INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D12/93

Salaries tax – whether second assessment can be validly issued on same income already assessed under previous valid assessment.

Panel: Robert Wei Wen Nam QC (chairman), Andrew Wang Wei Hung and Kenneth Ting Woo Shou.

Dates of hearing: 17 March and 20 April 1993.
Date of decision: 16 June 1993.

The taxpayer appealed to the Board of Review on three technical grounds namely, that a salaries tax assessment was invalid because there had been no valid salaries tax return issued. The second ground was that a second assessment had been issued by an ex-assessor on the same income as that covered by the first assessment and accordingly the second assessment was void. The third ground was that the assessors had acted ultra vires and accordingly the assessments and the determination made thereon were invalid.

Held:

The original assessment was a valid assessment and the purported cancellation thereof by an assessor was void. Accordingly the first assessment remained in force and effect. The second assessment had been incorrectly issued and should be cancelled because it brought to account the same income which had already been validly assessed to salaries tax. The third ground of appeal was rejected on the basis that the Board of Review had no jurisdiction to entertain such matters. The Board accordingly annulled the second assessment which was the subject matter of the appeal on the technical ground before it.

Appeal is partly allowed.

Cases referred to:

Aspin v Estill [1987] STC 723
IRC v Wilkinson [1992] STC 454
Reg v IRC, Ex p Preston [1985] 1 AC 835
Edwards v Bairstow [1956] AC 14
Lee v Knapp [1967] 2 QB 442

Lee Yun Hung for the Commissioner of Inland Revenue.

Taxpayer in absentia.

Decision:

Preliminaries

1. This is an appeal by an individual (the Taxpayer) against the salaries tax assessment (the fresh assessment) raised on her for the year of assessment 1991/92.

2. The appeal was heard in her absence and in the absence of her authorised representative. Documents admitted in evidence consisted of a salaries tax return, two notices of assessment and demand for tax and correspondence between the parties.

Facts

3. The Taxpayer resigned from her job with effect from March 1992 and was taking leave from September 1991 to March 1992.

4. On 10 October 1991 a salaries tax return was issued under section 51(1) of the Inland Revenue Ordinance (the IRO) to the Taxpayer at her Hong Kong address. The return was headed:

> 'SALARIES TAX RETURN – YEAR OF ASSESSMENT 1991/92 (Income for the period from 1 April 1991 to the date of cessation)'

It required the Taxpayer to 'complete and sign this form and return it to me within immediately (sic)'. In section B of the return, the Taxpayer was required to state 'details of income chargeable to salaries tax … which has accrued/will accrue to me during the period'.

5. In October 1991, the Taxpayer wrote to the assessor, salaries tax, in the following terms:

> 'I acknowledge receipt of the salaries tax return for the year of assessment 1991/92 dated 10 October 1991.
>
> I think I am not required to complete and return it to your department at this stage as although I have resigned from office with effect from September 1991, my employment will only be terminated in March 1992. I am now on my full pay vacation leave and will look for new employment. I will keep you informed once I have found a new job.
>
> If you are still of the opinion that I have to complete and return the BIR 50B for the year of assessment 1991/92 now, please write to me and advise me how to

> complete it as I have only received my salaries up to 30 November 1991 and my leave pay for the remaining leave period will only be paid to me at the end of December 1991, January 1992, February 1992 and after 13 March 1992.
>
> In addition, please be informed that I am now on an overseas trip. In the circumstances, please allow me more time to respond to your correspondence in future, or else, please write to me or contact me after January 1992 as I plan to return to Hong Kong at the end of January 1992.'

We were informed by Mr Lee, the representative of the Commissioner of Inland Revenue, that the letter was received in the office of the Inland Revenue Department on about 25 October 1991, and so we find.

6. On about 2 December 1991, a salaries tax assessment for the year of assessment 1991/92 (the original assessment) was raised on the Taxpayer; a notice of assessment and demand for tax for that year of assessment dated 2 December 1991 was sent to the Taxpayer at her Hong Kong address, containing, inter alia, the following particulars:

Principal income	$629,837
Tax payable thereon	94,475
Due date	10 December 1991

7. The Taxpayer was in overseas when she was informed during a telephone conversation with her relative in Hong Kong about the notice of assessment and demand for tax. By a letter dated 7 December 1991 addressed to the Commissioner, the Taxpayer applied for a holding-over of the tax charged and lodged an objection to the original assessment. The grounds of objection are briefly as follows:

(a) The income stated in the notice of assessment was for the year ended 31 March 1992 and therefore included income which had not accrued to the Taxpayer on 2 December 1991. Her income for the period from December 1991 to March 1992 was therefore not assessable income.

(b) The original assessment was invalid because no valid return had been issued. 'I cannot know and report income that "will accrue to me" for a future period.' The return was ultra vires and void because 'section 51(1) of the IRO does not intend to impose an obligation onto a taxpayer that he could not possibly comply with'.

(c) The original assessment was invalidly made and void. There was no response to the Taxpayer's letter dated 18 October 1991 (see paragraph 5 above). 'It is certainly not a reasonable and honest act not to reply to a taxpayer's enquiry regarding completion of the return and jump to estimate the taxpayer's

income … which has not legally accrued to the taxpayer and hence should not be taxed'.

Enclosed with the letter of 7 December 1991 was the salaries tax return which 'I have no alternative but to complete according to my understanding and interpretation of the law' since there had been no response to her letter of 18 October 1991. The completed return is dated 7 December 1991 and contains, inter alia, the following particulars:

Principal Income		
Salaries	4-91 to 9-91	$219,681
Leave Pay	9-91 to 11-91	85,079
Local Education Allowance		787
		$305,547
Approved Charitable Donations		$200

8. By a letter dated 24 December 1991 an assessor on behalf of the Commissioner wrote to the Taxpayer in overseas as follows:

'

Salaries Tax
Objection – Year of Assessment 1991/92

In view of the further information supplied by you in your letter dated 7 December 1991 it is suggested that the assessment be revised as follows:

	$
Basic Salary	435,708
Excess Home Finance Allowance – rent	485,039
	485,039
Quarter Value 10%	48,503
	533,542
Less: Donation	200
	533,342
Tax at standard rate 15%	80,001

Since you are not entitled to claim payment of the income for the period December 1991 to March 1992 by the due date, special arrangement has been made with our Collector of the Special Due Date Section. The payment of the tax for the respective

period in the amount of $23,977 ($80,001 × 104/347) may be deferred. For the sake of convenience, such sum will be deducted from your salary of February 1992. In case you preferred other modes of payment, please contact Mr Au of Special Due Date Section at … for arrangement. For the other portion that is $56,024 ($80,001 - $23,977), please pay within one month from the date of issue of this letter.

In passing, please be advised that there was no record of receiving your letter of 18 October 1991. In order to give you appropriate reply, please let me have a copy for information.

Please let me know whether you are prepared to accept such a revised assessment in settlement of this objection (by signing the addition at the foot of the attached copy of this letter).'

9. By another letter of 24 December 1991 the assessor notified the Taxpayer in overseas that pending the result of her objection to the original assessment, $14,474 out of the salaries tax as shown in the demand for tax (see paragraph 6 above) was held over but that the balance $80,001 must be paid on or before the due date, that is, 10 December 1991. The letter went on to state that 'a surcharge of 5% may be added it the tax is not paid on or before the due date.'

10. By a letter dated 23 January 1992 addressed to the Complaints Office of the Inland Revenue Department, the Taxpayer responded to the two letters both dated 24 December 1991 from the assessor (see paragraphs 8 and 9 above), briefly to the following effect:

(a) Without accepting the assessor's claim that there was no record of receiving her letter of 18 October 1991, a copy of that letter was enclosed.

(b) The offer contained in the letter of 24 December 1991 written on behalf of the Commissioner (see paragraph 8 above) was not acceptable.

(c) If an objected assessment was proved excessive, it could not be remedied by any 'arrangement … with … Collector'. The only remedy was to revise it under section 64. (This was 'without prejudice to my argument that the assessment is void ab initio'.)

(d) She strongly protested against recovery of tax from her salary of February 1992, because (1) it would compel payment of tax wrongly assessed, and (2) without her authority to the Treasury, the deduction could only be effected by a notice under section 76 in the case of a person who was or was likely to be a tax defaulter, and that would be detrimental to her reputation.

(e) 'Incidentally if the Commissioner shares my interpretation of section 11B and section 11D, I have made a correct return; the assessment and the tax payable are incorrect.'

(f) As a sign of good faith she was prepared to purchase a tax reserve certificate in the amount of tax payable on her assessable income for the period from April 1991 to November 1991 on two conditions: (1) the Commissioner should confirm that the objection could not be settled on the information available, explain the reasons and state what other information was required; and (2) to enable the tax reserve certificate to earn interest, any revised tax payable should be due in complete months after the issue date of the certificate. She asked for the forms for the purchase of the certificate.

(g) The original assessment was void ab initio and should be discharged completely. If it was not to be cancelled, she requested a statement of facts for agreement before the Commissioner determined the objection.

(h) The balance of tax payable as shown in the notice of holding-over dated 24 December 1991 appeared to be tax on her salaries received up to November 1991 plus amounts that might be received up to March 1992 after deducting rent payments and the donation. The assessor was knowingly demanding tax on income not yet accrued at the date of issue of the notice of assessment. The holding-over was an act in exercise of a discretionary power. She was formally asking for an explanation of the matters taken into account by the assessor in arriving at the sum of $80,001 the balance payable. She was also asking for a statement of the matters the assessor had taken into account in exercising her discretion under the proviso to section 59(1). She was making the requests because of the high-handed, unreasonable and harsh approach reflected in the two letters of 24 December 1991. She had to prepare a case for the Ombudsman or for a judicial review.

11. The next letter was dated 2 March 1992 from a senior assessor, salaries tax, to the Taxpayer in overseas. It reads as follows:

> 'I refer to your letter of complaint dated 23 January 1992.
>
> Please be advised that the notice of assessment for the year of assessment 1991/92 issued on 2 December 1991 will be completely discharged. A fresh notice of assessment will be issued to you in due course.
>
> Concerning your enquiry about the completion of the salaries tax return 1991/92 (BIR 50B), please be advised that you are requested to state the details of your income which will accrue to you during the period from 1 April 1991 to the date of cessation, that is, 13 March 1992 in section B of the return. As your employment was not yet ceased by the time you completed the return, an income figure which was computed to the best of your estimation was normally accepted. I regret that your letter of 18 October 1991 was attached to the file late so that appropriate advice cannot be given to you.

Should you still have any enquiries, please feel free to contact us again.'

12. On 3 March 1992, the senior assessor, salaries tax, issued instructions to her staff to have the original assessment completely discharged.

13. On about 7 April 1992, the fresh assessment (see paragraph 1 above) was made on the Taxpayer; a fresh notice of assessment and demand for tax for the year of assessment 1991/92 was thereupon issued to the Taxpayer in overseas. It contained the following particulars:

Principal Income	$485,826
Quarters	48,582
	$534,408
Less: Charitable Donation	200
Net Chargeable Income	$534,208
Tax Payable thereon	$80,131
Due Date: 20 May 1992	

14. By a letter dated 29 April 1992 the Taxpayer objected to the fresh assessment. The grounds of objection were:

'(1) It has been determined in response to my objection to the former settlement under charge number … that my salaries tax liability for the year of assessment 1991/92 should be nil; please refer to the letter dated 2 March 1992.

(2) Alternatively but without prejudice to (1) above, the assessment is invalid because

a. the objection mentioned in (1) above has not been settled, or

b. without prejudice to (2)a above, no valid return has been issued for the year; please refer to my previous letters on this issue.

Please hold over the tax completely if this assessment is not annulled or cancelled immediately.'

15.1 By a letter dated 24 July 1992 from an assessor, salaries tax, to the Taxpayer, the assessor confirmed receipt of the objection dated 29 April 1992 and further stated to the following effect:

(1) To assist in determining the objection further particulars will be requested;

(2) No part of the tax has been held over and the tax should be paid in accordance with the instructions on the demand note; and

(3) The case is being put up for the Commissioner's determination.

15.2 The Taxpayer replied by a letter dated 14 August 1992, commenting on the above-mentioned three statements, enquiring as to what further particulars were required, requesting a statement of facts before the Commissioner made his determination, and referring to Departmental Interpretation and Practice Note No 6 in support of her request.

15.3 Paragraph 15 of the Note, on which the Taxpayer relied, reads as follows:

> 'Where a case has been referred to the Commissioner for determination, a draft "statement of facts" will normally be sent to the taxpayer or his representative for comment. A request will also be made that any further facts, documentary evidence or arguments should now be brought forward.'

15.4 On 18 August 1992 the Commissioner issued his determination in which he decided against the Taxpayer's objection and confirmed the fresh assessment, which is the subject of this appeal. On 20 August 1992 a copy of the determination was sent by post to the Taxpayer in overseas.

15.5 By a letter dated 21 August 1992 from Mr Lee as a senior assessor to the Taxpayer, Mr Lee stated in effect that her letter dated 14 August 1992 was referred to him after the issue of the Commissioner's determination and that there was no point in arguing further about the fresh assessment.

Grounds of Appeal

16. There are three grounds of appeal:

Ground 1

The assessment is invalid because no valid salaries tax return has been issued.

Ground 2

The objection to the original assessment issued on 2 December 1991 has not been settled under section 64 of the Ordinance which requires the decision of the CIR or his representative. It cannot be concluded by an assessor. Any assessment once objected to can only be settled under section 64 of the Ordinance. The Ordinance provides for no other avenue to settle an objection. The fresh assessment is therefore invalid as it assessed the same income which had been the subject of the original assessment under objection.

Ground 3

The CIR and the assessors to the case have been acting unreasonably, tardily, capriciously, whimsically, biasedly and without due care and skill. The assessments and determination made by them are therefore invalid.

17. We consider that the following principles are applicable to the three grounds of appeal:

(1) Even though an act or decision of a public authority is wrong or lacking in jurisdiction, it subsists and remains fully effective unless and until it is set aside by a court or tribunal of competent jurisdiction (Halsbury's Laws of England, fourth edition, Reissue, vol 1(1), paragraph 26).

(2) A tax assessment raised by the Revenue is an act or decision of a public authority, and may on proper grounds be set aside or annulled by the Commissioner under the section 64 objection procedure, or, on appeal, by the Board of Review under the section 68 appeal procedure, or on further appeal or appeals, by the High Court, the Court of Appeal, or the Privy Council, as the case may be. In our view, subject to (3) below, the Taxpayer is entitled to question the validity of the fresh assessment, and also the validity of the salaries tax return or any other related act or decision in so far as it is relevant to the question of validity of the fresh assessment.

(3) (a) The function of the Board is to look at the facts and the Ordinance and decide whether the assessment has been made properly in accordance with the Ordinance or whether it is correct in terms of the Ordinance.

(b) Whether on the facts alleged, it was an abuse of power by the Revenue to make the assessment, or whether the conduct of the assessor was lawful in making the assessment, is a matter only to be considered by the High Court, and a matter for which the only remedy available is by way of judicial review (Aspin v Estill [1987] STC 723 CA at 723 and 726).

(c) Therefore, questions of validity which a taxpayer is entitled to raise before the Board of Review are confined to questions falling within (a) above.

Ground 1

18. What is assessable income is governed by the following provisions of the IRO:

'Section 11B The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.

Section 11C For the purpose of section 11B, a person shall be deemed to commence or cease, as the case may be, to derive income from a source whenever and as often as he commences or ceases:

(a) to hold any office or employment of profit; or

(b) to become entitled to a pension.

Section 11D For the purpose of section 11B:

(a) income which has accrued to a person during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, when notwithstanding anything contained in this Ordinance, an additional assessment shall be raised in respect of such income:

provided that for the purposes of this paragraph income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person;

(b) income accrues to a person when he becomes entitled to claim payment thereof …'

19. Thus assessable income for a year of assessment is the total income accrued and received actually or notionally during the basis period for that year of assessment. Any other income is not part of the assessable income for that year of assessment. If an assessment for a year of assessment is made during the basis period for that year, the assessable income for that assessment is the total income accrued and received up to the moment when the assessment is made; thus the time for testing assessability is the time when the assessment is made, not when the return is made, nor when the tax is paid.

20. At the return stage no question of assessability can arise. What the present return required was a statement of income 'which has accrued/will accrue' during the specified period. There is no difficulty about the concept of 'will accrue'; what is the difficult and even possible is to state accurately what will accrue. Does that render the return ultra vires and void as the Taxpayer contended? We think not. This is a case to which we think the 'golden rule' applies. Maxwell on the Interpretation of Statutes, twelve edition, states at page 43:

'The so-called "golden rule" is really a modification of the literal rule. It was stated in this way by Parke B: "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest

> absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." "If", said Brett LJ, "the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."'

Maxwell then gives examples of the application of the golden rule, including Lee v Knapp [1967] 2 QB 442, a case on section 77(1) of the Road Traffic Act 1960 which required the driver of a motor vehicle to 'stop' after an accident. Winn LJ said that he would not wish to give the impression that a momentary pause after an accident would exempt the driver of a car from the necessity of stopping to give particulars. He said at 447:

> 'The phrase "the driver of the motor vehicle shall stop" is properly to be construed as meaning the driver of the motor vehicle shall stop it and remain where he has stopped it for such a period of time as in the prevailing circumstances, having regard in particular to the character of the road or place in which the accident happened, will provide a sufficient period to enable persons who have a right so to do, and reasonable ground for so doing, to require of him direct and personally the information which may be required under the section.'

A tax return is issued under section 51(1) of the IRO and is in a form which is specified by the Board of Inland Revenue under the authority of section 86 of the IRO 'as a form which may be necessary for carrying this Ordinance into effect'. Its object is to obtain the specified information from the maker of the return to facilitate the making of tax assessments. Its words should, wherever possible, be construed so as to avoid absurdity, inconvenience and consequent frustration of its object. We therefore take the view that 'will accrue' in the present return should be construed to mean 'will accrue to the best of my (that is, the maker's) estimation', and that the present return is valid by virtue of the application of the golden rule. Furthermore, we also accept Mr Lee's submission that the return is valid by virtue of section 63 of the IRO which provides as follows:

> 'Section 63 No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.'

The return was in our view a 'proceeding' within the meaning of section 63.

21. The Taxpayer took the point that the return 'is invalid as it required me to declare "income which will accrue" in order to charge it to salaries tax'. We do not agree.

The fact that the return sought advance information about income which would accrue in the future does not prove that the return was specified by the Board of Inland Revenue for the purpose, inter alia, of assessing to tax what was not assessable income.

22. The Taxpayer suggested that the appropriate return for the declaration of income 'which will accrue' was a provisional salaries tax return and the correct tax to charge was provisional salaries tax. That suggestion was made in the context of her argument that it was impossible or unreasonable to require her to 'declare income that will accrue', taking the quoted words in their literal sense. We have stated our reasons for disagreeing with that interpretation (see paragraph 20 above). Furthermore, she did not demonstrate how a provisional salaries tax return might have worked in her case. Moreover, even assuming for argument's sake that a provisional salaries tax return would have worked, that does not in our view affect the validity of the present return.

23. As we are of the view that the return is valid, Ground 1 therefore fails. However, we shall state our views on the supposition that the return was invalid. In that event, Ground 1 would have succeeded. Section 59 of the IRO governs the making of first assessments (as distinct from additional assessments under section 60). Subject to the proviso to section 59(1), a first assessment must be preceded by the issue of a section 51(1) notice (which includes a return form). Section 59(1) reads:

> 'Section 59(1) Every person who is in the opinion of an assessor chargeable with tax under this Ordinance shall be assessed by him as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1):
>
> > Provided that the assessor may assess any person at any time if he is of opinion that such person is about to leave Hong Kong or that for any other reason it is expedient to do so.'

In the present case, both the original and fresh assessments were first assessments and were both preceded by the issue of the same section 51(1) notice which included the present salaries tax return. On the facts, the proviso did not come into play. If the return had been invalid, both the original and the fresh assessments would have been invalid as well because 'a return' in the first part of section 59(1) must mean 'a valid return'.

Ground 2

24. Ground 2 (see paragraph 16 above) is predicated on: (a) the continued effectiveness of the original assessment until it is annulled or revised under the section 64 objection procedure and (b) the invalidity of the complete discharge (see paragraph 12 above) as an act done or decision taken without authority. We consider that (a) must be right (see paragraph 17(1) above). As for (b), we are not unmindful of the fact that the subject assessment for the complete discharge was the original assessment, but as the question of validity of the fresh assessment turns on the question of validity of the complete discharge, we take the view that we have jurisdiction to decide the latter question. An

assessor as such has no authority under section 64(2) to annul or discharge an assessment under objection. Such authority is reserved for the Commissioner and his duly authorised representatives. The assessor concerned did not act on behalf of the Commissioner, nor, as we were informed by Mr Lee, was she an officer duly authorised by the Commissioner to perform acts or make decisions of that nature. The complete discharge is therefore invalid and ineffective, with the consequence that there is a co-existence of two assessments (that is, the original assessment and the fresh assessment) to the same tax (that is, the salaries tax) for the same year of assessment in respect of total income from the same employment – a situation not brought about by design, but nonetheless contrary to the intention of the law. Mr Lee cited IRC v Wilkinson [1992] STC 454 and two other cases in support of his contention that the two assessments were alternative assessments. We do not think that those cases are of any assistance; they all concern assessments to different taxes albeit in respect of the same receipts; the justification for the practice of making alternative assessments in the United Kingdom is that sometimes it is difficult to decide to which tax, out of two or more alternative taxes, for example, income tax and capital gains tax, the assessment should be made. The present case concerns salaries tax only; there did not exist any need for alternative assessments. In fact, the assessor planned something entirely different: discharging the original assessment and making a fresh assessment. In our view, the fresh assessment is invalid as a cumulative assessment. Ground 2 therefore succeeds. Needless to say, this is not a decision on the question whether the Taxpayer is chargeable with salaries tax in respect of her total income for the year of assessment 1991/92. On the facts, it is clear that she is so chargeable and it remains the duty of the Commissioner to address the original assessment under objection and tax the Taxpayer's income for the year of assessment 1991/92.

Ground 3

25. The adverbs used in Ground 3 are variations on the theme of an abuse of power or other unlawful conduct on the part of the Revenue which the Taxpayer contended had the effect of rendering the fresh assessment invalid. The preliminary question is whether we have the jurisdiction to entertain Ground 3. We think not.

26. The Taxpayer's contention was that this was a case to which the principle that judicial review should not be granted where an alternative appeal procedure is available applied, and she cited Reg v IRC. Ex p Preston [1985] 1 AC 835. In the Preston case the Revenue were taking steps under Part XVII of the Income and Corporation Taxes Act 1970 to counteract a tax advantage allegedly taken by the taxpayer from the acquisition and sale of certain shares in a limited company, when he applied to the High Court for leave to apply for an order prohibiting the Inland Revenue Commissioners from taking any further steps for the purpose of investigating or assessing the taxpayer to further tax liabilities in connection with the affairs of that company. In his application the taxpayer asserted that the conduct of the Inland Revenue Commissioners in invoking the anti-avoidance procedure was a breach of contract or breach of representations and that such conduct constituted an improper exercise or an abuse of the statutory powers of collection and management of Inland Revenue. The High Court granted the taxpayer leave to apply for judicial review and subsequently ordered and declared that the Inland Revenue Commissioners were not

entitled to exercise their powers in respect of the acquisition and disposal by the taxpayer of the shares and that the Commissioners' purported exercise of those powers in respect thereof was unlawful. The Court of Appeal allowed an appeal by the Commissioners from the High Court's decision and discharged the order mentioned above. As a result the Inland Revenue Commissioners made an additional assessment to income tax on the taxpayer to counteract the alleged tax advantage. An appeal by the taxpayer to the Special Commissioners against the additional assessment under section 462(1) of the 1970 Act was deferred pending the outcome of the taxpayer's appeal to the House of Lords in the judicial review proceedings.

27. The part of the Preston case particularly relied on by the Taxpayer is contained in the following passage from Lord Templeman's speech at 862:

> 'Woolf J rightly decided that the taxpayer had no remedy against the commissioners for breach of contract or breach of representations made by Mr Thomas in 1978 because the commissioners could not in 1978 bind themselves not to perform in 1982 the statutory duty of counteracting a tax advantage imposed on the commissioners by section 460 of the Act of 1970. The only remedy which might be available to the taxpayer was the remedy of judicial review. Judicial review is available where a decision-making authority exceeds its powers, commits an error or law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available. In most cases in which the commissioners are said to have fallen into error, the remedy of the taxpayer lies in the appeal procedures provided by the tax statutes to the General Commissioners or Special Commissioners. This appeal structure provides an independent and informed tribunal which meets in private so that the taxpayer is not embarrassed in disclosing his affairs and the commissioners are not inhibited by their duty of confidentiality. The commissioners and the tribunals established to hear appeals from the commissioners have wide knowledge and experience of fiscal law and practice. Appeals from the General Commissioners or the Special Commissioners lie, but only on questions of law, to the High Court by means of a case stated and the High Court can then correct all kinds of errors of law including errors which might otherwise be the subject of judicial review proceedings: see Edwards v Bairstow [1956] AC 14. Judicial review process should not be allowed to supplant the normal statutory appeal procedure. The present circumstances are exceptional in that the appeal procedure provided by section 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under section 460 was unlawful.'

28. In reply Mr Lee cited Aspin v Estill [1987] STC 723 CA. As we are adopting the principles stated by Sir John Donaldson MR in the Aspin case, we shall quote his decision in extenso. At 725 (h), he stated:

> 'The function of General Commissioners is to look at the facts and statutes and

> see whether the assessment has been properly prepared in accordance with those statutes.'

Then at 725 (j) he referred to the part of the passage from Lord Templeman's speech in the Preston case cited in paragraph 27 above commencing with the words 'Appeals from the General Commissioners or the Special Commissioners lie'. From 726 (b) to 727 (b), he continued as follows:

> 'That was a case which was concerned with alleged tax avoidance. Based on that short passage counsel for the taxpayer submitted that the General Commissioners could have considered whether, if the advice had been given (the allegation being that erroneous advice had been given by the Revenue to the taxpayer), it was an abuse of power – to use an unfortunate phrase, but one which is now hallowed by tradition – to raise this assessment at all. This is a somewhat surprising submission bearing in mind that judicial review is a remedy which is only available in the High Court, and then only subject to leave. Although that particular passage in Lord Templeman's speech did provide some foundation for counsel's argument, I am bound to say that for my part I greeted it with surprise bordering on horror, because I did not believe that it was the intention of Parliament that the General Commissioners, worthy body though they are, should exercise a judicial review jurisdiction.
>
> When one looks at an earlier passage in Lord Templeman's speech, I think that the passage which I have cited bears a slightly different meaning. He said [1985] STC 282 at 290, [1985] AC 835 at 861):
>
> > "If on this appeal it appears that the actions taken by the commissioners under section 460 have been unlawful, the commissioners cannot proceed to enforce the additional assessment made on the taxpayer under section 460, whether or not the taxpayer in 1977 fell foul of section 460. If your Lordship determine that the actions taken by the commissioners under section 460 have been lawful, then subject to the appeal procedure provided by section 462 to the Special Commissioners and the tribunal, the commissioners will proceed to enforce the additional assessment."
> >
> > In other words, the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power was one thing, and a matter only to be considered by the High Court. Whether, if he was right to make such an assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners.
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> > That is even made clearer by a passage from the speech of Lord Scarman where he said ([1985] STC 282 at 299, [1985] AC 835 at 852):

> 'But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot in the absence of special circumstances decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under part XVII of the 1970 Act. For instance, as my noble and learned friend points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide.
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> Note "for the court to decide", not "for the Special or General Commissioners to decide".
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> My conclusion therefore is that, even if the General Commissioners were to find these facts, they could not find their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. If the taxpayer has a remedy … it must lie in the judicial review route, subject to his getting leave, and, of course, subject to any facts which might emerge on an investigation of the facts it leave were granted.'

29. Simon's Taxes, Revised third edition, Division A2.511, page 496, cites the Aspin case for the following proposition:

> 'The General Commissioners are not generally empowered to investigate an allegation by a taxpayer of an abuse of power by the Revenue; the proper remedy in such cases is by way of judicial review in the High Court. In Aspin v Estill the taxpayer appealed against assessments under Schedule D Case V in respect of payments of social security retirement benefit by the US Federal Government. The taxpayer claimed that he had been wrongly advised by a tax office that the pension payments were not taxable, and argued that the case should be remitted to the Commissioners to investigate the facts behind his allegation. His appeal was dismissed by the Court of Appeal. Even if the Commissioners had found the facts alleged by the taxpayer they could not have taken them into account in deciding whether to uphold the assessments. The Commissioners' function was to decide whether the income was taxable and

> whether the assessments were properly raised; they had no power of judicial review of the conduct of the Revenue.'

30. In the Preston case no statutory appeal procedure was available to the taxpayer until the additional assessment was raised on him as a result of the Court of Appeal's decision to allow the appeal from the High Court's decision (see paragraph 26 above); but, as soon as the additional assessment was raised, the section 462 appeal procedure became available to him. His appeal against the additional assessment was deferred pending the outcome of the appeal to the House of Lords in the judicial review proceedings. On this aspect the taxpayer submitted:

> '... The prohibition was quashed on appeal to the Court of Appeal. The commissioners immediately issued an additional assessment. The taxpayer appealed under the tax statute to the Special Commissioners. The immediate issue for the Special Commissioners to consider was whether the commissioners were lawful in making the assessment. They were bound by the Court of Appeal's finding that it was lawful. If the taxpayer was not allowed to go under the judicial review process to the House of Lords to determine the issue, the appeal under the tax statute process would ultimately reach the House but necessarily, and not meritoriously, through the High Court and the Court of Appeal, all of which were bound by the previous Court of Appeal's judgment.'

That submission was predicated upon two premises: (1) that under the section 462 appeal procedure the Special Commissioners had jurisdiction to decide the question whether the conduct of the Inland Revenue Commissioners was lawful in making the additional assessment, and (2) that as the section 462 appeal procedure was no where near so convenient or effective as the judicial review proceedings, the latter were allowed to continue to the House of Lords. It is clear that the question facing the House was whether the Inland Revenue Commissioners were guilty of unfairness amounting to abuse of power by reason of conduct equivalent to a breach of contract or breach of representations on their part. It was accepted by all concerned, from the Law Lords to the parties by their counsel, that that question should be decided by the House of Lords in the judicial review proceedings. The House was not asked to decide any question as to the jurisdiction of the Special Commissioners to decide the lawfulness of the Inland Revenue Commissioners making the additional assessment. It follows that any statement by the Law Lords in favour of or against the existence of such a jurisdiction would be obiter and not be binding. Furthermore, even assuming for argument's sake that such a statement could form part of the ratio decidendi and therefore be binding, it must be clear what it was, otherwise it would not be binding (see Halsbury's Laws of England, fourth edition, Reissue, vol 26, paragraph 573, page 293). In their Lordships' speeches, there was in our view no statement, clear or otherwise, relating to the existence of such a jurisdiction. Moreover, it is to be noted that the last sentence in the passage in Lord Templeman's speech cited in paragraph 27 above – 'The present circumstances are exceptional in that the appeal procedure provided by section 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under section 460 was unlawful' – was apt whether or not the Special Commissioners had

jurisdiction over the question of lawfulness of the Inland Revenue Commissioners making the additional assessment.

31. For all those reasons, we are of the view that in stating the principles in the Apsin case, Sir John Donaldson MR did not depart from any principles forming part of the ratio decidendi in the Preston case. Our conclusion therefore is that the principles stated in the Aspin case should be followed. It follows that we have no jurisdiction to entertain Ground 3 and that Ground 3 fails.

Decision

32. Our decision is that this appeal succeeds on Ground 2 and that the fresh assessment is hereby annulled.