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Judicial Control of Tax Negotiation

Sandra Eden*

Abstract

This article considers the supervisory jurisdiction of the UK courts through an examination of their control of the UK tax authorities. It concentrates on the conditions under which the tax authorities have been authorized by the UK courts to enter extra statutory arrangements to afford some taxpayers concessional treatment. The article considers the basis of judicial review and then examines the legislative framework within which the Revenue operates. With this background the article considers the principles of judicial review in tax cases. Starting with the general principles, it then examines the argument that the Revenue makes extra statutory concessions on the basis of its powers of care and management and it considers the limitations of that argument. The cases dealing with legitimate expectation are examined too, as are the limits on the legitimate expectation principle. Finally, the article considers “the slippery principle of equality” within the UK constitution and the equally frustrating (for third parties) problem of establishing locus standi.

The article concludes that there are significant tensions between competing interests when the Courts review the Revenue’s granting of extra statutory concessions. They seem to have afforded the taxing authorities considerable autonomy in their fulfilment of their management function, but they have limited them to the exercise of discretion only in the course of their care and management of the tax system and in the context of their primary duty to collect tax. The author concludes that the courts have done well in balancing the interests of the tax authorities and taxpayer but that wider interests, such as equality between taxpayers, have not fared as well.

INTRODUCTION

The main purpose of this paper is to consider the supervisory jurisdiction of the UK courts through an examination of their control of the UK tax authorities. One particular aspect is an examination of the conditions under which the tax authorities have been authorised by the UK courts to enter into agreements or make public statements to the effect that they will collect less tax than that which may be regarded as officially due. This is, on the face of it, a curious phenomenon as under traditional British constitutional law it is the legislature alone which may determine the conditions under which tax is to be payable.

The judicial control of the exercise of executive powers constitutes an interesting object of enquiry from a number of angles. From a constitutional perspective, from where does the courts’ authority to permit behaviour which apparently contradicts the intention of parliament derive? How can they authorise acts by a public body which appear to be in direct conflict with the statutory rules relating to the obligation of the citizens to pay tax? This raises deep and difficult questions about the source of the courts’ authority, which in turn raise even deeper and more difficult questions about the democratic justification of the imposition of authority by the state. From a narrower legal perspective, what principles are used by the courts to govern the relationship between the revenue authorities and the taxpayer? What does it tell us about the nature of judicial control of public bodies, and is there anything of particular interest in the operation of these principles in the context of taxation?

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These big constitutional issues are generally considered either in the context of cases on fundamental human rights such as personal liberty or freedom of speech, or in the context of cases where the division of power between the judiciary and the legislature are brought into sharp distinction, such as ouster clauses. Although taxation is providing an increasingly important field for judicial review, the constitutional implications of the cases remain relatively unexamined.

THE BASIS OF JUDICIAL REVIEW IN THE UK

The function of judicial review is relatively clear: it is the control of the power exercised by the executive. The principles which underpin the procedure have been developed exclusively by the courts.¹ Although under traditional democratic theory it is for the legislature to control the executive, the rise in the role in the state, the increase in legislation and the increasing difficulty of the legislature in controlling the executive has resulted in an exponential increase in the role that the courts play in the regulation of the bodies of the state.

In developing their contemporary supervisory jurisdiction, the courts have arrogated to themselves considerable powers over the executive and have assumed constitutional functions which, traditionally have been exercised by the legislative branch.²

Whilst the function of judicial review is clear, its constitutional basis is open to debate. The traditional explanation of the foundation of the courts' supervisory powers is found in the theory of parliamentary sovereignty and the doctrine of ultra vires. The theory of parliamentary supremacy dictates that once parliament has been elected, its authority is unchallengeable;³ the rule of law derives its authority from its parentage, not its content.

[T]he legislative outcome of the political battle derives its moral authority entirely from its pedigree as the product of a decision-making procedure to which all parties and interest-groups have access, according to their numbers and strengths.⁴

This has been termed the majoritarian concept of democratic rule.⁵ In terms of this theory, the power of parliament is based on the legitimacy granted by the democratic process of voting. The imposition of the authority of the courts derives from and is subservient to political process. When the courts are engaged in the function of patrolling the exercise of statutory powers by statutory authorities, the only principles to which they are entitled to have recourse are those emanating from Parliament. Courts are able to impose the duties of acting reasonably on the public bodies because, on the basis of the traditional view of ultra vires, Parliament must have intended that they so act.⁶ Thus the doctrine of ultra vires derives ultimately from the will of

¹ There is some procedural regulation of the process, for example the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court SI 1977 No 1955.

² Elliott, *The Constitutional Foundations of Judicial review* (Hart Publishing 2001) at 3.

³ Of course this no longer holds true for the UK with the advent of the accession to the European Union and now the enactment of the Human Rights Act 1998.

⁴ Allan, "Fairness, Equality, Rationality: Constitutional Theory and Judicial review" in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (Oxford 1998) 15 at 16.

⁵ Allan, *supra*. See also Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999).

⁶ The judiciary seem to retain this orthodox view: eg Lord Browne Wilkinson in *R v Lord President of the Privy Council ex p. Page* [1993] AC 682.

Parliament via the medium of statutory interpretation. Sir William Wade, one of the leading exponents of administrative law in the UK expresses this as follows,

Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.⁷

The courts have a constitutional mandate only to impose the will of an elected parliament. Thus is the legitimacy of the courts' role established in a way which is consistent with the principle of the sovereignty of parliament and legislative supremacy.

Recently there has been some debate about whether or not the orthodox view of ultra vires, utilising the principle of the implied intention of parliament, provides a coherent or sufficient account of the exercise of the courts' supervisory powers.⁸ There are a number of features of judicial review which do not easily sit in this analysis. First, since 1985 in the *GCHQ* case⁹, it is clear that the principles of judicial review extend to the powers of public bodies which do not derive from parliament but which are exercised under the authority of the common law. The problem is this: how can the justification of the implied intention of parliament extend to explain the operation of those very same principles in the context of extra-statutory powers of a public body?¹⁰

There are other difficulties too: judicial review is now used to uphold the duties on public bodies to act in accordance with the European Convention of Human Rights and the EC Treaty.¹¹ Wherever these principles come from, it is not directly from the UK parliament. The adoption of principles traditionally associated with judicial review in the sphere of the private law also is difficult to explain.¹² A further objection to the "parliamentary intention" explanation lies in the observation that the content of the principles of judicial review have themselves changed over time, even in relation to the same legislation.¹³

The alternative explanation of the import of the duty of fairness into the exercise of power is that it has nothing to do with the implied intention of the legislature but

⁷ Wade and Forsyth, *Administrative Law* (Oxford, 2000) 8th ed at 37.

⁸ Apart from the articles cited below, the debate rumbles on in the following articles: Allan, "Doctrine and Theory in Administrative Law: An elusive quest for the limits of jurisdiction" 2003 PL 429; Craig, "Constitutional Foundations, the Rule of Law and Supremacy" 2003 PL 92; Forsyth and Elliot, "The Legitimacy of Judicial Review" 2003 PL 286.

⁹ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. See also *R v Panel on Take-Overs and Mergers ex p. Datafin plc* [1987] QB 815.

¹⁰ Craig, *Administrative law* (Sweet and Maxwell 1999) at 5. One suggested answer to this may be that, although separate explanation may be required to be found to underpin the application of judicial review principles in the non-statutory context, the deemed intention of parliament still remains the foundation of the courts' authority in areas where statutory powers are being exercised. Eg Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" 55 [1996] CLJ 122, reprinted in Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) at 29. See also *Boddington v British Transport Police* [1999] 2 AC 143 per Lord Steyn at 172.

¹¹ Human Rights Act 1998 s 6, see also Elliott, op cit note 2.

¹² Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" in Forsyth (ed), op cit note 10 at 4.

¹³ Craig "Ultra Vires and the Foundations of Judicial Review" in Forsyth (ed), op cit note 10 at 47.

derives independently from common law principles.¹⁴ This puts the role of the court onto a rather different footing as the direct link between the exercise of the courts' supervisory jurisdiction and the supremacy of parliament disappears. Under communitarianism, power wielded by parliament is not absolute but is simply one manifestation of the theory of democracy under an unwritten constitution in terms of which power is transferred to parliament to be exercised subject to fundamental ideals of freedom, dignity and equality. Allan explains this thus,

It is sufficient, in the majoritarian conception, that a measure or decision has sufficient connection with whatever purpose or policy had been endorsed by ordinary legislative procedure – a judgment of formal or instrumental rationality. The rationality requirement under the communitarian conception is more demanding: it entails the rejection (or restrictive interpretation) of measures or decisions which are inconsistent with a suitably expansive, but none-the less determinate, theory of the common good.¹⁵

Principles of fairness and justice derive from principles of citizenship and are, under communitarian theory, independent of and superior to the will of parliament. Thus the courts are not necessarily applying the will of parliament when they are asked to regulate the operations of public bodies in the process of judicial review; they are applying independent values of human dignity and the common good.

After an examination of the principles applied in tax judicial review cases, we shall return to these competing conceptions of power and ask what light, if any, the cases shed.

THE LEGISLATIVE FRAMEWORK – THE POWERS OF THE TAX AUTHORITIES

The statutory powers of the Inland Revenue, responsible for direct taxes, are contained in the *Inland Revenue Regulation Act 1890* and the *Taxes Management Act 1970*. Customs and Excise operate value added tax under the *VAT Act 1994*. In contrast to the detailed nature of the legislation in substantive areas, the broad statutory powers are contained in a few brief sections.

Section 1 of the *Inland Revenue Regulation Act 1890* provides:

- (1) It shall be lawful for Her Majesty the Queen to appoint persons to be Commissioners for the collection and management of inland revenue, and the Commissioners shall hold office during Her Majesty's pleasure.
- (2) The Commissioners shall have all necessary powers for carrying into execution every Act of Parliament relating to inland revenue, and shall in the exercise of their duty be subject to the authority, direction, and control of the Treasury, and shall obey all orders and instructions which have been or may be issued to them in that behalf by the Treasury.

Section 13 of the Act further provides

The Commissioners shall collect and cause to be collected every part of inland revenue, and all money under their care and management.

¹⁴ Sir John Laws "Law and Democracy" [1995] PL 72, Oliver, op cit note 12.

¹⁵ Allen, op cit note 8 at 23.

Section 1 of the *Taxes Management Act 1970* states simply, “Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland Revenue” and the “care and management” formula is similarly used in the context of all other taxes and duties.¹⁶

There are a few legislative provisions governing administration, for example, the *Taxes Management Act 1970* s 54 provides that once a tax assessment has been appealed, the case can be settled by “agreement” which is binding on the parties¹⁷ and s102 of the same act provides the tax authorities with power to mitigate penalties on unpaid tax. There is little more.

Cumulatively, these statutory provisions do not provide very much in the way of detailed guidance and the content of the powers and duties of the tax authorities has been fleshed out in court through the challenges to the tax authorities under judicial review.

THE PRINCIPLES OF JUDICIAL REVIEW IN TAX CASES

General principles

As a preliminary point, although it was probably never seriously in doubt, it is worth noting that as recently as 1981, the House of Lords thought it worth stressing that the tax authorities were in fact subject to the supervisory jurisdiction of the courts.¹⁸ In taxation as in other areas of law, judicial review has grown exponentially over recent years and it is only in the last twenty or so years that there has been very much by way of judicial consideration of the principles involved in tax cases.

As mentioned above, under the orthodox view of judicial review, the courts are mainly concerned with ensuring that public bodies act within their powers, that is that they do not act in an ultra vires fashion. There are two aspects to this. First, an act which is simply outside the scope of a body’s powers is ultra vires and therefore void. No reliance can be placed on such acts and there are no exceptions to this as the damage caused by permitting statutory bodies to act outwith their powers is regarded as worse than any unfairness caused to individuals. Arguments based on reasonableness, rationality and fairness can never be used to make lawful the unlawful exercise of power. This strict version of the ultra vires doctrine has only featured in a very limited number of cases, but a straightforward example of an ultra vires act was a decision of the tax authorities not to make a repayment of VAT which had been paid in error.¹⁹

More usually a case for judicial review is made on the broader version of the ultra vires doctrine, having its roots in *Wednesbury Corporation*.²⁰ This is the principle that

¹⁶ Eg VAT, stamp duties, car taxes, betting and gaming taxes, insurance premium tax, oil taxes.

¹⁷ In *IRC v Nuttall* [1990] BTC 107 the Court of Appeal accepted that the courts had a managerial discretion to accept pecuniary settlements instead of instituting proceedings even where there was no appeal. A similar provision exists in relation to VAT: VAT Act 1994 s 85. Whether or not there is an “agreement” is settled by normal principles of contract law: *R (on the application of DFS Furniture Co plc) v C & E Commers* [2003] BTC 5003.

¹⁸ *R v Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 per Lord Wilberforce at 631 and Lord Diplock at 637. See also Lord Scarman in *R v IRC ex parte Preston* [1985] BTC 208 at 223.

¹⁹ *R v IRC ex parte Kay* [1997] BTC 5010. See also *Al Fayed v Advocate General for Scotland* 2004 S.L.T. 798, 2004 G.W.D. 22-491 2004 WL 1476764, discussed below at note 44 et seq.

²⁰ *Wednesbury Corporation v Ministry of Housing and Local Government (no 2)* [1966] 2 QB 275.

that acts which are *prima facie* within the scope of a body's lawful powers become unlawful if they are tainted by either procedural or substantive defects: an abuse of power as opposed to a simple excess of power. One is struck when reading the judgments in this area by the frequency of the reference to fairness as the overarching principle. Lord Scarman explained the principles of judicial review as follows,

The Commissioners [of Inland Revenue] have their statutory powers and duties, the exercise of which can be challenged by the process of judicial review only if certain principles of general application are met. The taxpayer must show either a failure to discharge their statutory duty to him or that they have abused their powers or acted outside them.... [U]nfairness in the purported exercise of a power can be such that it is an abuse or excess of power.²¹

In the context of judicial review, the concept of fairness has developed specific limitations²² and in particular it is clear that a high degree of unfairness, unfairness amounting to an abuse of power,²³ is required before the courts will get involved.²⁴ For example, Simon Brown L.J. observed in *Unilever* that there is a distinction between:

...on the one hand mere unfair conduct which may be characterised as “a bit rich” but nevertheless understandable – and on the other hand a decision so outrageously unfair that it should not be allowed to stand.²⁵

It is not possible to give a definitive account of the content of fairness and indeed the judiciary are concerned that its ambit is not set in stone.²⁶ There are of course the normal requirements of judicial review that the tax authorities do not fetter their discretion, take into account factors which are irrelevant or ignore factors which are relevant. Whilst not an exact analogy,²⁷ conduct by the authorities which would amount to a breach of contract or representation in a private law relationship is likely to be an abuse of power.²⁸ Where a substantive rather than procedural unfairness is established, for an example a Revenue statement as to interpretation of the law which they then alter, the taxpayers must have relied upon it to their prejudice.²⁹ There are also suggestions that the courts would expect a higher standard of behaviour from tax authorities than they would expect from private bodies.³⁰

Exercise of the powers of care and management

On several occasions, the argument has been put forward that statements or agreements by the tax authorities to the effect that they will not collect tax are

²¹ *R v IRC ex parte Preston* op cit note 18. See also *R v IRC ex parte Unilever plc* [1996] BTC 183 per Simon Brown at 196.

²² Judge J in *R v Board of Inland Revenue ex parte MFK Underwriting Agencies Ltd* [1989] BTC 561 at 584.

²³ *R v IR Commrs, ex parte Preston* (op cit note 18), Lord Templeman, 217-218.

²⁴ Simon Brown LJ in *Unilever* at 194, Judge J in *MFK Underwriting Agencies* stated at 586, “the court should be extremely wary of deciding to be unfair actions which the Commissioners themselves have determined are fair.”

²⁵ At 195.

²⁶ *Unilever* per Bingham at 190, *Thompson v Fletcher* [2002] BTC 371 at 384.

²⁷ *Unilever* per Simon Brown LJ at 195.

²⁸ *Preston* per Lord Templeman at 219 and Lord Scarman at 223.

²⁹ *Unilever* per Bingham at 190, *R v IRC ex parte SG Warburg & Co Ltd* 1994 BTC 223 per Hidden J at 201.

³⁰ eg *Unilever* per Simon Brown LJ at 195.

unlawful on the basis that their statutory duty is to collect taxes, not to forgive them. The argument continues to the effect that, if an agreement not to enforce the tax legislation is outside their powers, it is unlawful on the basis of the strict ultra vires rule and can never bind a public body irrespective of unfairness or frustration of expectation. A slightly unsavoury feature of this argument is that it is generally made by the tax authorities who are seeking to extract themselves from honouring an earlier statement or agreement.³¹

The starting point on the power of care and management in the context of agreements not to collect tax is the House of Lords' decision in *IRC v National Federation of Self-employed and Small Businesses Ltd*³² which concerned the taxation of casually employed journalists who had been proving extremely difficult to pin down and tax. There was a widespread practice of giving false names to employers and the Inland Revenue were finding it difficult to tax "Mickey Mouse of Sunset Boulevard" and other such characters. Broadly, a deal was entered into between the unions and the employers of these journalists to the effect that the Inland Revenue would not seek to recover tax from these individuals for a number of past years in return for an undertaking as to a future change in practice which would enable tax to be collected.

This so-called amnesty was challenged by a body representing other taxpayers who were outraged by the preferential treatment offered to the "Fleet Street casuals" which compared unfavourably with what they perceived as being their own treatment in the hands of the taxing authorities. Lurking in the background to the case is the clear sense that the "goods guys" thought that the advantageous treatment of the "bad guys" was due to the underlying threat of industrial action in an industry renowned for striking in the 1970s, a fear not substantiated on the evidence presented to the court, at least.

There are two angles to the House of Lord's judgment. One is procedural, concerning the standing of the National Federation to seek review of the Inland Revenue's decision and this is considered later. The other is substantive: whether the deal was one that the Inland Revenue had the power to make. The House of Lords decided that it did. It was unanimously held that the making of such deals was within the lawful exercise of the wide powers conferred within the "care and management" formula. Only if the deal had been motivated by other than managerial purposes would the deal have been unlawful. Quite how widely the scope of managerial purposes extends was not discussed, although it can reasonably be implied from the judgments that if the deal had been made to avoid a strike, this would have been regarded as inappropriate.

Lord Roskill best explained the reasoning as follows,

The [Inland Revenue] were in no way arrogating to themselves a right not to comply with their statutory obligations under the statute to which I have referred. On the contrary, the whole case was that they had made a sensible arrangement in the overall performance of their statutory duties in connection with taxes management, an arrangement made in the best interests of everyone directly involved and, indeed of persons indirectly involved, for the agreement reached would be likely to lead ultimately to a

³¹ For example *MFK Underwriting Agencies Ltd* (note 22) *Al Fayed* (note 19). Although see *National Federation* op cit note 18.

³² [1982] A.C. 617.

greater collection of revenue than if the agreement had not been reached or 'amnesty' granted.³³

In other words, if you have to dangle the carrot of not collecting past tax in order to persuade taxpayers to comply with their duties to pay future tax, this is within the scope of what is reasonable. Adverse comments can be expressed on this view, such as it is hard to believe that the Inland Revenue would not have the legal powers to ensure that tax was collected in the future and, if they did not, how were they to expect the employers to operate PAYE or the reporting requirements without legal authority? Leaving such criticisms aside, this case provides clear authority for the view that it is within the powers of the tax authorities to agree not to collect tax, and furthermore, makes it clear that the tax authorities are invested with wide discretionary powers, the use of which are only to be disturbed in the clearest possible cases.

Subsequently, the Inland Revenue's power to come to a negotiated settlement was confirmed in *IRC v Nuttall*³⁴ in which a taxpayer was seeking to escape from an earlier agreement on the basis that it was not within the Inland Revenue's capacity to make it. Drawing on *National Federation*, the Court of Appeal unanimously held that such settlements (or "back tax agreements" as they are frequently described) fell within the powers or care and management awarded under s 1 of the 1890 Act.

Limitations on the power of care and management

The Inland Revenue have operated a system of extra-statutory concessions in the UK for many years which are now widely available in published form. Extra-statutory concessions, almost legislative in tone, operate to excuse the taxpayer from paying the correct amount of tax in tightly drawn situations. They provide exemptions where the strict legal situation is thought by the tax authorities to produce a result which is either unfair, anomalous or inappropriate to enforce given the amounts involved. The booklet in which they are published prefaces them with the words,

An extra-statutory concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.³⁵

There is something rather uncomfortable about the use of extra-statutory concessions: the practice of not seeking to collect tax which is clearly due in terms of the primary legislation has peculiar status which is reflected by judicial unease with the practice, encapsulated by the statement of Walton J in 1979,³⁶

I, in company with many other judges before me, am totally unable to understand upon what basis the Inland Revenue Commissioners are entitled to make extra-statutory concessions. To take a very simple example (since

³³ At 661.

³⁴ [1990] BTC 107.

³⁵ IR 1. Although the extent to which concessions are in fact limited to minor or transitory anomalies was questioned in *R (on the application of Wilkinson) v IRC* [2002] BTC 97 at para 27.

³⁶ *Vestey and Others v IRC (No 2)* approved of by Lord Wilberforce in the House of Lords [1979] 3 W.L.R. 915, 926, 931.

example is clearly called for), upon what basis have the commissioners taken it upon themselves to provide that income tax is not to be charged upon a miner's free coal and allowances in lieu thereof? That this should be the law is doubtless quite correct: I am not arguing the merits, or even suggesting that some other result, as a matter of equity, should be reached. But this, surely, ought to be a matter for Parliament, and not the commissioners. If this kind of concession can be made, where does it stop; and why are some groups favoured as against others? I am not alone in failing to understand how any such concessions can properly be made.³⁷

He added, "One should be taxed by law and not be untaxed by concession."³⁸

However, despite the approval of the above sentiments in the House of Lords, this took place prior to the decisions in *National Federation* and *Preston*, and by 1987, McNeill J was of the view that extra-statutory concessions fell well within the "concept of good management or of administrative common sense" and to be "well within the proper exercise of managerial discretion".³⁹ In 1989, Lord Justice Bingham was able to say, "no doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them."⁴⁰

It now appears to be accepted that extra-statutory concessions are legitimately issued and their scope and application are appropriately considered in individual cases by the courts, although judicial statements continue to be grudging:

One of the problems of concessions is that they can lead to documents such as this certificate which is and is known by all concerned to be inaccurate. ... It is a pity that the trenchant aphorism of Walton J in *Vestey v IR Commrs* [1979] 1 Ch 177 at p. 197: 'One should be taxed by law, and not be untaxed by concession' has not been heeded. Concessions lead not only to artificiality and false documentation but also to arguments whether particular transactions fall within them. The language of concession is not that of a statute and should not be construed as if it was.

The judge though then continued,

But if a concession is published to all who might benefit from it, they are entitled to arrange their affairs in reliance on it, provided that what they do falls clearly within the terms of the concession.⁴¹

This is not an entirely accurate statement of the current position because before the concession can bind the tax authorities, it must have been issued in the course of the exercise of their powers of care and management. The cases in which concessions have been considered have all proceeded on some rather vague notion of their relationship with the care and management function but in *R (on the application of*

³⁷ See also Scott L.J. in *Absalom v. Talbot* (1943) 26 T.C. 166, 181, Viscount Radcliffe in *Inland Revenue Commissioners v. Frere* [1965] A.C. 402, 429, Lord Upjohn in *Inland Revenue Commissioners v. Bates* [1968] A.C. 483, 516.

³⁸ At 197.

³⁹ *R v HMIT ex parte Fulford Dobson* [1987] BTC 158 at 166.

⁴⁰ *MFK Underwriting Agencies Ltd* op cit note 22 at 581.

⁴¹ per Collins J in *R v C & E Commers ex parte Greenwich Property Ltd* [2001] BTC 5158 at 5163. See also Moses J in *R (on the application of Wilkinson) v IRC* op cit note 35 at para 27.

*Wilkinson) v IRC*⁴², careful judicial consideration of the constitutional basis of such concessions is apparent. One of the issues in this case was whether the Inland Revenue should have granted a concession in order to make a statutory relief (available to women only) available to men too so as to achieve compatibility with rights provided for by the ECHR. The Court of Appeal held that the Inland Revenue had no power to grant the concession to override an unequivocal legislative provision except for the purposes of facilitating the overall task of collecting taxes as part of its duty of “care and management”.

No doubt, when interpreting tax legislation, it is open to the commissioners to be as purposive as the most pro-active judge in attempting to ensure that effect is given to the intention of Parliament and that anomalies and injustices are avoided. But in the light of the authorities that we have cited above and of fundamental constitutional principle we do not see how s. 1 of TMA 1970 can authorise the commissioners to announce that they will deliberately refrain from collecting taxes that Parliament has unequivocally decreed shall be paid, not because this will facilitate the overall task of collecting taxes, but because the commissioners take the view that it is objectionable that the taxpayer should have to pay the taxes in question.⁴³

So, the power to grant concessions is not without limit but must be exercised only for the purposes of facilitating the task of tax collection. Given that concessions by definition reduce the amount of tax collected, under this test there is only one obvious justification for a concession: where the costs of collection outweigh the tax at stake. On this basis, many concessions are hard to justify.

Further limitations to the powers of the tax authorities are considered in the most important case in recent years on the ultra vires doctrine in the context of taxation, recently decided by the Court of Session in Scotland⁴⁴. The case concerns a “forward tax agreement” entered into between the UK tax authorities and Mohammed Al Fayed. The tax position of a non-UK domiciliary resident in the UK in relation to foreign source income and gains is that they are only taxable to the extent that they are remitted into the UK. This means that a wealthy and well-advised individual could avoid UK tax on foreign income and gains by arranging for only capital (and not capital gains) to be remitted to the UK. A handful of agreements (“forward tax agreements”) had been entered into between the tax authorities and non-UK domiciled taxpayers under which lump sums were paid to the Inland Revenue each year in lieu of an assessment made on the basis of the actual income and gains (if any) remitted. Several successive agreements had been entered into with Mr Al Fayed, the last intended to last from 1997 to 2003, to the effect that he would pay a certain amount of “tax” each year and, in return, the tax authorities would effectively stay away from his affairs. On the basis of information which subsequently became public, the Inland Revenue decided that it had entered into these agreements on the basis of inadequate information and took a decision in 2000 to resile as to the future from the 1997 agreement on the basis that it was ultra vires.

Al Fayed argued that the agreement was not ultra vires, (and that even if it was, to resile from it was unfair and a breach of his legitimate expectation, discussed below).

⁴² Supra.

⁴³ At para 46.

⁴⁴ Op cit note 19. The petitioner has appealed to the House of Lords.

The Inland Revenue had initially argued that, although in general they had the power to enter into forward tax agreements, this particular one was ultra vires. This was on the basis that it provided that the taxpayers were to be treated as domiciled outside the UK, whatever the true position, but contained no provisions for termination in the event of a change of circumstance and was entered into on the basis of insufficient information. However, in the lower court it had been decided that all forward tax agreements were ultra vires⁴⁵ and this was the principal line taken on appeal.⁴⁶ So far at least (the case is under appeal to the House of Lords), the courts have backed the Inland Revenue.

The taxpayer had sought to make an analogy with “back tax agreements”, the practice whereby tax authorities negotiate a settlement with the taxpayer in relation to periods already ended⁴⁷ and the “amnesty” entered into in the *National Federation* case. On the basis that it was legitimate to contract to accept an amount which might not be precisely equivalent to the actual tax due in relation to past periods, it was argued that the tax authorities should be permitted to enter into similar agreements in respect of future periods. However, the court distinguished these agreements on the basis that the statutory duty of the tax authorities is to collect “tax as it falls due in respect of actual transactions”⁴⁸. Although the managerial discretion to enter into a compromise in respect of past transactions in the circumstances of each case was recognised as falling within the duties and powers of the Inland Revenue, they did not have the power to collect tax in the future. Therefore, neither did they have power to enter into an agreement in relation to tax which might or might not become due in the future.⁴⁹

Fundamentally, the decision boils down to this: making a deal in relation to a transaction already carried out in light of all the available knowledge means that the Revenue can assess with reasonable accuracy what facts they are going to be able to establish, where they will have difficulties and what amount of tax they believe might be at stake. An informed judgment can be made on the balance between expenditure on further enquiries versus potential tax collection. In relation to a future tax agreement, there is no way of judging whether the deal is economic or not: they do not know how much tax they are forgiving, circumstances might change (such as might effect a change in domicile) or the laws might change. It is unusual for the courts to second-guess the tax authorities as to the way in which to maximise the tax take and one might have thought that the best judge as to the course of action to generate the most revenue would be the Revenue themselves. However, and this is a point made most clearly by the lower court, the Revenue’s powers of care and management must be considered in the context of their duty to collect tax. They have no duty to maximise Treasury income from any source.

Of course there is a distinction between a deal on a transaction yet to be done and one on a future transaction. In the first there is a question of balancing resources: time and effort spent chasing tax against the likely return. Where the transaction has yet to be carried out (and may not be carried out, depending on the tax position), there is

⁴⁵ *Al Fayed and others v Advocate General for Scotland* [2002] STC 910.

⁴⁶ By this stage, the Inland Revenue had terminated all seven other tax agreements remaining.

⁴⁷ A practice held to be valid in *IRC v Nuttall* [1990] BTC 107. See also *IRC v Woollen* [1992] BTC 633 per Nolan LJ at 640.

⁴⁸ Para 73.

⁴⁹ Para 76.

another factor in the equation: the balance between some tax and no tax. In a narrow sense, the agreement maximises the return to the Treasury. The deal is as follows: a taxpayer, contemplating a transaction (A), says to the Revenue, “If you tax A in full, it is not worthwhile me carrying it out. I will not engage in the transaction and you get no tax. However, if you agree to take a lower sum, we both win.” Expressed like this, one can see why such agreements cannot be permitted: they subvert the tax system by attributing different tax consequence from those which are intended by parliament and they give particular taxpayers preferential treatment.

Legitimate expectation – the reliance cases

There are a number of different situations in which a taxpayer may seek to rely on statements by the tax authorities. The statement may be about the authority’s interpretation of a particular rule, as to the amount of tax due, or their intention to take no further proceedings. The statement may be made to a specific taxpayer, either at a preliminary stage in response to a request for a clearance by the taxpayer or much later, in the context of settling a dispute, or may be contained in a published document setting out the tax authorities’ interpretation of a particular area of law. Included also under this heading are those situations where the tax authorities may be implied to be bound as to the future by past actions.

The fairness issue usually raised in the reliance cases is that of “legitimate expectation”, a relatively recent development in administrative law where it first emerged in the context of procedural fairness and the expectation of being heard.⁵⁰ It was indeed in a tax case, *R v IRC ex parte Preston*,⁵¹ that it was firmly established that the principle applied not only to expectations as to procedural fairness but also to the substance: the body could be held to its previous statements. *Preston* involved a taxpayer who, on the point of an investigation by the Inland Revenue, offered to abandon various claims for relief on the basis that this would “facilitate the agreement” of his tax affairs. Various questions were asked of him, which he answered (with, as it turned out, a lack of complete candour), with the result that the investigations were closed. Subsequently further information came to light and the Inland Revenue returned to his tax affairs for those years.

The opinion of Lord Templeman in *Preston* reveals a broad notion of fairness, regarding legitimate expectation as a ground in itself of fairness. He drew on the private law analogy of breach of contract,

In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the Commissioners if that decision is unfair to the appellant because the conduct of the Commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy.⁵²

The treatment of legitimate expectation as an independent substantive ground marks a significant extension to the view of Woolf J in the lower courts, who thought that a prior statement or agreement not to proceed was merely a relevant factor to be

⁵⁰ *Re H.K* [1967] 2 QB 617, *Schmidt v Home Secretary* [1969] 2 Ch 149.

⁵¹ *Op cit* note 18.

⁵² At 219. The contract analogy is repeated in subsequent cases, including *MFK Underwriting Agencies Ltd* *op cit* note 22 and *R v IRC ex parte Matrix Securities Ltd* [1994] BTC 85.

weighed up in the event that the authority was considering whether to change its mind, rather than an independent ground. In other words, his view was that the existence of any expectation created was relevant and must be taken into account in any subsequent consideration of the case, but did not determine the outcome. This relegates a legitimate expectation to a relevant consideration, rather than being an independent constituent of the right to be treated fairly.

However, as it turned out in *Preston*, the taxpayer was not protected from further assessments on the facts, although the judgments oddly never spelt out precisely why. It might be that the case should be viewed as a “cards face-up” situation, although the actual term had not at that stage emerged.⁵³ There is though a narrower alternative basis, for which there is authority in Lord Scarman’s judgment. This does not involve wider issues such as fairness but is based simply on the terms of the agreement with the taxpayer:

It was the appellant’s case that upon the true construction of the correspondence ... the Commissioners purported to contract or to represent that they would not thereafter reopen the tax assessments of the appellant for the years 1974–75 and 1975–76 if he withdrew his claims for interest relief and capital loss. Had he made good this case, I do not doubt that he would have been entitled to relief by way of judicial review for unfairness amounting to abuse of the power to initiate action under Pt. XVII of the Act of 1970. But he failed upon the construction of the correspondence as my noble and learned friend demonstrates in his speech...⁵⁴

In other words, this uses traditional contractual analysis to find that the agreement contains an implied term that it should apply to the tax affairs of the individual on the basis of the disclosed information only. Under this analysis, the Revenue are not seeking to change their position and so there can be no question as to whether such a change would be fair.⁵⁵

The courts have had to return to arguments based on reliance on several occasions since *Preston* and in all but two have the taxpayers failed although in all have the general principle of reliance and the duty of disclosure on the taxpayer been reiterated.⁵⁶ In *MFK Underwriting Agencies Ltd*,⁵⁷ the taxpayers claimed reliance on representations made by a number of officials of the Board of Inland Revenue as to the tax treatment of a particular return from investment. It was judged that the statements that the Inland Revenue had made were within their managerial discretion. Again, as it turned out on the facts, the representations were not regarded as sufficiently specific or unqualified as to bind the authorities. It is worth quoting from Bingham L.J.’s judgment at length,

Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer’s only

⁵³ Supra. Discussed below at text to note 59.

⁵⁴ At 224.

⁵⁵ See the discussion on this point in Hinds “Estopping the taxman” 1991 BTR 191.

⁵⁶ The taxpayers were successful in *Unilever* op cit note 21 and *R v IRC v Greenwich Property Ltd* [2001] BTC 5158. They were also successful in *R v IRC ex parte Kay* op cit note 19. Although this last case contains references to legitimate expectation, it is probably more closely allied with the strict ultra vires rule, discussed below.

⁵⁷ *R v Board of Inland Revenue ex parte MFK Underwriting Agencies Ltd* op cit note 22.

legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law. ...No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the Revenue is of a less formal nature a more detailed enquiry is in my view necessary. If it is to be successfully said that as a result of such an approach the Inland Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the Revenue will forego any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all.

Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.

In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited.⁵⁸

The laying of the cards on the table by the taxpayer was a theme picked up by the House of Lords in the subsequent case of *Matrix Securities*.⁵⁹ Here, the taxpayers sought and were granted a clearance in relation to a tax avoidance scheme. Whilst they revealed the factual basis of the scheme, they did not point out that it was an avoidance scheme or how it was supposed to work. They sought clearance from the local inspector rather than the specialist division, and there was considerable evidence that they knew that the specialist division would be unlikely to grant the clearance.

⁵⁸ per Bingham LJ at 581, echoing Lord Oliver in *R v AG ex parte Imperial Chemical Industries plc* [1986] BTC 8015 at p 8046.

⁵⁹ *R v IRC ex parte Matrix Securities Ltd* op cit note 52.

The taxpayers failed on two grounds: one, on the basis that although sufficient information to enable inferences to be drawn was disclosed, this may not amount to full disclosure; two, that the taxpayers knew or should have known that clearances for such schemes should have been sent to the technical division, and that by applying to the local inspector, they were falling short of their obligation of acting fairly.

The success rate of the taxpayers in the reliance cases has been limited and the taxpayers have generally failed either because they could not show that they fell within the terms of the statement⁶⁰ or the statement was not in sufficiently clear terms as to create an expectation that it could be relied upon⁶¹. The courts have held the tax authorities to their statements on the basis of legitimate expectation of the taxpayer in only two cases. The first, *Greenwich Property Ltd*,⁶² is a fairly straightforward application of a concession to the facts. A statement had been published which, by concession, treated a particular transaction as zero-rated for the purposes of VAT and the tax authorities were held bound by this even though the particular transaction entered into was not precisely the one contemplated by the concession whilst coming strictly within its terms..

The second case, *R v IRC ex parte Unilever*⁶³, is more interesting as the expectation derived not from published statement but from previous Inland Revenue practice. This pushes forward the boundaries of the principle as expounded in *MFK Underwriting Agencies*⁶⁴, where it was suggested that the rule applied only to clear, unambiguous and unqualified representations. The facts of *Unilever* were rather unusual. The statutory time limit for making loss relief claims is two years from the end of the accounting period of loss.⁶⁵ Over a period of twenty years and in the context of at least thirty occasions, the Unilever group had submitted estimated figures which took into account loss relief without specifying the details. Tax was paid on this estimate with the final tax computations submitted at a later date (outwith the two year time limit) whereupon adjustments were made. One year, out of the blue, loss relief was refused by the Revenue on the basis that no relevant claim had been made in time.

In upholding the taxpayer's claim that this was so unfair as to amount to an abuse of power, the judges were careful to stress the "literally exceptional" nature of the case. A strong factor in the decision is the "demonstrable pointlessness" of the strict application of the time limit for both parties.⁶⁶ Although there was no statutory discretion to extend the loss relief time limit (this was added later) it was held that the power to do so was implicit in the care and management provision.

The case is also interesting for its observations by Simon Brown LJ on the extent of the principle of fairness, in which he sought to distance himself from the private law analogy with the concept of fairness in public law developed in *MFK Underwriting Agencies and Matrix Securities*.

⁶⁰ Eg *Fulford Dobson*, op cit note 39, *R v IRC ex parte Brumfield* [1989] BTC 3.

⁶¹ Eg *MFK Underwriting Agencies Ltd* op cit note 22, *R (on the application of Thomson) v Fletcher* [2002] BTC 371.

⁶² Op cit note 41.

⁶³ Op cit note 21.

⁶⁴ op cit note 22

⁶⁵ ICTA 1988 s 393(11).

⁶⁶ Per Simon Brown at 196.

Limits to legitimate expectation

Notwithstanding the importance that the courts have attached to the principle that statements by public bodies can be relied upon, the limits to this principle have recently been probed in two cases. In *F & I Services* the Court of Appeal recently considered the effect of the withdrawal of a VAT clearance for a voucher scheme which had an effect on a continuing basis on the taxpayer.⁶⁷ The withdrawal was consequent upon a change in the view of the tax authorities as to the operation of the legislation and, although it was not sought to operate the change retrospectively, the taxpayer had incurred expense on the introduction of the scheme. The court was of the view that the taxpayer's legitimate expectation was limited to past transactions only. Sedley LJ expressed forceful views on the ultra vires nature of a wrongful statement of the law by the tax authorities:

In his written submission [the taxpayer] contended: 'The mere fact that advice turns out to be wrong in law does not by itself entitle the Commissioners to go back on it'. I entirely disagree. There is nothing 'mere' about official advice which is wrong in law, at least if the taxpayer relies on it. It is of course serious for the taxpayer; but it is serious for the public and for the rule of law. It is the Bill of Rights 1688 – the nearest thing we have to a constitutional text – which abrogates the dispensing power of the Crown. The decision [in] *MFK Underwriting Agencies Ltd* ... makes it absolutely clear that the law recognises no legitimate expectation that a public authority will act unlawfully. It is only where the expectation is of a particular exercise of managerial discretion that the court will begin to examine its legitimacy.⁶⁸

A bona fide change of legal opinion within the commissioners would also evidently have the same effect.⁶⁹

One of the difficulties of this case is in reconciling the last sentence from the above quote with the suggestion by Robert Walker LJ that the taxpayer did have a legitimate expectation that he would not be asked to pay tax in relation to past transactions.⁷⁰ As in *Al Fayed*, the tax authorities had not sought to recover tax retrospectively so the point was not considered in detail but the logic of these cases would suggest that an unlawful act should never form the basis of a legitimate expectation. Considerations of fairness might suggest that in a balancing operation, the disadvantage caused to the taxpayer might sometimes outweigh principles of lawfulness although a remedy in damages would do less damage to the legal principles involved.⁷¹

The second case is *Al Fayed* which, as discussed earlier, decided that forward tax agreements were outside the powers of the Inland Revenue. The taxpayer argued, despite this, that in the interests of fairness the agreement should continue to be binding. The difficulty for the taxpayers was that there is ample authority for the

⁶⁷ *R v C & E Commers ex parte F & I Services* [2001] BTC 5266.

⁶⁸ *Ibid* at 5,283.

⁶⁹ At 5282. The question of compensation payable by the tax authorities was mentioned in passing, although it was noted that the policy implications of such a step are immense and may require legislation. The possibility of compensation was also referred to in *Matrix Securities* op cit note 52.

⁷⁰ *Ibid* at 5,282.

⁷¹ Indeed this is suggested in *F & I Services* op cit note 67 at para 72.

principle that no-one can legitimately expect a statutory body to act illegally.⁷² So, while the petitioners might have had an expectation, it was not legitimate.

The distinction between *Al Fayed* and *F & I Services* on the one hand and *Unilever*, discussed above, on the other is the legitimacy of the decision relied upon. In *Unilever*, the discretion to extend time limits beyond those provided for in statute was regarded as integral to the care and management function. As such, it was one which was within the Revenue's powers to make and could form the basis of legitimate expectation. One must also though be able to explain why a decision as to the meaning of statute, made bona fide albeit wrong in law, is ultra vires whilst the deliberate decision not to apply time limits was perfectly legal. This must pivot on the reason for the actions in each case. One was made deliberately for reasons of administrative convenience and the other was just a plain mistake. Mistakes are evidently permitted as part of the care and management function

Equality

The slippery principle of equality lurks behind many of the elements of our unwritten constitution. Thus the rule of law, which is the concept of general and abstract rules, applicable to all without favour, is but one expression of this principle. Of course under the UK constitutional system, there are limited opportunities for the judiciary to comment on the validity of our legislation, but the principle of equality might legitimately be brought to bear in the application of the legislation as part of the concept of fairness.

The general principle of equality or non-discrimination is probably today most associated with EU law,⁷³ but it has received judicial support for many years, most notably in the judgment of Lord Scarman in the *National Federation case*,

I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.⁷⁴

He concluded,

I am, therefore, of the opinion that a legal duty of fairness is owed by the revenue to the general body of taxpayers.⁷⁵

Sir Thomas Bingham made the following general observations in *Unilever*,

It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have been treated differently.⁷⁶

⁷² eg Judge J. in *R v IRC ex p. M.F.K. Underwriting Ltd* op cit note 22, *R v IRC ex p Preston* per Woolf J at 264, *R v AG ex parte Imperial Chemical Industries plc* [1986] BTC 8015 per Lord Oliver.

⁷³ The EU influence was recently identified in this context in *C & E Commers v National Westminster Bank plc* [2003] BTC 5578 at 5592.

⁷⁴ At 651.

⁷⁵ At 652.

⁷⁶ At 192. See also *Al Fayed* para 102 (op cit note 19) for another statement of the general principle.

However, despite acknowledgment of the existence of the equality principle in court judgments, it has not yet succeeded in practice. It would only be in the most unusual of circumstances in which differential treatment as between similar taxpayers could be used as an argument by a taxpayer. In *R v C & E Commissioners v British Sky Broadcasting Group*⁷⁷, there was no suggestion that mere inconsistency of treatment as between different tax offices would result in the breach of the duty to act fairly. In particular, the knowledge of the administrator at the time the decision is made is critical in determining whether any particular decision is unfair and a breach would only arise where the tax authorities had deliberately applied differential treatment, for example in order to provoke a test case.

Locus standi

Most negotiated settlements between taxpayers and the tax authorities do not come to the attention of the courts for obvious reasons: unless either party reneges on the agreement it is not in the interest of either to bring the matter forward. Obviously if one party, usually the tax authority, changes its mind, the taxpayer is likely to object, and most of the cases on legitimate expectation have come about in this way. There is another route though in which cases can be brought to the courts' attention and this is where a third party argues that the deal is not legitimate in some way.

The main problem for third parties in taking such actions is the procedural requirement in judicial review cases for the applicant to show "sufficient interest" in seeking review.⁷⁸ There have been relatively few instances of third party cases in the UK but it is reasonably clear that individuals other than those directly involved are not normally regarded as having sufficient interest to challenge the arrangements made between the taxpayer and tax authorities. The leading case here is *National Federation of Small Businesses*⁷⁹. Up to and including the decision in the Court of Appeal, this case was decided entirely on whether the National Federation had standing to seek judicial review of the arrangement between the Fleet Street casuals and the tax authorities without reference to any arguments as to the fairness or otherwise of the arrangement. A characteristically colourful judgment by Lord Denning giving judgment for the majority in the Court of Appeal was of the view that it did have sufficient interest,

One thing I must say. If these self-employed and small shopkeepers cannot complain, there is no one else who can. The unlawful conduct of the revenue (assuming it is unlawful) will go without remedy. The revenue authorities will have obtained a dispensing power without it being authorised by Parliament. And that, by a defect in our procedure - because no one has a locus standi to complain.

Rather than grant the Revenue such a dispensing power, I would allow the whole body of taxpayers a locus standi to complain. Assuredly the Attorney-General will not complain on their behalf. He never does complain against a government department.⁸⁰

⁷⁷ [2001] BTC 5123. See also *C & E Commers v National Westminster Bank plc* [2003] BTC 5578.

⁷⁸ R.S.C. Ord. R 3(5).

⁷⁹ Op cit note 18.

⁸⁰ 1980 QBD 407 at 424.

This was not a view shared by any of the five Lords who heard the appeal. Each was of the view that in the circumstances, the Federation had no locus standi. Curiously, most of the judgments regarded the locus standi decision as being intimately connected with the substantive issues. Lord Wilberforce expressed his views as follows:

There maybe simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all ...; then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context.⁸¹

Lord Diplock⁸² appears to be of the view that the National Federation would have had locus standi had they established that the Inland Revenue had entered into agreement for improper reasons. Lord Scarman was also apparently of the same view.⁸³ The difficulty with this approach is that it boils down to accepting that a third party has interest if he can succeed on the merits, but otherwise he does not.

Whilst none of the opinions were prepared entirely to shut the door on the possibility of a third party showing sufficient interest to challenge a decision by the tax authorities, it was clearly regarded as possible only in exceptional circumstances.⁸⁴ This balance was expressed by Lord Fraser as follows,

All are agreed that a direct financial or legal interest is not now required There is also general agreement that a mere busybody does not have a sufficient interest. ... The correct approach in such a case is, in my opinion, to look at the statute under which the duty arises and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.⁸⁵

The few other cases in which the issue of locus standi has been raised would tend to support the view that, in general, third parties will not be entitled to complain about the treatment of others.⁸⁶ In *R v C & E Commissioners ex parte Cook, ex parte Preston*⁸⁷ two bookies were denied judicial review of an extra statutory concession giving leeway as to payments of duty on the basis of a lack of interest. They had

⁸¹ At 630.

⁸² At 644.

⁸³ At 654.

⁸⁴ In a case of “sufficient gravity”: Lord Wilberforce at 633; “exceptionally grave or widespread illegality”: Lord Fraser at 647; where there is “grossly improper pressure or motive”: Lord Roskill at 662.

⁸⁵ At 646.

⁸⁶ If the taxpayer complains of the advantageous treatment of another, he risks failure on the lack of standing. One way to avoid this is to base the case on principles of equality, and argue that he should have been awarded similarly advantageous treatment, eg *C & E Commers v National Westminster Bank plc* op cit note 77. This can only work where the taxpayer is in a similar position to the taxpayer who is receiving advantageous treatment.

⁸⁷ (1969) 119 NLJ 1116.

evidently hoped, by requiring Customs to apply the strict letter of the law, to put their competitors out of business. More recently, in a case in which *Freeserve*, a UK internet service provider, was denied *locus standi* to challenge the tax treatment of an offshore competitor, *Evans Lombe J* referred to the “rule” that one taxpayer has no right to bring judicial review proceedings in relation to the tax affairs of another.⁸⁸

The one case where standing was granted to a third party in a tax context was unusual in the extreme.⁸⁹ *ICI plc* had sought review of the Inland Revenue’s determination of a transfer price of a gas for the purposes of oil producers. *ICI*, not being an oil producer, was not eligible for this treatment and was disadvantaged by what it (correctly) regarded as an erroneously fixed price. One critical aspect of the decision was that the complaint did not concern a specific assessment but a valuation, the effects of which would have continued for a period of time. Another aspect mentioned was that the act was complained of by *ICI* not as taxpayer, but as competitor, an argument which, as already noted, subsequently failed in *Freeserve*.

CONCLUSION

The cases reveal the existence of tensions between a number of competing interests. Most obviously there are the parties who are most immediately concerned in the resolution of the case: the individual taxpayer seeking fair treatment from a powerful state body and the tax authorities who, it might be argued, would prefer to exercise their statutory powers without interference from the judiciary. Less obviously, other individuals or groups have a stake in the outcome of these decisions. Each member of the taxpaying community is entitled to expect that he or she is being afforded equal treatment with their neighbours and is not being unduly burdened by the failure of others to pay their fair share. There are also the collective interests of the wider community to consider. For example, is the power wielded by the tax authorities consistent with their statutory powers because, if not, the executive may be acting without legitimacy? To this extent, the tax system may not reflect wider policy decisions such as distribution of the tax burden, taxation based on ability to pay, or the achievement of vertical and horizontal equity.

Looking first at the two parties immediately concerned, the courts have revealed themselves reasonably prepared to give protection to the taxpayers’ legitimate expectations by holding the revenue authorities to their statements in appropriate cases. By holding the authorities bound by concession, by past practice and perhaps even by wrongful statements of law, at least as to the past, they have rejected the argument that an expectation is only legitimate if the anticipated treatment offered is backed up by direct and specific legal authority.⁹⁰ At the same time, the courts have sought to give the tax authorities wide scope to perform their duties as they see fit by interpreting their care and management powers in ways which provide a significant degree of autonomy in the fulfilment of their management function. In general there has been relatively little second guessing of particular decisions, and the courts have been reluctant to substitute their views for those of the tax authorities. There are many

⁸⁸ *R (on the application of Freeserve.com plc) v C & E Commissioners* [2004] BTC 5400.

⁸⁹ *R v AG ex parte Imperial Chemical Industries plc* op cit note 72.

⁹⁰ The main exception to this is *F & I Services Ltd*, op cit note 67.

references to the expertise present in the Revenue and a general judicial regard is evident for the way in which the tax authorities carry out their functions.⁹¹

However, where the courts have been required to delve a little more deeply, it appears that to the extent the tax authorities are vested with implied discretion to override the express requirements of statute, it may only be exercised in the course of their care and management of the tax system and in the context of their primary duty which is to collect tax. In particular here we must recall *Wilkinson* where it was held that there was no power to grant an extra-statutory concession in order to give effect to rights under the ECHR and *F & I Services*, where it was held that a decision not to collect tax on the basis of an error of law was ultra vires, in contrast to such decisions made as a result of policy. Even in *Al Fayed* where there is a reasonable argument that the agreement was made to maximise income, it was not made to maximise tax.

Pausing for a moment to make an assessment of the balance achieved between the respective interests of the tax authorities and the taxpayer, one would be likely to conclude that the courts have marshalled the boundary rather effectively. Clearly the tax authorities cannot be expected to collect every last penny due in all circumstances irrespective of whether it is economic or reasonable and some discretion has to be built into the process. On only two occasions have the courts been prepared to say that the tax authorities were acting outside their powers in entering into agreements⁹² and one of these was on the basis that they were effectively collecting tax which was not due, which seems a reasonable limitation on the tax authorities' powers.⁹³

And while taxpayers have largely found themselves able to rely on statements made by the tax authorities, it must be in the interests of fairness between the parties that they should be able to do so: they must come to the table with clean hands and, even should they fall within the scope of any general statement, they must show that they placed reliance on it. There are perhaps one or two cases where one might have had some sympathy with the losing taxpayer, for example in *Matrix* it appeared that not only is the taxpayer required to lay all his cards face up on the table, but he is also expected to explain the significance of the hand. However, in the round, the courts have given the tax authorities and the taxpayer the chance to do a deal and have imposed reasonable duties on each in the course of holding each side to it.

However, whilst scoring well on the management of the relationship between the two parties intimately concerned, it is argued that wider interests which might legitimately have a claim to be taken into account are faring less well.

The principle of equality between taxpayers has been mentioned on several occasions by the judiciary as a relevant consideration, but an examination of the decisions suggests that this has in practice not been an important factor. The interests of the small businesses in *National Federation* were overridden, as were the arguments of BSKyB⁹⁴ that they had to pay VAT when none of their competitors did.

The evidence on locus standi, although limited in quantity, shows a reluctance on the part of the courts to recognise third party interest in the affairs of other taxpayers. Lord

⁹¹ Eg *Unilever* op cit note 21.

⁹² *Al Fayed* and *Kay* both op cit note 19.

⁹³ *Kay* op cit.

⁹⁴ Op cit note 77.

Denning, in the Court of Appeal, used the rating cases in support of his argument in favour of granting standing to the National Federation. He made the following observations,

The most instructive cases on this topic are those in which a ratepayer qualifies as a 'person aggrieved.' He has a sufficient standing to complain of an error in the valuation list whereby some other person has been rated too little. The complainant may be only one ratepayer out of the 21 million people in the area of Greater London. He may complain that a valuation is too little on the other side of London 20 miles away. He is a 'person aggrieved' even though he is not affected in his pocket in the slightest. Lord Wilberforce put it well when he said in *Arsenal Football Club Ltd. v. Ende* [1979] A.C. 1, 17:

'Uniformity and fairness have always been proclaimed, and judicially approved, as standards by which to judge the validity of rates. Indeed I believe that many men feel a more acute sense of grievance if they think they are being treated unfairly in relation to their fellow ratepayers than they do about the actual payments they have to make. To produce a sense of justice is an important objective of taxation policy.'⁹⁵

But as we saw earlier, this decision was overturned by the House of Lords.

In section two, above; competing views of the source of the court's authority were identified: majoritarianism and communitarianism. The first imports requirements of reasonableness through the doctrine of parliamentary sovereignty and ultra vires, the second through independently derived principles of justice and fairness. One of the purposes of this paper was to see what light, if any, the approach of the courts in tax cases sheds on this debate and it is time to consider this. It is a tricky endeavour for a number of reasons. First, direct evidence from the case reports is virtually impossible to find as this is not the kind of debate in which the judiciary, at least in the course of judicial decisions, generally engage. Second, there is a wide degree of coincidence behind the principles which inform judicial decision making irrespective as to which constitutional theory underpins judicial review. The rule of law for example may be the embodiment of formal legality but also clearly underpins broader considerations of fairness, equal treatment and the common good. Similarly, although under majoritarianism decisions are justified by reference to statute, equally such references would be expected under the communitarian theory of judicial decision making: judges do not operate in a vacuum, even if they may go beyond legislation to draw upon common law principles in appropriate cases. Principles of fairness in the abstract can also derive from either theory: whilst fairness is intrinsic to common law principles, it is not unreasonable to imply it into principles of statutory interpretation.

Whilst the task of identifying which theory is most appropriate may be difficult, if a review of all the cases in a fertile area for judicial review fails to provide some evidence one way or another, it suggests that these high-level theories have little bearing on the day-to-day practice of the courts but are only of use in the apocalyptic case, for example whether legislation could ever be declared unlawful. At a theoretical

⁹⁵ At 145. It should be noted however that there is a potential distinction between the tax cases and the rates cases to be made here: the rates legislation provided a mechanism for a "person aggrieved" to appeal. There is no such equivalent in tax legislation, so the courts have no statutory steer that individuals outside the parties concerned should have standing to complain.

level this may be interesting but is not significant in the normal case of judicial review.

It is suggested that some evidence can be gleaned from the patterns of decision making in the cases considered above and, although the evidence is ambiguous, on balance it provides the majoritarian theory with most support.

The strongest argument in favour of the communitarian view lies in the courts' recognition of extra statutory concessions as it is hard to explain such deliberate departure from the terms of the statute on the basis of implied authority within the statute. Arguments based on managerial discretion and legitimate expectation have prevailed over the narrow statutory approach but it is possible that these arguments themselves reflect an approach to decision making which is evidence of the majoritarianism. The tax authorities have been afforded perhaps a surprisingly wide degree of discretion, but this has largely been given through the application of the private law concepts of certainty, reliance and disclosure. In particular the fact that the taxpayer must be able to establish that they have acted in reliance upon published statements before they can rely on them comes very close to operating the rule of estoppel, in direct contrast to the public law rule that estoppel cannot be used against the Crown. There are several statements in the cases which link the content of the doctrine of legitimate expectation with breach of contract or misrepresentation and *Preston* is a clear example of the contractual approach. It is argued that the quasi-contractual approach, with its emphasis on the immediate interests of the parties involved, is evidence of a rejection of the communitarian view which would be more likely to place emphasis on the public interest and suggest more liberal rules on locus standi.

The quasi-contractual approach is consistent with the stress on managerial interest as a guiding principle for determining the limits of the authority's powers. It protects the autonomy of the tax authorities rather than imbuing them with a duty to give deeper consideration of the public interest. The wide range of discretion attributed to the tax authorities by the words "care and management" and the limited use of the strict doctrine of ultra vires in the sense of *Al Fayed* reflects values of autonomy for the public authority and freedom from legal regulation rather than public law values of fairness, control of power and equality.