revenue would then make assessments on the basis of the completed questionnaire. The applicant would then appeal against the assessments in order to reserve its position. Tax would then be paid in accordance with the assessments. Later, after the applicant's accounts had been finalised, tax computations would be prepared and sent to the Revenue. The appeals would then be determined by agreement and any necessary adjustments made by the further payment by the applicant, or the repayment by the Revenue, of tax.

Over a period of more than 20 years the tax computations on which the applicant's final liability to tax were determined were often submitted more than two years after the end of the accounting period to which they related. For the three accounting periods ended 31st December 1986, 31st December 1987 and 31st December 1988 the applicant submitted its **questionnaires** timeously. However, the Revenue refused to allow the applicant loss relief for those periods; such refusal being on the ground that the applicant's claims had not been made within the two-year statutory time-limit prescribed (for the first two periods) by s.177(10) of the Income and Corporation Taxes Act 1970/(for the third period) s.393(11) of the Income and Corporation Taxes Act 1988; i.e., on the ground that the **tax computations** for the said accounting periods had been submitted more than two years after the end of the accounting period to which they respectively related.

The applicant sought judicial review of the Revenue's decision to refuse its claims; the grounds of such application being *inter alia* (1) that the completed questionnaires constituted valid claims made within the two-year time-limit, (2) that, even if the claims had not been validly made, the Revenue should be required

by law to treat the claims as validly made, the ground of such requirement being that the Revenue had adopted a course of conduct which had led the applicant reasonably to believe that there existed a practice, acceptable to the Revenue, of allowing the applicant to make a loss relief claim in an informal manner and/or that the Revenue had acquiesced in such practice and/or that the applicant genuinely believed that such a practice existed so that it would be unfair in the circumstances for the Revenue to resile from that practice without giving proper notice, and (3) that the Revenue had failed reasonably to exercise their discretion to allow late claims, and, by such failure, had caused substantial unfairness to the applicant.

The Submissions of the Parties and Judgment of the Court

The applicant taxpayer failed on ground (1) (as referred to above), but succeeded on grounds (2) and (3) (as referred to above) and was thus successful in its application for judicial review.

Ground (1): Did the completed questionnaire constitute formally valid claims, ie made within the statutory two-year time-limit?

Reluctantly the court adopted the Revenue's position that the questionnaire did not sufficiently alert the inspector to the fact that claims for loss-relief were being made. The applicant had correctly contended that there was no prescribed form in which a claim to loss-relief had to be made. However, the figures for net taxable profits (reached after allowing for loss-relief) were insufficient alone to alert the inspector to the fact that relief was being claimed. As there was no separate compartment of the questionnaire to indicate the amount of losses, the inspector was not directly alerted to the claim until the tax computations were sent in. *Gallic Leasing Ltd v Coburn (Inspector of Taxes)* [1991] STC 699 established that, as regards claims to group-relief (the form for which was also not prescribed), there was an irreducible minimum of information that a claim, in order to be valid, had to contain. An inspector should not have to divine, assume or infer that a claim was being made. In the instant case the irreducible minimum of information was either an explicit inclusion of figures showing the amount of losses, or an express indication that the figures for net taxable profits had been arrived at after taking losses into account, or an express statement that loss relief was to be claimed.

Ground (2): Had the Revenue adopted a course of conduct which led the applicant reasonably to believe that informal claims would be accepted?

There was some disagreement between the parties as to the exact number of occasions on which the Revenue had accepted, as valid claims, tax computations submitted outside the two-year time-limit. Nevertheless, it was clear that, for over

20 years, the Revenue had accepted a significant and substantial number of late claims without demur. All of the applicant's returns were made to the same department of the Revenue, so that the court could not accept the Revenue's contention that a course of conduct by varying individual inspectors taken together would not affect the applicant's perception of what was required of it. Further, the Revenue's inaction over the 20 years or so had never been satisfactorily explained.

The question for the court, however, was whether the applicant could assert a legal right to require the Revenue to accept the applicant's claims for relief in respect of the said three periods. The applicant's case was that it was a fundamental principle of administrative law that public bodies such as the Revenue had to exercise their statutory powers and perform their statutory duties fairly and reasonably and ought not to abuse their powers. The applicant relied in particular on *HTV Ltd v Price Commission* [1976] ICR 170, CA to support its submissions that (a) the Revenue had by their conduct induced and/or fostered a belief in the applicant that it could safely rely on omitting to provide to the Revenue any further information than that in fact provided; and (b) that, the applicant having refrained from action in reliance on such belief, it would be unfair and unjust to allow the Revenue to refuse the applicant's claims. It would, submitted the applicant, be all the more unfair where, as in the instant case, the requirement breached was merely procedural, inserted solely for the convenience of the Revenue in the administration and collection of taxes, where the breach had caused no prejudice to the Revenue, and where permitting the Revenue to insist on such a technicality would cause enormous prejudice to the applicant.

The Revenue for their part contended that the Revenue were entitled to carry out their primary duty of collecting taxes and that time limits should be adhered to unless the Revenue's conduct had amounted to a representation that time limits could be relaxed. It was not enough, submitted the Revenue, for the applicant to show unfairness; there had to be conduct amounting to a breach of representation. The Revenue contended that silent acquiescence on their part did not amount to a representation and, accordingly, that there had been no representation by the Revenue which had subsequently been breached.

The court considered that both *Preston v IRC* [1985] STC 282, HL and *R v IRC, ex parte MFK Underwriting Agencies Ltd* [1989] STC 873, QBD, on which the parties respectively relied, treated whether it would be an abuse of power for the Revenue to insist on enforcing substantive anti-avoidance/charging provisions, but not, as in the instant case, a prior question of whether regulatory time-limits should be enforced; a factor which might be significant in deciding on which side of the line the present case fell. The court considered, however, that the ambit of unfairness amounting to an abuse of power was the real root of the matter. In the judgment of the court, the applicant's argument succeeded for the following reasons: (a) for a long period of over 20 years, the Revenue had represented, by their conduct and acquiescence, that informal claims made within the two-year

time-limit would be accepted; (b) that, even if the Revenue had not intended to, their conduct had fostered a belief in the applicant that no more information than that invoked by the questionnaire was required to make a valid claim; and (c) that, as the Revenue's conduct had amounted to a representation, it was unfair for the Revenue to impose, without advance notice thereof, a requirement that a formal claim be made within the time-limits. In *Matrix Securities v IRC* [1994] STC 272, Lord Mustill observed at 294 that the issue, of whether an abuse of power had occurred, was a matter of impression. In the court's judgment, a jury of reasonable men and women would be persuaded that the whole picture of the instant case did smack of an abuse of power by the Revenue. Where a regulatory rule was involved, acquiescence on the part of the Revenue, if substantial, was sufficient to amount to a representation which could ground a successful application for judicial review.

Ground (3): Should the Revenue have exercised their discretion to allow the late claims?

The parties were agreed that the Revenue had, under the general care and management provision of s.1 of the Taxes Management Act 1970, a discretion to allow late claims. In relation to losses incurred in accounting periods ending after 31st March 1991 the specific discretion provided by s.393A(10) of the Income and Corporation Taxes Act 1988 would also be in point. The applicant submitted that, in the circumstances of the present case, the only reasonable exercise of the Revenue's discretion was to allow the late claims. According to an **internal instruction leaflet** given to inspectors, claims to loss relief "should normally be refused" if made outside the statutory time-limit. However, the **leaflet** further stated that special consideration should be given where a company might reasonably believe that an adequate claim had been timeously made, and that, in such circumstances, a late claim might be allowed. Although the applicant's claims were not directly made until the tax computations were submitted, it was clear that the applicant genuinely believed that the questionnaires adequately enshrined its claims for relief; for, the applicant would otherwise have added, in the questionnaire, a statement to the effect that loss-relief was being claimed; a practice which the applicant adopted with respect to later years. In the light of the Revenue's conduct in not protesting the manner in which the applicant had made its claims over the past two decades, it was, held the court, unreasonable to the point of **irrationality** for the Revenue to refuse to exercise their discretion in the applicant's favour in respect of the instant three claims. There would, said the court, be no prejudice to the Revenue and no additional burden placed on the general body of taxpayers for the instant three claims to be allowed.

Conclusion

This case has, for the time being, clearly established that, in a proper case, judicial review will be (and has been) granted against the Inland Revenue on grounds of unfairness alone. It is understood that the Inland Revenue have now initiated an appeal to the Court of Appeal.

It cannot be sufficiently stressed that an applicant is only likely to succeed if it can show that its conduct in relation to the matter has at all times been impeccable; conduct which, in the writer's view, would comply with the duty of utmost good faith (*uberrimae fidei*) applicable in the context of certain classes of contract, most notably insurance contracts. The merest whiff of anything but the highest standard of probity and openness is likely to be fatal to the application. See Lord Templeman in *Preston v IRC* [1985] STC 282 at 295d-e. Advisers and litigants alike should bear this firmly in mind when embarking on an application for judicial review.