TAX APPEALS: JUDICIAL REVIEW

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Introduction

Judicial Review is the name given to the procedure whereby the court will supervise or review the actual or proposed conduct of a public body[2] on the application of a person (called the applicant) who has a complaint or grievance about that conduct, and who has a sufficient interest (called *locus standi* or standing) in the matter entitling him to be heard. In general judicial review is concerned with consideration of the process by which a decision has been reached rather than with the merits of the decision itself. That is why the court's judicial review jurisdiction is a supervisory jurisdiction, to be contrasted with its original and appellate jurisdictions. It is well established that the decisions of tribunals such as the General and Special Commissioners and VAT tribunals, and actions of administrative bodies such as the Commissioners of Inland Revenue[3] and of Customs and Excise, are in principle amenable to judicial review. There are at least three different grounds on which their conduct may be subject to judicial review.[4] The first ground, "illegality", is where the tribunal or other body has failed correctly to understand the law that regulates its decision-making power and to give effect to it. The second ground, "irrationality", is sometimes called *Wednesbury* unreasonableness[5] and applies to a decision which is so outrageous in its defiance of logic or of accepted moral standard that no sensible person who had applied his mind to the question to be decided could have arrived at it. The third ground, "procedural impropriety", covers failure to observe basic rules

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2 See generally *R v Panel on Take-Overs and Mergers ex p. Datafin plc* [1987] QB 815

3 See in particular *IRC v National Federation of Self-Employed and Small Businesses* [1981] STC 260 at 265-266, per Lord Wilberforce, at 274, per Lord Diplock, and at 285-286, per Lord Roskill.

4 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410-411, per Diplock L.J.

5 After the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228-229

of fairness (natural justice) and failure by a tribunal to observe statutory rules of procedure applicable to the exercise of its jurisdiction. Further development may in course of time add further grounds, such as the principle of "proportionality", which is recognised in European Community Law.[6] We shall consider these grounds in more detail below.

The courts are reluctant to interfere with the decisions and conduct of tribunals by way of judicial review. There is a substantive and a procedural basis for this reluctance. The substantive basis is the realisation that Parliament has entrusted the hearing of disputes such as tax appeals to an independent and informed tribunal with wide knowledge and experience of the relevant law and practice, and has given the courts an appellate jurisdiction only, often limited to points of law rather than of fact. Therefore the courts will not interfere too much by imposing on the tribunal strict or detailed rules about how they should conduct their own proceedings. Moreover, the procedure before the tribunal is meant to be informal so as to be comprehensible to and affordable by a lay litigant (who probably has no right to legal aid). Therefore all that can be expected is rough and ready justice in the resolution of the dispute, and so the courts will not be too quick to find fault with the tribunal's conduct. The procedural basis for the court's reluctance to interfere by way of judicial review is the existence of a right of appeal from the tribunal's decision to the superior courts. Where there is such a right, the court can obviously reverse the tribunal's decision as being wrong in law. But the court's appellate jurisdiction also includes the power to quash the tribunal's decision and require the tribunal to hear the case all over again, because of procedural impropriety the first time. Therefore the complaint which a would-be applicant for judicial review makes about a tribunal's decision-making process is often capable of remedy by way of appeal. Since the judicial review procedure will not be allowed to supplant the normal statutory appeal procedure,[7] and judicial review will not normally be granted where an alternative remedy is available, the courts will only be willing to review a tribunal's decision in exceptional cases.[8] In most cases the would-be applicant will be left to his appeal, even if the time for appealing has already expired.

The courts are even more cautious about interfering with the actions of administrative bodies such as the Commissioners of Inland Revenue and of Customs and Excise. This is because the work of inspectors and other officials is primarily administrative rather than judicial. They are not required to act like tribunals, holding the ring impartially between opposing camps. Their statutory duty is to ascertain and collect the right amount of tax from taxpayers, many of whom are unwilling to declare their true liability; and an appeal to a tribunal is usually available to a taxpayer who believes that the inspector's assessment or other decision is wrong in fact or in law. The existence of a right of appeal means that an inspector's or other official's action will only exceptionally be amenable to challenge by way of judicial review on the ground of illegality. As the officials are acting administratively rather than judicially,

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6 See for example *WH Smith Do-It-All Ltd v Peterborough C.C.* [1990] WLR 1131.

7 *Preston v IRC* [1985] STC 282 at 291, per Lord Templeman.

8 See for example *R v H.M.I.T ex p. Wyner* [1974] STC 576; *R v C.C.E and London VAT Tribunal ex p. Theodorou* [1989] STC 292 and *R v C.C.E and London VAT Tribunal ex p. Menzies* [1990] STC 263 (CA).

the requirements of fairness or procedural propriety and rationality will be applied less strictly to them than to tribunals. For example, an inspector's decision will not be struck down on the ground of unfairness unless it has been taken for an improper motive or it otherwise amounts to an abuse of power.[9] His decision will not be lightly struck down on the ground of irrationality, given that (unlike a tribunal) he will generally be under no obligation to provide reasons for his decision.[10]

Procedure

Judicial review applications must be made in accordance with the provisions of Order 53 of the Rules of the Supreme Court. There are two stages to the application. The first is for the applicant to obtain the permission of the court to apply for judicial review. This is called an application for leave. Only if leave is granted will the applicant be able to proceed to the second stage, where the court hears the judicial review application itself. The reason for the first stage is to sift out unmeritorious applications. The application for leave is made before a single judge ex parte, so that the body whose action is under challenge will take no part in this stage of the proceedings, and may not know anything about it. The application for leave is usually made on paper, without any oral hearing. The judge's task is to decide whether there is an arguable case for granting the relief claimed, on a consideration of the applicant's notice (called Form No. 86A) which states the relief sought and the grounds upon which it is sought and his affidavit verifying the facts relied upon. If the judge refuses to give leave, then the applicant is entitled to renew his application at an oral hearing before a different judge.

Delay

Leave may be refused on the ground of delay. The application for leave must be made promptly, and in any event within three months from the date when grounds for the application first arose. Theoretically the judge could refuse to grant leave even if the application was made within the three month period, but this would be most unusual. On the other hand, the judge has power to extend the three month period if he considers that there is a good reason for doing so.[11] Failure to obtain legal advice is not necessarily a good reason for delay. It is therefore very important that a taxpayer should act promptly in seeking specialist advice when he has been prejudicially affected by the conduct of an inspector or other official or by a tribunal. If there has been delay, the reasons for it should be set out in the Form 86A.

Standing

Leave may also be refused on the ground that the applicant lacks sufficient interest (standing) in the action complained of to entitle him to apply for judicial review of that action. A taxpayer will almost invariably have a sufficient interest in an

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9 *Preston v IRC* [1985] STC 282.

10 Although an adverse inference may be drawn from a failure to give reasons. But see *R v IRC ex p. Coombs* [1991] STC 97 (HL).

11 The stronger the applicant's case on the merits, the more likely that the judge will be inclined to grant leave despite delay: see *R v IRC ex p. Sims* [1987] STC 211.

assessment or other decision which affects him personally.[12] He will not have sufficient interest in a decision relating to another taxpayer,[13] unless the other taxpayer is a business rival and the decision gives him a commercial advantage,[14] or unless the decision relating to the other taxpayer otherwise affects the applicant.

The Second Stage

If leave is granted, the next stage is for the application for judicial review to be made, by originating motion, to a Divisional Court of the Queen's Bench Division. The motion must be served on "all persons directly affected". Where the complaint is about the decision of a tribunal such as the General Commissioners, they and the Inspector of Taxes or the Commissioners of Inland Revenue are all directly affected and so should be served.[15]

It occasionally happens that, on receipt of the originating motion, the Revenue authorities will accept that the applicant should have the relief sought without the need for a court hearing. The applicant will not be entitled to his costs of the proceedings, however, unless he warned the Revenue authorities of his intention to launch the proceedings before doing so, thereby giving them an opportunity to remedy his complaint without the need for litigation.[16]

If, on the other hand, the application for judicial review is opposed, there will be an oral hearing at which all parties will be heard by the Divisional Court. Discovery of documents is obtainable by way of an interlocutory application to a judge or Queen's Bench master.[17] Discovery is therefore not automatic (as it is in writ actions) but can be obtained where it is necessary for disposing fairly of the matter.[18] Discovery will not be ordered where the application is a mere fishing expedition.[19] That is, if the applicant's case does not, on the evidence, leave the ground, the court will not

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12 *R v H.M. Treasury ex p. Smedley* [1985] QB 657.

13 *IRC v National Federation of Self-Employed and Small Businesses* [1981] STC 260. See also *R v C.C.E and London VAT Tribunal ex p. Menzies* [1990] STC 263.

14 *R v A-G ex p. I.C.I. plc* (1986) 60 TC 1 at 63-64.

15 See *R v General Commissioners for St. George, Hanover Square ex p. Hood-Barrs* (1947) 27 TC 506 at 510-512.

16 *R v IRC ex p. Opman International* [1986] STC 18.

17 R.S.C Ord 53, r.8 and Ord 24, rr.3 and 8.

18 That is, whenever, and to the extent that, the justice of the case requires: *O'Reilly v Mackman* [1983] 2 AC 237 at 282, per Lord Diplock.

19 *IRC v National Federation of Self-Employed and Small Businesses* [1981] STC 260 at 289, per Lord Roskill; and see *R v IRC ex p. Rothschild Holdings plc* [1987] STC 163.

consider ordering discovery against the body in the hope of eliciting some impropriety.[20]

Evidence is usually given by affidavit, but permission to cross-examine deponents upon their affidavits can be obtained by way of an interlocutory application[21] and will be given whenever the justice of the particular case requires.[22]

Discretion

The court will consider the judicial review application on its merits in the light of all evidence and submissions and decide first whether the body is guilty of illegality, *Wednesbury* unreasonableness or procedural impropriety. Secondly, the court will decide whether it should exercise its discretion to grant any, and if so what, relief to the applicant. The existence of the discretion means that the court may refuse to grant relief even if satisfied that the public body is guilty of illegality etc., on the ground that the application is an unmeritorious one. In one case, for example, the judge said that even if he had decided that the General Commissioners had erred in law by refusing to admit certain evidence, he would have hesitated long before exercising his discretion in the applicant's favour, and would probably have declined to do so, because it was very doubtful indeed whether the evidence would have had anything more than minimal effect on the Commissioners.[23] In the same case it was held that merely because leave to apply for judicial review has been granted at the first stage, the court is not precluded from rejecting the application, on the ground of undue delay, at the second stage.[24] Rejection on the ground that the applicant lacks sufficient interest can also be made at this stage. If the applicant obtained leave by suppressing material facts in his affidavit, the court will refuse relief without going into the merits of the case.[25]

If the court decides in its discretion to grant relief to the applicant, various different orders may be made. First, an order of certiorari may be given to quash the body's

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20 *IRC v National Federation, ibid*, at 268, per Lord Wilberforce. See also *R v IRC ex p. Taylor* [1988] STC 832 (CA).

21 R.S.C. Ord 53, r.8 and Ord. 38, r.2(3).

22 *O'Reilly v Mackman*, above n.18, at 282-283. Lord Diplock emphasised that the grant of leave to cross-examine deponents in judicial review applications is governed by the same principles as in actions begun by originating summons.

23 *R v Tavistock General Commissioners ex p. Worth* [1985] STC 564. A further ground for refusing relief, not raised by the judge, was that the applicant's complaint should have been pursued by way of appeal by case stated.

24 At 568-569. See also *R v Inspector of Taxes ex p. Brumfield* [1989] STC 151.

25 *R v Kensington Commissioners ex p. Polignac* [1917] 1 KB 486.

decision. This would be the appropriate order where the complaint is about a tribunal's decision which the applicant wants to nullify. Where the court quashes a decision, it has power to remit the matter to the tribunal to reconsider it and to reach a decision in accordance with the court's judgment.[26] Secondly, an order of mandamus to compel the body to do something, or thirdly, an order of prohibition to prohibit it from doing something. Finally, a declaration, declaring what the body should or should not do, without actually ordering them to do or not to do it. Where the body whose conduct is under review is a Revenue authority as opposed to a tribunal, any relief given to the applicant will usually be a declaration rather than an order of prohibition or mandamus, because it will be assumed that the authority will do what the court by declaration says should be done without the need for an order to that effect.

Judicial Review in Tax Cases

It may be helpful to give a few examples of tax cases where the courts have been asked to review the action of a tax tribunal or Revenue authority, by reference to the three established grounds of review: illegality, irrationality and procedural impropriety.

(a) Illegality

... illegality is the failure to give effect to the law that regulates the tribunal or other body's decision-making power. In *R v IRC ex p. T.C. Coombs*,[27] the House of Lords held that in serving on the applicant a notice requiring the furnishing of information, the Inspector of Taxes had not exceeded the power conferred on him by s.20(1) TMA 1970. S.20(1) empowers an inspector to require the taxpayer to deliver documents which in the inspector's "reasonable opinion" may contain information relevant to the taxpayer's liability. If the taxpayer can prove[28] that the inspector's opinion is unreasonable then judicial review will lie to quash the notice. In *R v IRC ex p. Goldberg*,[29] the Divisional Court quashed a notice served by the Board of Inland Revenue on the applicant, a barrister, under s.20(2) TMA on the ground that the notice required the delivery of privileged documents, contrary to s.20B(8). The validity of s.20 notices cannot be tested by way of an appeal to the General or Special Commissioners and so judicial review will not be refused on the ground that the taxpayer has an alternative remedy. If an appeal does lie against the decision in question, it is only in exceptional cases that judicial review will be available on the ground of illegality.

(b) Irrationality

This applies to an action which is so unreasonable that no reasonable official or tribunal could have taken it. Not every decision which is unreasonable will be

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26 R.S.C., Ord. 53, r.9(4).

27 [1991] STC 97.

28 The onus of proof is on the taxpayer. He must give evidence, by affidavit, of the unreasonableness of the inspector's opinion.

29 [1988] STC 524.

irrational because it may not be so illogical or lacking in common sense as to be unreasonable in the *Wednesbury* sense. In *R v HM Inspector of Taxes ex p. Kissane*,[30] the judge granted the applicant leave to apply for judicial review of the inspector's decision to raise an income tax assessment on him under s.488(8) ICTA 1970 where there was arguably no evidence that the applicant was within the scope of the subsection. The judge acknowledged that this point could perfectly well be taken before the Appeal Commissioners and that the seeking of judicial review to question the rationality of the inspector's assessment ran the risk of making a mountain out of a molehill; if the assessment was so obviously bad it would be swiftly set aside on appeal. However, he decided to grant leave, being influenced by the absence of any provision in the machinery of appeal before the Commissioners for the award of costs, and by the fact that the evidence indicated that the inspector's decision to raise the assessment rested on a misunderstanding of material facts. However, the absence of a power in the Appeal Commissioners to award costs cannot be a sufficient ground for allowing proceedings by judicial review rather than by appeal. The judge referred in this connection to the decision of Ackner LJ in *R v Special Commissioners ex p. Stipplechoice*.[31] There the Court of Appeal granted the applicant company leave to apply for judicial review of a decision by one of the Special Commissioners granting leave to the Revenue to raise an "out of time" assessment under s.41 TMA 1970 on the applicant, on the ground that there was a good arguable case that the information relied on by the Revenue could not reasonably justify the "out of time" assessment. It appeared a reasonable assumption that it was this same information upon which the Special Commissioner was persuaded to rely in giving leave under s.41. The applicant had thus established a prima facie case that the Special Commissioner had exercised her power in a manner which was unreasonable in the *Wednesbury* sense. The Court of Appeal therefore gave the applicant leave to move for judicial review, Ackner LJ pointing out that Parliament had laid down no special procedure for appealing against the grant of leave to raise an out of time assessment under s.41; all that the applicant could do was to appeal against the assessment and could not obtain his costs even if he established before the Appeal Commissioners that the assessment had not been properly made. When the application for certiorari came to be considered on its merits, at the second stage, the Special Commissioner filed an affidavit disclosing the information upon which she had given leave under s.41. In the light of that evidence, the court held that the Special Commissioner had not acted unreasonably, and so relief was refused.[32]

(c) Procedural Impropriety

As we have seen, the manner in which tax tribunals conduct their own proceedings is largely left to their own discretion, subject to the overriding requirement that the tribunal must give each party a reasonable opportunity of presenting his case, and must not be biased in favour of one of the parties. In short, the courts will only intervene by judicial review in extreme cases, where the tribunal has so exercised its discretion as to amount to an injustice. For example, in *R v Sevenoaks General Commissioners ex p. Thorne*,[33] the inspector claimed penalties and default interest

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30 [1986] STC 152.

31 [1988] STC 248(CA).

32 [1986] STC 474.

33 [1989] STC 560.

from the applicant totalling over £560,000. The applicant was summoned to appear before the General Commissioners but was unable to attend on the appointed day because he was ill. The hearing was adjourned to another day, but still the applicant was ill and could not attend. This time the Commissioners refused an adjournment on the ground that the applicant could not say when he would recover. The Commissioners then proceeded with the hearing and awarded penalties of £120,000 and default interest of £32,000 against the applicant. In relation to the award of default interest,[34] the Commissioners' decision was quashed and the case was remitted to be re-heard by a fresh panel on the ground that the Commissioners had erred in principle. They regarded the medical evidence as sufficient in itself to refuse an adjournment, whereas they should have considered whether in all the circumstances, including the size of the claims against the applicant, to refuse an adjournment would give rise to an injustice to the applicant. That error was in fact an injustice because it was arguable that the applicant had a reasonable excuse which would relieve him of liability to pay the default interest, but he never had the chance to give evidence to deal with the point. So far as impropriety by Revenue authorities is concerned, we have already seen that an authority's action will only be struck down as procedurally improper where it has been taken for an improper motive or where it is otherwise so unfair as to amount to an abuse of power. There are no reported cases of improper motive, which may be because if it ever happens it is virtually impossible to prove. As for other sorts of unfairness, if the Revenue authority has so conducted itself as to create in a taxpayer's mind a legitimate expectation that a particular course of conduct will be followed by the authority, for example, that the taxpayer will be treated as non-domiciled, or that a particular tax treatment will be applied to a transaction entered into by him, and the taxpayer acts on that expectation to his detriment, it may well be unfair for the authority to follow a different course of conduct, and will not be allowed to do so. The expectation may be created by an agreement between the authority and the taxpayer as in *Preston v IRC*.[35] There the House of Lords held that an agreement between the Inland Revenue and a taxpayer, that the Revenue would not assess the taxpayer in relation to a particular series of transactions and in return the taxpayer would abandon certain tax repayment claims, was not binding on the Revenue because the taxpayer had not made a full disclosure of the transactions and of his part in them when the agreement was reached. Alternatively, the expectation may be created by a representation made by the Revenue authority to the taxpayer. Whether the representation is binding on the Revenue will depend on the factual context. A statement formally published to the world - such as an Extra-Statutory Concession or a Statement of Practice - might safely be regarded as binding, subject to its terms, in any case falling clearly within them.[36] Therefore, much will depend upon the precise terms of the published

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[34] There was no right of appeal in relation to that award, whereas the applicant could and did appeal against the award of penalties. The same judge heard the judicial review application and the penalties appeal together.

[35] [1985] STC 282.

[36] *R v IRC ex p. MFK Underwriting Agents Ltd* [1989] STC 873 at 892.

statement. In *R v IRC ex p. Fulford-Dobson*,[37] for example, the Inland Revenue were not bound to apply an Extra-Statutory Concession to the applicant's transaction, since the Concession itself said that it could not be relied upon for tax avoidance, and the taxpayer was guilty of tax avoidance. Where the Revenue's statement is of a less formal nature, and has been made specifically to the taxpayer, that statement will in general only be binding on the Revenue if the taxpayer has put all his cards face up on the table (giving full details of the transaction in question, indicating the ruling sought,

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[37] [1987] STC 344, *R v Inspector of Taxes ex p. Brumfield* [1989] STC 151 concerned the application of a Statement of Practice.

making plain that a fully considered ruling is sought and indicating the use he intends to make of the ruling if given) and if the ruling or statement relied on is clear, unambiguous and devoid of relevant qualification.[38]

We have already seen that where the Revenue authority's decision is complained of on the ground of illegality or irrationality, judicial review will usually be refused if the would-be applicant has an alternative remedy by way of appeal against the General or Special Commissioners or to the VAT Tribunal. Where the complaint is that the Revenue's decision constitutes an abuse of power, judicial review will be an appropriate remedy, even if the decision itself (to raise an assessment, for example) can be appealed against, for the applicant's complaint has nothing to do with the merits of the decision itself. His complaint is that the decision should never have been taken in the first place. He may have no defence on the merits to proceedings initiated by the Revenue, but the objection raised by judicial review is that the Revenue should never have initiated those proceedings. Indeed, it may be that judicial review is the only remedy in these circumstances. In *Aspin v Estill*,[39] for example, which was an appeal by case stated, the taxpayer claimed that he had relied upon information given to him by the Inland Revenue that certain of his income would not be subject to tax. He complained that the Revenue were acting unfairly and oppressively in assessing him to tax on that income. The Court of Appeal held that this complaint could not be raised before the Appeal Commissioners, or on appeal by case stated, but was a matter for which the only remedy available was by way of judicial review. Donaldson MR greeted the contrary argument with "surprise bordering on horror". He did not believe that it was Parliament's intention that the General Commissioners, worthy body though they are, should exercise a judicial review jurisdiction. In other words, there is no appeal remedy for an abuse of power committed by a Revenue authority. As we have seen, wherever an appeal machinery is absent, then whatever the ground of complaint about the decision, whether it be illegality or irrationality, or procedural impropriety, the taxpayer's only remedy will be judicial review. For example, a direction by the Inland Revenue that PAYE should be recovered from an employee instead of from his employer is not subject to appeal, and therefore judicial review is the only remedy for a defect in the making of the decision.[40]

Other Non-Appeal Proceedings

In this section we shall briefly consider proceedings where tax issues may arise, other than appeal and judicial review proceedings.

(a) Proceedings by the Revenue

An example of such proceedings is where the Commissioners of Inland Revenue or Customs and Excise issue a writ in the High Court (or, in Scotland, the Court of Session) for payment of tax due and payable under an assessment. The tax may be due because the taxpayer failed to appeal against the assessment, or because he appealed but the assessment was upheld by the Appeal Commissioners or VAT

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38 *R v IRC ex p. MFK*, above n.36, at 382-383, per Bingham LJ

39 [1987] STC 723.

40 See for example *R v IRC ex p. Chisholm* [1981] STC 253; *R v IRC ex p. Cook and Keys* [1987] STC 434.

also have done so by way of appeal. For example, suppose that the taxpayer is assessed to tax by an assessment which is invalid as premature. No doubt he could appeal against the assessment to the appeal tribunal[46] and it is arguable that he could apply by judicial review for the assessment to be quashed. If he fails to do either, can he raise the point as a defence to a writ for the tax? The probable answer is that he cannot.

(b) Inter Partes Proceedings: Joinder of the Revenue

There may also be civil proceedings between private parties which incidentally raise tax issues. There are many examples in the reports.[47] It would often be convenient to have the Commissioners of Inland Revenue or of Customs and Excise added as a party to the proceedings so as to resolve the tax issues once and for all, and thereby avoid the risk of inconsistent decisions in separate proceedings, both of which are final. In principle, this can be done because Rules of Supreme Court Order 15, rule 6(2)(b)(ii) provides for the addition as a party to any cause or matter of "any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient[48] to determine as between him and that party as well as between the parties to the cause or matter". However, the Commissioners of the Inland Revenue apparently take the view that it should not be open to a litigant to compel them to appear in proceedings. They have given four reasons.[49] First, this would give a risk that the Commissioners would be involved in a multiplicity of proceedings at a cost in time and money which is out of proportion to their interest. Secondly, the ascertainment of the taxpayer's liability to the Revenue usually involves many and complex matters which are outside the issues as between the primary contestants. Thirdly, the Commissioners would often be embarrassed in their conduct of their case by confidential information in their possession concerning the affairs of one party which was unknown to the other. Fourthly, their intervention might involve a reversal in the burden of proof, which is normally on the taxpayer in proceedings before the General or Special Commissioners. For these reasons, it seems, Order 77, rule 8A was added to the Rules of the Supreme Court to provide that nothing in Order 15, rule 6(2)(b)(ii) should be construed as enabling the Commissioners of Inland Revenue to be added as a party to any cause or matter except with their consent. Oddly, it seems that rule 8A does not apply to the Commissioners of Customs and Excise, but it is likely that in practice a court would not agree to add them as a party

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46 See for example *Jones v O'Brien* [1988] STC 615 and *Gohuldas v East Africa Commissioner* [1958] AC 461.

47 A recent example is *Pennine Raceway Ltd v Kirklees Metropolitan Council (No. 2)* [1989] STC 122 (CA).

48 Originally a person could only be added if his presence was necessary, but Ord. 15 was amended following the decision of the House of Lords in *Re Vandervell's Trusts* (1970) 46 TC 341 that this did not permit the Inland Revenue to be added.

49 See *Westminster Bank (C.I) Ltd v National Bank of Greece* (1970) 46 TC 472 at 476-477.

to proceedings without their consent.

The Revenue may be more willing to be added as a party in cases involving a pure question of construction or of law, where no questions of fact have to be determined. An example is *Re Pilkington's Will Trusts*.[50] As a party to the proceedings, the Revenue would be bound by the Court's decision. In the event of subsequent appeal proceedings, the Appeal Commissioners would be bound to treat as *res judicata* "any decision of a competent court to which the Crown was a party on any issue which may come before them".[51] It is less clear whether the Appeal Commissioners would be bound by findings of fact in previous court proceedings to which the Revenue was a party.[52] It is unlikely that the Revenue would give consent to being added as a party where complex questions of fact are involved, so that this point is unlikely to arise in practice.

If the Revenue refuses to give its consent to be added as a party, it will not be bound by the court's decision, other than in the sense that any decision on a question of law would create a precedent binding on the Revenue as on anyone else. A fortiore, the Revenue would not be bound by any findings of fact if it was not a party. The Revenue would be entitled to re-test the evidence in subsequent appeal proceedings where the burden of proof would be on the taxpayer.

Even where the Revenue has refused to give its consent to be added as a party, it sometimes indicates that it would in practice accept the consequences of any decision in the proceedings, as if it were a party. This is frequently the position, for example, in rectification proceedings,[53] although the Revenue may say that

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50 (1962) 40 TC 416.

51 *Re Vandervell's Trusts, ibid* at 361, per Lord Reid.

52 See *ibid.* at 366, per Viscount Dilhorne and at 372-374, per Lord Diplock.

53 See *Lake v Lake* [1989] STC 865 at 869.

it will only accept the consequences of a decision if the judge has been referred to all the authorities relevant to the particular area of law.

On occasions where the Revenue has declined an invitation to take part in proceedings raising tax questions, the court may of its own volition invite the Revenue to instruct Counsel to appear as amicus curiae (friend of the court) to give the court the benefit of the Revenue's views on the tax issues.[54] The Revenue is not entitled to its costs in instructing the amicus curiae.[55]

(c) Originating Summons Against the Revenue

As the foregoing discussion indicates, it would seem that the High Court has jurisdiction to add the Revenue as a party to a properly instituted action between private parties, where a tax question arises incidentally in the litigation. On the other hand, the High Court has no original jurisdiction to determine directly whether or not a taxpayer is liable to tax if, as is usually the case, Parliament has provided an appeal machinery for that question to be determined by a tribunal rather than by the High Court. If, therefore, a taxpayer commences proceedings against the Revenue by way of originating summons for a declaration as to his income tax, capital gains tax, value added tax or corporation tax liability, the Revenue will be entitled to an order that the proceedings be stayed.[56] However, where Parliament has conferred an original jurisdiction to determine tax issues upon the High Court rather than on a tribunal, it is arguable that the Court has power to determine those issues in proceedings commenced by originating summons as an alternative to the machinery provided for in the statute. This is so even if the statutory machinery requires the taxpayer to pay the tax in dispute as a condition of commencing the proceedings, so that by taking out an originating summons instead the taxpayer bypasses the statutory requirement. On the other hand, it is presumably open to the Revenue to insist upon the statutory machinery being used to determine the tax issues. However, in a number of stamp duty or similar cases it would appear that the Inland Revenue have made no objection to the use by the taxpayer of the originating summons procedure.[57]

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54 This was done in *Westminster Bank (C.I.) Ltd v Bank of Greece* (1970) 46 TC 472. It is likely to be done where two subjects are indulging in friendly litigation the purpose of which is to improve the position of one of them vis-a-vis the Revenue; see for example *Van der Linde v Van der Linde* [1947] Ch 306.

55 See (1970) 46 TC 472 at 490.

56 See *Argosam Finance Co. Ltd. v Oxby* (1965) 47 TC 86 and *Re Vandervell's Trusts* (1970) 46 TC 341.

57 See *Sun Alliance v IRC* [1972] Ch 133; *Reed International Ltd v IRC* [1975] STC 427; *Agricultural Mortgage Corporation v IRC* [1978] STC 11 and *Clarke Chapman-John Thompson Ltd v IRC* [1975] STC 567.