Neutral Citation Number: [2019] EWCA Civ 1643

Case No: C1/2017/3344

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
SIR KENNETH PARKER (Sitting as a Judge of the High Court)
[2017] EWHC 2881 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ROSE
and
SIR BERNARD RIX

- -

Between :

THE QUEEN on the application of
AOZORA GMAC INVESTMENT LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondent

- -
- -

David Ewart QC (instructed by **Eversheds Sutherlands (International) LLP**) for the Appellant
James Rivett QC and Barbara Belgrano (instructed by **Solicitors Office, HMRC**) for the Respondent

Hearing dates: 30 and 31 July 2019

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Approved Judgment

Lady Justice Rose:

Background

1. The Appellant ('Aozora UK') appeals against the order of Sir Kenneth Parker (sitting as a judge of the High Court) by which he dismissed Aozora UK's application for judicial review of the decision of the Respondent ('HMRC') to issue closure notices following inquiries into Aozora UK's tax returns for accounting periods ending 31 March 2007, 31 March 2008 and 31 March 2009. Aozora UK is a member of a group of companies and is a wholly-owned subsidiary of the Japanese parent company Aozora Bank Limited ('Aozora Japan'). Aozora UK was set up by Aozora Japan in 2006 as a vehicle for investments to be made outside Japan. In order to make such an investment, Aozora UK in turn established a wholly-owned subsidiary in the United States of America, Aozora GMAC Investments LLC ('Aozora US') which was for fiscal purposes resident in the US.

2. During accounting periods ended 31 March 2007 – 31 March 2009 Aozora UK made loans to Aozora US and received interest payments in respect of the funds advanced. The issue in this appeal relates to the taxation of those interest payments in the hands of Aozora UK. The interest payments were potentially liable to tax in both the UK and the US. The US imposed withholding tax at the rate of 30 percent on the interest paid by Aozora US. Aozora UK was liable to corporation tax in the UK on the amount of interest received from Aozora US. The effect of each closure notice was to deny Aozora UK unilateral credit relief under section 790 of the Income and Corporation Taxes Act 1988 ('ICTA 1988') so that Aozora UK was not allowed to use the tax already withheld by the US tax authorities to offset its liability to UK corporation tax on the interest. Instead it was allowed to deduct the US withheld tax from the gross amount of interest payable and to pay corporation tax on the net interest received.

3. The closure notices were issued by HMRC on the basis that the provisions of section 793A ICTA 1988 operated to prevent the availability of unilateral credit relief under section 790 ICTA 1988. By its judicial review claim, Aozora UK contends that the terms of HMRC's international tax manual as published at the relevant times contained a representation by HMRC that the scope of section 793A was limited to precluding the availability of credit relief only in one particular circumstance which, it is common ground, did not apply to Aozora UK. Aozora UK argues that the representation was binding on HMRC because it gave rise to a legitimate expectation that Aozora UK would be taxed in accordance with that interpretation of section 793A, whether or not the terms of the Manual were accurate as a matter of law. Further, Aozora UK argues HMRC should not be permitted by the court now to resile from the alleged representation.

4. Sir Kenneth Parker held that:

   i) The statement in the Manual as to the proper construction of section 793A did amount to a representation on the part of HMRC on which it was reasonable for taxpayers to rely.

   ii) However, Aozora UK had not relied on that representation when making the decision to arrange the loans to Aozora US through Aozora UK.

iii) Further, he held that it would not be conspicuously unjust for HMRC to resile from the representation in the circumstances of the case.

5. The Judge therefore dismissed the application. Permission to appeal was granted by David Richards LJ on 2 November 2018.

Double taxation relief

6. This appeal turns on the question when unilateral tax relief under section 790 ICTA 1988 is available in circumstances where there is a double taxation arrangement in place between the UK and the relevant overseas jurisdiction but where that arrangement does not by its terms provide double taxation relief in the particular circumstances of the taxpayer's case. Looking first at the arrangements in place between the UK and the USA, the UK and USA signed the UK/USA Double Taxation Convention ('The Treaty') on 24 July 2001. The Treaty entered into force on 31 March 2003 and became effective for corporation tax from 1 April 2003 and for taxes withheld at source from 1 May 2003. The detailed wording of the provisions does not matter for our purposes. What matters is that the effect of the Treaty was as follows:

i) According to Article 23 of the Treaty, UK resident companies could only benefit from the double taxation relief provided by the Treaty if they were "qualified persons" as defined in Article 23(2). That definition was aimed at ensuring, broadly, that the UK resident company was resident in the UK for some genuine business reason and not simply set up here to take advantage of the double taxation relief provided for by the Treaty – to discourage "treaty shopping".

ii) Article 11 of the Treaty provided double taxation relief for interest payments by providing that interest payments arising in the USA but paid to a UK qualified person were taxable only in the UK and not in the USA. Thus if a company was resident in the UK and was a "qualified person" and it received interest in the USA, the interest was exempt from US tax so that no tax would be withheld at source. The income, exempt from any US tax, would then be taxed in full in the UK at the appropriate rate of corporation tax.

iii) If a UK resident company was not a qualified person and so did not benefit from relief because of Article 23, it could apply under Article 23(6) to the US competent authority (the Internal Revenue Service) to be granted the benefits that the Treaty confers on qualified persons, including exemption from US tax under Article 11.

iv) Article 24(4) of the Treaty provided for certain instances in which the double tax relief was not available or fully available. One of these, in Article 24(4)(c), dealt with tax relief on dividend payments where the USA treated the dividend as beneficially owned by a US resident and the UK treated the dividend as beneficially owned by a UK resident. It restricted the circumstances in which a qualified person could claim relief by way of credit against UK corporation tax for any US tax charged on the relevant underlying profits of the US company paying the dividend. The Judge recorded that he had struggled to make sense of the convoluted wording of Article 24(4)(c) and that he concluded, at paragraph 28 of his judgment, that it was designed to limit the benefit of the

relief in respect of a particular tax avoidance arbitrage device that had come to the attention of the UK and US Governments and which they wanted to defeat.

7. Turning to the provisions of the relevant UK legislation, where a double taxation treaty provides that the Contracting Parties must provide relief in particular circumstances, section 788 of ICTA 1988 and subsequent provisions confer the benefit of that on the taxpayer. Unilateral double tax relief is granted by the UK Government under section 790 ICTA 1988. Such relief is available not only where there is no tax treaty at all between the UK and the other taxing jurisdiction but also, in some circumstances, where the relevant tax treaty does not cover the particular circumstances of this taxpayer. Section 790(1) ICTA 1988 provides that double taxation relief conferred by that section applies in respect of tax payable under the law of the overseas territory "by allowing that tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief."

8. The Finance Act 2000, Schedule 30 paragraph 5(1) inserted into ICTA 1988 a new section, section 793A. This provides:

> "**793A No double relief etc.**
>
> (1) Where relief in respect of an amount of tax that would otherwise be payable under the law of a territory outside the United Kingdom may be allowed —
>
> (a) under arrangements made in relation to that territory, or
>
> (b) under the law of that territory in consequence of any such arrangements,
>
> credit may not be allowed in respect of that tax, whether the relief has been used or not.
>
> (2) Where under arrangements having effect by virtue of section 788, credit may be allowed in respect of an amount of tax, credit by way of unilateral relief may not be allowed in respect of that tax.
>
> (3) Where arrangements made in relation to a territory outside the United Kingdom contain express provision to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances."

9. Subsection (3) of section 793A has effect in respect only of arrangements (that is, tax treaties) made on or after 21 March 2000. As the Judge rightly said at paragraph 11 of his judgment, if the taxpayer is claiming unilateral tax credit in respect of US tax, "the taxpayer needs carefully to consider the UK–US Treaty to determine the extent to which section 793A(3) might apply, because that particular treaty was entered into after the crucial date". The effect of section 793A is that if the reason why the

taxpayer cannot benefit from relief under section 788 is not because there are no applicable arrangements in place with the other taxing jurisdiction covering his circumstances, but because the applicable arrangements expressly provide that relief is not to be available in the taxpayer's circumstances, then the taxpayer cannot circumvent that provision by claiming unilateral relief under section 790 instead.

The Manual

10. During the three accounting periods we are concerned with in this case, HMRC had published a manual to assist its staff to understand and apply the law. The relevant manual for our purposes was HMRC's international tax manual ('the Manual'). In accordance with the Code of Practice on Access to Government Information, the Manual was made available to the general public for the information of taxpayers and their advisers. Paragraph 151060 of the Manual at the relevant time stated:

> "**UK legislation – unilateral relief**
>
> ICTA88/s790 together with TCGA92/s277 for Capital Gains Tax, allows unilateral tax credit relief to be given against United Kingdom taxes for foreign taxes imposed in a country with which the United Kingdom has no double taxation agreement. The legislation provides that Section 792-806M (rules for giving foreign tax credit relief) are to apply as if there was an agreement in force with the country concerned which contained the provisions in Sections 790(3) and (4).
>
> Unilateral relief under s790 can only be given by way of credit for foreign tax. Part of the income cannot be taken out for assessment. In broad terms credit is limited to the amount that would be due if a treaty were in existence.
>
> ICTA88/s793A provides a restriction to credit relief under s.790. It provides that where a double taxation treaty contains an express provision to the effect that relief by way of credit shall not be given in particular cases or circumstances specified or described in the agreement, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances. The provision has effect for arrangements made after 20 March 2000. <u>At 1 April 2003 the only provisions to which s.793A applies is Article 24(4)(c) of the new UK/US DTA</u>". (emphasis added).

11. By 3 February 2011 the Manual had been amended specifically to exclude the sentence emphasised above.

The decision to set up Aozora UK

12. In the later part of 2006, Aozora Japan was considering how to structure an investment into the US. It was advised on the tax implications of this project by Tohmatsu Tax Co in Japan ('Deloitte Japan'). One possibility was a direct investment

by Aozora Japan. Interest payments from Aozora US directly to Aozora Japan would have qualified for exemption from US withholding tax under Article 11(3)(c)(i) of the US/Japan Double Tax Treaty. However, Aozora Japan would have paid corporation tax at the rate of 41 percent on those interest payments under Japanese revenue law. Aozora Japan considered making the investment through a UK resident subsidiary. That was the route decided upon and on 6 November 2006 Aozora UK was incorporated in the UK. It was recognised all along and was common ground in these proceedings that Aozora UK was not a qualified person within the meaning of Article 23 of the Treaty. This was, amongst other reasons, because it was not publicly traded on a recognised stock exchange and it was not engaged actively in a trade or business other than making or managing investments. Deloitte Japan prepared calculations modelling the tax position on different assumptions, namely an assumption where there was no relief from US withholding tax under the Treaty; and on an alternative assumption where the relief was available. On the first assumption Deloitte Japan included in its calculations the benefit of unilateral relief under section 790 ICTA 1988 as being available.

13. In preparing its advice, Deloitte Japan consulted one of the partners in Deloitte in London who was known to specialise in advising on UK/USA double taxation relief, Mr Neil Coles. He looked at the calculations that had been prepared on the assumption that unilateral relief would be available and he did not demur from that position. He also advised that it would be wise to apply to the US competent authority under Article 23(6) of the Treaty for the benefits of the Treaty to be conferred on Aozora UK even though it did not meet the criteria for being a qualified person. On 27 March 2008, Aozora UK asked the IRS in the USA for a favourable determination under Article 23(6) of the Treaty, on the basis that Aozora UK "was not established, acquired, maintained or operated with a principal purpose of obtaining benefits under the Treaty". The IRS refused the request and Aozora UK was advised that a legal challenge to that ruling had no realistic prospect of success.

14. Nonetheless, the investment in the USA went ahead through Aozora UK and Aozora UK received interest payments from which 30 per cent withholding tax had been deducted by the US taxing authorities. When Aozora UK filed its tax returns for the three years in dispute, it accounted for tax on those interest payments as if it were entitled, by way of unilateral relief under section 790 ICTA 1988, to set that 30 per cent withheld tax against its own liability to corporation tax on the interest payments. HMRC opened enquiries into those tax returns and recalculated the tax on the basis that there was no entitlement to unilateral relief. HMRC said that the disapplication of unilateral relief in section 793A ICTA 1988 had been triggered by the application of Article 23 of the Treaty because according to HMRC, Article 23 is an "express provision to the effect that relief by way of credit shall not be given" under the Treaty in the circumstances where the UK taxpayer is not a qualified person. That being Aozora UK's situation, credit by way of unilateral relief is also not allowed. Aozora UK challenged those closure notices but they were confirmed by HMRC in a review decision of 21 October 2016. The difference in tax treatment is substantial: the corporation tax due from Aozora UK as a result of each closure notice is £900,497 for the accounting period ending 31 March 2007, £2,640,337 for the period ending 31 March 2009 and £922,622 for the accounting period ending 31 March 2010.

15. Aozora UK contends that HMRC's interpretation of section 793A ICTA 1988 is wrong and that Article 23 of the Treaty is not an "express provision" of a double taxation relief arrangement that rules out unilateral tax relief for the purposes of section 793A. It has therefore lodged an appeal against its assessments to the First-tier Tribunal (Tax Chamber). That appeal is pending. The judicial review claim argues that, even if HMRC's construction of Article 23 and section 793A is correct, HMRC cannot rely on section 793A to defeat a claim for unilateral relief in this particular case because Aozora UK had a legitimate expectation based on the representation in the Manual during the relevant three accounting years to the effect that the only provision then extant in a double taxation arrangement that fell within the scope of section 793A was Article 24(4)(c) of the Treaty. That was a representation that HMRC would not treat Article 23, on which HMRC now wish to rely, as an express provision caught by section 793A.

The judgment below

16. The Judge set out the legal principles on which the judicial review claim of legitimate expectation is based and which I discuss below. He then considered first whether the Manual contained a relevant representation. He described the submissions on behalf of HMRC as to why there was no relevant representation as powerful but concluded that there was a relevant representation in this case: see paragraphs 59 onwards. Having considered the position of the "ordinarily sophisticated taxpayer", he held that the representation made in the Manual was clear, unambiguous and devoid of any relevant qualification to the effect that the ordinarily sophisticated taxpayer was not required to look beyond Article 24(4)(c) of the Treaty when considering the potential disapplication of unilateral relief pursuant to section 793A(3):

> "77. Even if, therefore, the hypothetical taxpayer considered the matter objectively, and with a superabundance of caution, there was nothing at all prominent to alert the anxious taxpayer to look beyond the terms of the HMRC guidance that uniquely identified a single Article of the Tax Treaty, namely, Article 24(4)(c).
>
> 78. I do, therefore, reach the conclusion that the guidance constituted a relevant representation, namely, that s.793A(3) had application only to the circumstances set out in Article 24(4)(c) of the Tax Treaty. It is common ground that Article 24(4)(c) had no relevance to Aozora UK. It was also common ground that Aozora UK was not seeking to rely upon the guidance in order to engage in tax avoidance in the sense intended by the guidance. Aozora Japan was therefore entitled in principle to rely on the guidance."

17. The next question was whether Aozora UK had relied on that representation. The Judge said at paragraph 82 that strictly speaking Aozora UK did not yet exist at the relevant time but that he was prepared to treat Aozora Japan as a proxy for the actual taxpayer in this context. He considered a witness statement of Mr Coles in which Mr Coles described what he had done when asked to look at the calculations provided by Deloitte Japan for the purpose of advising Aozora Japan. He also looked at the email traffic and other correspondence passing between Deloitte Japan and Deloitte UK and

between Deloitte Japan and Aozora Japan. He noted that neither Deloitte London nor Deloitte Japan had provided Aozora Japan with any written tax advice and it was not therefore possible to ascertain with confidence what specifically, if anything, was said to Aozora Japan about the Manual or whether Deloitte Japan even knew about the Manual. There was no mention of the Manual or guidance in any of the contemporary emails. He held:

> "85. On the evidence before me, therefore, the only conclusion that I can properly draw is that Aozora Japan was relying on, and was exclusively relying on, expert advice of Deloitte that unilateral credit would be available under UK law to a wholly owned subsidiary company resident in the UK in respect of taxed income received from the US by the UK subsidiary. Aozora Japan was unaware of the Manual and guidance and did not directly rely upon any representation made by HMRC about the meaning and scope of s.793A(3)."

18. The Judge therefore held that Aozora UK had not shown that the representation "played a real and substantial part in the giving of the advice". It was not enough to show that the adviser was 'supported' or 'encouraged' in giving the advice by the representation, those being the words that Mr Coles had used in his witness statement: paragraph 88. Mr Coles' evidence was that he had come to his own conclusion that it was only Article 24(4)(c) of the Treaty that was caught by section 793A of ICTA 1988.

19. The Judge went on to hold that as a matter of principle, it would not be enough to show that Deloitte, as tax adviser to Aozora UK, had relied on the Manual. He held that that would not be sufficient where there was no evidence that (i) the adviser drew the taxpayer's attention to the representation made by HMRC; or (ii) that Deloitte had explicitly explained to the taxpayer that Mr Coles was relying upon the representation in giving the relevant advice to the taxpayer.

20. The Judge said:

> "87. In the absence of such a condition it seems to me that it would be all too easy for an adviser later to assert that he had relied on HMRC guidance in advising a client, and it would be very difficult for HMRC to rebut such an assertion, whatever the true position might have been. The temptation for the tax adviser would be all the greater if, as might well be expected, the client was later aggrieved by what has turned out to be possibly flawed advice, and the adviser were exposed to legal liability and reputational damage. On the other hand it does not seem unduly burdensome, particularly in the context of a doctrinal exception to the principle of legality in favour of legitimate expectation, to require the adviser in advance to make plain to the client that he has relied, in giving the advice, on HMRC guidance. The adviser, of course, always has the alternative – which may in some cases be preferable – of contacting HMRC, explaining the nature and scale of a contemplated transaction or transactions, and indicating an

> intention to rely upon a relevant HMRC guidance. That course was not adopted in the present case."

21. Finally the Judge dealt with the issue of conspicuous unfairness. The Judge described this element of the test for legitimate expectation as setting "a very high hurdle indeed": paragraph 97. He held at paragraph 98:

> "98. In my view, Aozora UK could not clear that hurdle in this case, unless it produced clear and compelling evidence that, by reason of its putative reliance on the relevant representation, it had suffered substantial detriment. It must show that, but for the advice that unilateral tax credit was available, it would not have made the business decision that it did, but would have made a business decision that was more favourable from a tax point of view. However, there is simply no evidence before the Court from Aozora Japan or Aozora UK as to what Aozora Japan would have done if they had been expressly (and, for this purpose, correctly) told that, by virtue of Article 23 of the Tax Treaty and s.793A(3), no unilateral credit would be available on the scenario under consideration."

22. He was not satisfied that Aozora Japan would not have established Aozora UK in the UK if it had believed that no unilateral relief would be available under section 790. There was therefore no substantial detriment to Aozora UK if HMRC now resiled from the representation in the Manual and there would be no conspicuous unfairness or abuse of power if HMRC now insisted that section 793A(3) must be applied in accordance with its true construction; that construction was a matter to be determined in Aozora UK's extant appeal against the closure notices before the First-tier Tribunal (Tax Chamber).

The Appeal

23. Aozora UK's grounds of appeal raise five issues:

Ground 1: The Judge erred in holding that it was necessary for Aozora UK to have itself relied on the representations in paragraph 151060 of the Manual. They argued that it is sufficient that Aozora UK's tax advisers relied on the representation in advising Aozora UK.

Ground 2: The Judge erred in holding that the Deloitte UK partner did not rely upon the representation in concluding that section 793A(3) of ICTA 1988 only applied to Article 24(4)(c) of the Treaty. The Judge misread and misinterpreted Mr Coles' written evidence which was that he did rely on the representation in taking the view that there was no risk that unilateral relief would be denied by section 793A(3).

Ground 3: The Judge erred in holding that Aozora UK had to prove what advice would have been given if the representation had not been made or if HMRC had correctly stated the law in the Manual. That is not a burden placed on a taxpayer where there was actual reliance on a representation which might reasonably have led the representee to conclude as it did.

Ground 4: The Judge erred in holding that Aozora UK had to prove what it would have done if the representation had not been made. The burden of proof on that issue was on the representor, that is HMRC.

Ground 5: The Judge erred in holding that it was not conspicuously unfair for HMRC to resile from their representation and collect so much additional tax which they had represented would not be due. That was plainly conspicuously unfair.

24. On 7 December 2018 HMRC served a Respondents' Notice seeking to uphold the judgment on the additional ground that the Judge was wrong to hold that the Manual contained a representation that was sufficiently clear, unambiguous and devoid of relevant qualification to give rise to a legitimate expectation.

Did the statement in the Manual amount to a representation?

25. It is convenient to address HMRC's Respondents' Notice first. HMRC publishes manuals to assist its staff to understand and apply the law. The manuals are made available to the general public for the information of taxpayers and their advisers in accordance with the Code of Practice on Access to Government Information. At the relevant time for this application, HMRC also published a general notice about the way in which the guidance should be used both by its staff and by taxpayers:

> "Inland Revenue Guidance Manuals
>
> These manuals contain guidance which has been prepared for the staff of the Inland Revenue. It is being published for the information of taxpayers and their advisors in accordance with the Code of Practice on Access to Government Information.
>
> It should not be assumed that the guidance is comprehensive nor that it will provide a definitive answer in every case. The staff of the Inland Revenue are expected to use their own judgment, based on their training and experience, in applying the guidance to the facts of particular cases. In particular difficult or complex cases they are able to obtain further guidance from specialists in Head Office.
>
> The guidance in these manuals is based on the law as it stood at date of publication. The Inland Revenue will publish amended or supplementary guidance if there is a change in the law or in the Department's interpretation of it. The Inland Revenue may give earlier notice of such changes through Tax Bulletin or a press release.
>
> Subject to these qualifications readers may assume that the guidance given will be applied in the normal case; but where the Inland Revenue considers that there is, or may have been, avoidance of tax the guidance will not necessarily apply."

26. In *R v IRC ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545 ('*MFK Underwriting*'), Bingham LJ, sitting in the Divisional Court with Judge J, made the following observations: (at 1569B)

> "I am, however, of opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the revenue the factual context, including the position of the revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law: *Reg. v Attorney-General, Ex parte Imperial Chemical Industries plc* (1986) 60 T.C.1, 64G, *per* Lord Oliver of Aylmerton. Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of "One should be taxed by law, and not be untaxed by concession": *Vestey v Inland Revenue Commissioners* [1979] Ch. 177, 197 *per* Walton J. 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."

27. Bingham LJ went on to state that where a representation had been made to a particular taxpayer following a request for a ruling it is necessary that the ruling statement relied on should be "clear, unambiguous and devoid of relevant qualification". In *R (oao Davies) v HMRC; R (oao Gaines Cooper) v HMRC* [2011] UKSC 47, [2011] 1 WLR 2625, where the issue was whether taxpayers who had moved abroad could claim non-resident tax status on the basis of certain paragraphs in a published booklet, Lord Wilson confirmed that Bingham LJ's requirement that representations should be "clear, unambiguous and devoid of relevant qualification" applied also to representations made in guidance formally published by HMRC to the world. Further, it is clear from the judgment in *Davies* that the content of the alleged representations is to be determined on an objective basis. As Lord Wilson expressed it at [29]:

> "… It is better to forsake any arid analytical exercise and to proceed on the basis that the representations in the booklet for which the appellants contend must have been clear; the judgment about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part on the identity of the person to whom it is made, the hypothetical representee is the "ordinarily sophisticated taxpayer" irrespective of whether he is in receipt of professional advice."

28. In my judgment the Judge was right to find that there was a clear and unambiguous representation here on which taxpayers were entitled to rely. Mr Rivett QC, appearing on behalf of HMRC submitted that the Judge erred in deciding that the ordinarily sophisticated taxpayer was not required to look beyond Article 24(4)(c) of the Treaty. This is because an ordinarily sophisticated taxpayer would be aware that relief is available under Article 24 of the Treaty only to a person who is a "qualified

person" within the meaning of Article 23. He argued therefore that Article 24(4)(c) sets out a restriction on the availability of relief to a "qualified person" and says nothing about what other express provisions there may be in the Treaty that fall within the terms of section 793A but apply to persons who are not qualified. The sentence in the Manual should, he said, be understood to mean "the only provision, if you are a qualified person, to which s. 793A applies is Article 24(4)(c) of the new UK/US DTA". There was nothing in the Manual to indicate that HMRC took the view that section 793A would not operate to prevent the availability of unilateral relief in circumstances where the taxpayer was not a qualified person for the purposes of Article 23.

29. I do not accept that the ordinarily sophisticated taxpayer would have realised that he needed to read the statement in the Manual as dealing only with express Treaty provisions that apply to qualified persons. On the contrary, if HMRC is right that Article 23 of the Treaty is also an express provision falling within section 793A, the taxpayer might well expect that to be mentioned in the guidance, given that that appears to be a much more significant disapplication of the Treaty benefits and hence likely to lead to the disapplication of unilateral relief under section 793A much more frequently than the rather arcane Article 24(4)(c). I accept that the Manual is not a representation that there will never be a provision other than Article 24(4)(c) of the Treaty that falls within section 793A. But it is in my judgment a clear and unambiguous representation that the only provision in the Treaty on which section 793A bites so as to deprive a taxpayer of unilateral relief is Article 24(4)(c). The representation is qualified in that HMRC warns the reader that the Manual cannot be relied on for tax avoidance and that in a particularly difficult or complex case an experienced officer might arrive at a different answer. Here there was no suggestion of tax avoidance and the interest payment arrangements were not particularly difficult or complex compared with typical double taxation problems. None of the qualifications therefore applied to Aozora Japan's situation.

30. Secondly, Mr Rivett argues that there was no relevant representation to taxpayers generally that HMRC would refrain from applying section 793A in accordance with its proper construction. Put at its highest, the terms of the Manual identify only an expression of HMRC's views as at the time of the publication of the Manual as to the construction of that provision. The mere expression of a view as to the interpretation of a statutory provision cannot amount to a "representation" to taxpayers generally giving rise to a substantive legitimate expectation worthy of protection by the courts. Further, an ordinarily sophisticated taxpayer would be aware of the critical distinction between the role of Parliament to make the law, the role of the courts to decide what the law is and the role of HMRC to administer the collection of taxes, as described by Lord Bingham in *MFK Underwriting* cited above. This limited role means, HMRC say, that it is not therefore reasonable for taxpayers to rely on HMRC's interpretation of the law. HMRC accept that they have a discretion to formulate policy in the interstices of the tax legislation and to deal pragmatically with minor or transitory anomalies or cases of hardship at the margin. But there is no discretion or managerial power on the part of HMRC being exercised here and it was not reasonable for an ordinarily sophisticated taxpayer to rely on this statement as a promise that, irrespective of what the law enacted by Parliament provides, HMRC would apply their own interpretation to the general body of taxpayers.

31. I do not accept the contention that because the ordinarily sophisticated taxpayer knows that HMRC apply the law but do not make the law, there can never be a legitimate expectation arising from a statement by HMRC in published guidance as to what the law is. HMRC make many different kinds of statements about the application of the law in the course of their duty to administer the body of tax law. In some cases such as *MFK Underwriting* or *GSTS Pathology LLP v Revenue and Customs Comrs* [2013] EWHC 1801 (Admin), [2013] STC 2017, the statement about what the law means is made to one particular taxpayer following a request for a ruling on a proposed transaction. In many cases, however, the guidance is contained in published guidance directed at the whole world, as was the case in *Davies* and in *R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075, [2018] 1 WLR 1682 discussed further below. There are some statements issued by HMRC which go beyond a mere expression of its opinion as to the law. For example, a taxing statute may contain wording which is inherently uncertain, such as where it describes something as needing to be 'substantial' or 'material' or states that something must be done within a 'reasonable time'. HMRC will wish to ensure that all members of staff apply the term in the same way so that taxpayers are dealt with consistently, regardless of which officer handles their case. That guidance may then be published so that taxpayers can conduct their affairs on the basis of the bright line created by HMRC's practice. In other cases, the legislation may by its terms confer a discretion on HMRC in the exercise of some power without spelling out the criteria to be applied. Again, in order to ensure consistent treatment, HMRC may issue guidance setting out what factors staff should take into account and may publish that guidance so that taxpayers know the kind of information that will be relevant to the decision that they are inviting HMRC to make.

32. The statement in the Manual on which Aozora UK rely in their claim is not a statement creating a bright line where the statutory wording is vague or describing how HMRC will exercise a power. It is a statement as to what the law means. Although the courts have emphasised that HMRC does not have a general discretion to remit taxes that are lawfully due, it does not follow that a statement made in guidance as to the content of the law cannot give rise to legitimate expectation or that the only kinds of statements made by HMRC on which a taxpayer can rely are those relating to a policy, or a discretion or to the question of tax management. There is a managerial discretion being exercised here. That is the managerial discretion exercised by HMRC by publishing the guidance because the publication of guidance is an important aspect of the way in which HMRC manages the collection of taxes. It is inherent in the nature of guidance that it only fulfils the function of assisting in the management of the collection of taxes if taxpayers can rely on it. It is true, as the Judge said, that it is open to taxpayers to apply specifically to HMRC for a ruling on their circumstances, but an important function of publishing guidance is precisely to reduce the number of occasions on which a taxpayer or its advisers will need to seek an individual ruling from HMRC. Guidance as to the meaning of the taxing statutes also facilitates the self-assessment process by helping taxpayers and their advisers complete their self-assessment forms correctly. This in turn reduces the number of enquiries that HMRC will need to open into taxpayers' returns. Bingham LJ's exhortation in *MFK Underwriting* that taxpayers' only legitimate expectation is to be taxed according to statute is followed a few sentences later by the statement "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".

His observation was not an indication that a representation about HMRC's view of the law can never give rise to a legitimate expectation. Such a principle would, in my judgment, greatly reduce the value of HMRC's published guidance and greatly increase the burden on taxpayers and their advisers trying to navigate their way through complicated legislation.

33. I therefore hold that the Judge was right to hold that there was a clear and unambiguous representation here that was, so far as Aozora Japan was concerned devoid of relevant qualification. However, the nature of the representation is significant for the second stage of the analysis as to whether the representation gave rise to a legitimate expectation which this court should protect; the issue to which I now turn.

Unfairness: the second stage

34. The development of the concept of substantive legitimate expectations was recently described by the Supreme Court in *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 from paragraph 55 onwards. That case concerned a clear and unambiguous statement that was not alleged to give rise to a substantive right but was a policy statement about procedure made to the world at large. Lord Kerr, with whom the other Justices agreed, said (at 62) that "where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context."

35. Once the court has identified that, construed objectively, the statement made by HMRC is capable of giving rise to a legally enforceable legitimate expectation, the court then turns to the question of whether the statement has done so in the particular circumstances of this taxpayer. Although the Judge dealt with the questions of reliance and conspicuous unfairness separately, his analysis shows that the factors that the court takes into account at this second stage overlap and often do not fall neatly under different headings. There have been many different formulations of the test to be applied because claims of legitimate expectation are made in greatly differing circumstances, tax, immigration and asylum procedures, planning law and provision for the homeless. The different ways in which the test has been expressed reflect the particular circumstances in which the issue has arisen but they are all directed at the same, high level question because they all contain the same key ingredients: a representation made by the public authority followed by conduct on the part of that authority vis à vis the claimant which contradicts that statement and about which the claimant is aggrieved. The question for the court in each case is whether the failure of the public body in its conduct towards the claimant to abide by the representation it made is something which the courts should intervene to prevent. The safest course in any particular case is not, therefore, to pick out passages from earlier authorities dealing with different circumstances and attempt to transplant them into a different situation but to consider what factors should be relevant in answering the fundamental question, guided by earlier cases in which the facts were reasonably close to the facts facing the court in the instant case.

36. I consider therefore that the most helpful formulation of the test to be applied in this claim is the test recently set out in *R (Hely-Hutchinson) v HMRC* [2017] EWCA Civ 1075, [2018] 1 WLR 1682 ('*Hely-Hutchinson*'). In *Hely-Hutchinson* it was common

ground that the statements in the guidance issued by HMRC were capable of giving rise to a legitimate expectation that HMRC would apply to cases such as the claimant's a beneficial tax treatment that had been established by a Court of Appeal decision. The question for the court was whether HMRC should be able to resile from that guidance. Arden LJ said:

> "45. … If HMRC finds that they need to resile from guidance, a taxpayer can only rely on the legitimate expectation that the guidance created where, having regard to the legitimate expectation, it would be so unfair as to amount to an abuse of power.
>
> 46. There are two important corollaries of HMRC's duty of fairness. First, HMRC's duty does not mean that it has to ensure that all taxpayers are charged with tax, if it appears that the facts bring them within a particular statutory charge, as there may be all sorts of reasons why it is not practical in the interests of good management to do so: see *R (Weston) v Inland Revenue Comrs* (2004) 76 TC, paras 8-10 per Moses J. Second, in *R (Esterson) v Revenue and Customs Comrs* [2008] STC 875, para 40, Davis J, applying *Weston* concluded that the fact that some other taxpayers benefited from a policy does not require that the claimant taxpayer should, as a matter of public law fairness, do so if that involves the perpetuation of the mistake or misapprehension that led to the adoption of the policy."

37. On the question of whether HMRC could resile from the guidance it had given to Mr Hely-Hutchinson, Arden LJ noted at [72] that it is well established that it is open to a public body to change a policy if it has acted under a mistake. The question is whether or not there has been sufficient unfairness to prevent correction of the mistake. She said that it is clear from the authorities that the unfairness has to reach a very high level; it has to be outrageously or conspicuously unfair. The question is as to the balancing of the public interest against the interest of taxpayers affected by the decision to withdraw the guidance. One important factor in that case was that the taxpayer had entered into the relevant transactions before the guidance was issued although after he had completed his self-assessment returns and that HMRC had never agreed the losses. He was therefore being taxed on the basis that he thought would apply when he committed himself to the transactions which gave rise to the losses. It was apparent that HMRC had carefully considered whether the taxpayer had suffered any detriment and made their decision on the information that he had provided. The absence of detriment was not conclusive but it was, she said, a powerful factor. The detriment suffered by Mr Hely-Hutchinson was not caused by any reliance on the guidance.

38. Mr Ewart argued that, despite Arden LJ's judgment in *Hely-Hutchinson*, the case law establishes that detrimental reliance is not a requirement for establishing a legitimate expectation. He relied on *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137, [2019] 1 WLR 929 for this proposition. That case involved an example of a clear and unequivocal policy which the public body had indicated would be followed, namely that reasons would

be given for a decision by the Secretary of State not to call in an application for planning permission even though there was no statutory obligation to provide reasons. An individual was entitled, this Court held, to expect that policy to be operated unless and until a reasonable decision was taken that the policy be modified or withdrawn. Similarly, the claimant in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening) (no 2)* [2011] UKSC 12, [2012] 1 AC 245 complained that a published policy that there was a presumption in favour of release from detention of foreign national prisoners on completion of their sentences of imprisonment even if they were liable to deportation was not applied by the Secretary of State. In that case the Supreme Court held that a decision maker must follow a published policy unless there are good reasons for not doing so and there was no requirement linked to specific knowledge of the policy on the part of any individual.

39. In a case where the representation relied on is that a particular procedure will be followed when the public body is exercising one of its statutory powers, it does not make sense for the court to require reliance on the policy. For example, Mr Lumba could not be expected to show that at the time he committed the offence for which he was imprisoned, he was aware of the policy that would apply when he completed his term, still less that when he committed the offence he did so in reliance on the policy which he now complained was not properly being applied. Similarly where the complaint is about a failure to consult it will not be possible for the claimant to establish detriment in the sense that the decision taken would have been different if their views had been sought and taken into account. The representation on which Aozora UK relies in the present case is not of that kind. I certainly do not read *Lumba* or *Save Britain's Heritage* as contradicting what Arden LJ said in *Hely-Hutchinson* – and in fact the basis on which the Court of Appeal decided the case – to the effect that knowledge of the representation and detrimental reliance on it are powerful factors in deciding whether it would be unfair for HMRC now to frustrate the expectation that their representation has created.

40. Mr Ewart also relied on *R (oao Vacation Rentals (UK) Ltd (formerly known as the Hoseasons Group Ltd)) v HMRC* [2018] UKUT 383 (TTC), [2019] STC 251. In that case, the Upper Tribunal (Fancourt J and Judge Herrington) considered the VAT treatment of a card-handling services fee which the claimant had added to the price paid by a holidaymaker who booked a holiday using a credit or debit card. Originally HMRC treated the services as exempt from VAT. The Court of Appeal in an earlier case subsequently held that the services were exempt because they comprised four separate components, the fourth of which was exempt. The effect of the court's decision was that if the fourth component was present, then all four components of the service were exempt but that the first three components without the fourth would be taxable. HMRC then issued a Business Brief stating that if an agent charged a fee which incorporated the fourth component then that charge would be exempt from VAT. The judgment records that Vacation Rentals read and applied the terms of the Business Brief and thereafter treated its supplies as exempt from VAT. HMRC later changed their view and issued assessments in respect of VAT for the supply of the services introducing an additional condition that needed to be satisfied before the service was exempt. Vacation Rentals argued that it had a legitimate expectation that HMRC would comply with their own published policy and could not defeat that expectation by assessing the supplies as standard rated. HMRC accepted that the guidance was capable of giving rise to a legitimate expectation but argued that taking

all the circumstances into account, including the fact that the claimant was a very sophisticated taxpayer with access to high-quality advice and that the Business Brief only sought to summarise publicly available court decisions, their conduct was not so outrageously unfair so as to prevent them from correcting their view of the legislation as interpreted by the court.

41. The Upper Tribunal in *Vacation Rentals* set out the relevant principles as summarised by Leggatt J (as he then was) in *GSTS Pathology LLP v Revenue and Customs Comrs* [12013 EWHC 1801 (Admin), [2013] STC 2017, a case which, they noted, concerned a specific assurance given by HMRC to a taxpayer following that taxpayer's request. The Tribunal at para 53 cited a passage from that judgment in which Leggatt J said (at 72 of *GSTS*) that:

> " … Although it has sometimes been said to be a requirement also that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance is not essential but is relevant to the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation".

42. The Tribunal held that there was a representation in the Business Brief and that HMRC's revised stance contradicted that representation. The Tribunal then considered whether it would be unfair and an abuse of power for HMRC to seek to resile from the guidance in the Business Brief. The Tribunal rejected HMRC's contention that the claimant needed to show conspicuous unfairness on the basis of *Ex p Unilever plc* [1996] STC 681 ('*Unilever*'). In paragraph 88 the Tribunal said:

> "88. As regards *Unilever*, whilst the doctrines of substantive legitimate expectation and abuse of power merge into each other, the principle of 'conspicuous unfairness amounting to an abuse of power' identified in that case (now more properly to be regarded as an aspect of irrationality: see *R (on the application of Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2018] 4 All ER 183, [2018] 2 WLR 1583 (at [38] to [40] per Lord Carnwath JSC) is pertinent where there is no express promise, assurance or representation on which the taxpayer can rely. It is not directly applicable where the taxpayer has established a legitimate expectation based on clear guidance by a public authority. In particular, it cannot be used to throw a greater burden onto a claimant than would otherwise exist.
>
> 89. In our view it is only open to HMRC to override the legitimate expectation that it has encouraged in circumstances where there is a sufficient public interest to override it: …
>
> 90. It is clear that once a legitimate expectation has been established, as in this case, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. If the authority does

> not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence of the legitimate expectation created, its conduct is so unfair as to amount to an abuse of power…"

43. The Upper Tribunal concluded that in that case HMRC had not discharged that burden. Mr Ewart relied on *Vacation Rentals* (although of course it is not binding on this court) for three propositions. The first appeared to be that a legitimate expectation could be entitled to protection even if there was no detrimental reliance on the part of the taxpayer. The second was that where a legitimate expectation has been created by HMRC, the onus shifts to HMRC to show a sufficient public interest to override it and that in the absence of evidence of such a public interest the court may conclude that the frustration of the expectation is so unfair as to amount to an abuse of power. He also relied on the statement in paragraph 88 that the concept of "conspicuous unfairness" has no relevance where there is an express promise, assurance or representation.

44. I do not agree with Mr Ewart's propositions. As regards the role of detrimental reliance, I have already concluded that this is a relevant and indeed an important factor in cases such as the present where the issue involves HMRC's wish to resile from guidance issued either to an individual taxpayer or to the whole world. It is true, as Leggatt J said in *GSTS,* that some cases have recognised a legitimate expectation without detrimental reliance and I have described earlier other, different situations in which the absence of reliance on - or even knowledge of the guidance - does not rule out a successful claim. But Leggatt J's observation was limited to stating that it is not essential in all cases but that it is still relevant, he said, to the question of whether it would be unjust for the authority to frustrate the expectation created. There is nothing controversial in that statement of the law. It accords with the statement of Lord Kerr in *Finucane* where he said (at paragraphs 62 – 63) that a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. That was quite different from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment. In that case it was not incumbent on Mrs Finucane to show that she had suffered a detriment. That argument did not avail in that instance, since Lord Kerr said "the question of detriment can only arise, if it arises at all, in the context of a substantive legitimate expectation".

45. In *GSTS* as in *MFK* and the other cases concerning representations made by HMRC in response to requests for guidance made in respect of specific proposed transactions, there is generally no difficulty with detrimental reliance - the claim for judicial review is likely to be brought only if the taxpayer in fact goes ahead with the transaction following the guidance and HMRC then seeks to tax the transaction less favourably than it said it would. I do not regard either *GSTS* or *Vacation Rentals* as deciding that detrimental reliance is not relevant. Further, I do not agree with Mr Ewart's contention that there was no reliance or detriment described in *Vacation Rentals*. It may well have been assumed that the very fact that the claimant treated its supplies as exempt rather than standard rateable gave rise to detriment since it would have organised its business in terms of setting the level of the fees and dealing with input tax on the basis that the supplies were exempt.

46. Secondly I do not accept that, once a representation capable of giving rise to a legitimate expectation has been identified, the burden shifts to HMRC to adduce evidence to the court showing some public interest in it being able to resile from the representation. Such an approach fails to recognise that these supposed separate elements or stages in establishing unfairness are all part and parcel of the taxpayer making good his claim that he has a legitimate expectation arising from the representation which the court should protect. Further, the Upper Tribunal does not seem to have been reminded by HMRC of the important public interest in the collection of taxes imposed by Parliament. This public interest was emphasised recently by Simler J (as she then was) in *R (oao Dixons Retail plc) v HMRC* [2018] EWHC 2556 (Admin), 2018 WL 03615172. That case concerned a dispute about whether HMRC could go back on a representation which Dixons claimed to have received that particular care plan products sold by it were insurance products and therefore exempt from VAT. HMRC later changed its view and attempted to alter the VAT treatment of the care plans retrospectively. Simler J held that in fact there had been no clear, unequivocal, unqualified representation giving rise to a legitimate expectation in the correspondence passing between the parties. She went on to consider whether if there had been such a representation it would have been unfair for HMRC to retract it retrospectively. She held that there was unfairness in the case before her because Dixons had continued to charge customers a price inclusive of VAT rather than reducing the price once they believed that the product was VAT exempt. There was limited reliance therefore on the representation. She also described the countervailing considerations:

> "66. On the other hand, and to be weighed on the other side of the balance, is the obvious and strong public interest in the defendant collecting tax that is due in accordance with statute and correcting an incorrect decision if there is a good reason to do so. Fairness in relation to the general body of taxpayers who do pay their VAT so that no individual or group of taxpayers is unfairly advantaged at the expense of other taxpayers weighs strongly on this side of the balance."

47. The two contrasting interests in the collection of taxes in accordance with the will of Parliament and the usefulness of binding guidance being issued by HMRC were also described by Henderson LJ in *Samarkand Film Partnership No 3 and others v HMRC* [2017] EWCA Civ 77, [2017] STC 926. In that case HMRC had warned several times in the guidance that it would not apply in cases where there was or might have been tax avoidance. Henderson LJ (with whom David Richards and Arden LJJ agreed) summarised the law on unfairness as follows:

> "115. … There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers. There is also a real public interest in the revenue making known the general approach which it will adopt, and the practice which it will normally follow, in specific areas… [T]here are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material of this nature is so clear and unqualified that

> the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law".

48. Thirdly, I do not accept that Lord Carnwath's discussion of *Unilever* in *R v Gallaher Group Ltd and others v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96 (to which the Upper Tribunal referred in paragraph [88] of *Vacation Rentals*) suggests that a high degree of unfairness is only relevant where the taxpayer asserts irrationality on the part of HMRC and is no longer a requirement where the taxpayer relies on an express promise, assurance or representation. It is true that the phrase 'conspicuous unfairness' was used by Simon Brown LJ in *Unilever* when deciding that the absence of an unqualified and unambiguous representation by HMRC to Unilever was not fatal to its judicial review claim. He referred to *In re Preston* [1985] 1 AC 835 in which the House of Lords had decided that the Inland Revenue Commissioners were amenable to the process of judicial review if the claimant could show that they had failed to discharge their statutory duty towards him or that they had abused their powers or acted ultra vires. Lord Templeman in *Preston* had said, however, that the court can only intervene if "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners. Simon Brown LJ said in *Unilever* (at page 695a) that "unfairness amounting to an abuse of power" as envisaged by *Preston* was unlawful because it is either illegal or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.

49. The need for a high degree of unfairness arises, in my judgment, from the fact that, as Lord Templeman put it in *Preston* the primary duty of the Commissioners is to collect, not to forgive tax. It is not linked with the existence or absence of a representation. Lord Carnwath in *Gallaher* was not dispensing with the need for a high degree of unfairness to be established before the court would prevent HMRC resiling from a representation, assurance or promise. I consider that wherever an express representation is established it is still essential for the court to consider all the factors relevant to whether it would be unfair to allow HMRC to frustrate an expectation arising from that promise, assurance or representation and further that a high level of unfairness is necessary to override the public interest in the collection of taxes to which I have referred. Gallaher, which was one of a number of tobacco manufacturers and retailers which had been fined for an infringement of competition prohibitions, was not seeking to rely on a representation made to it by the OFT. Rather it argued that the OFT had assured a different alleged infringer, TMR, that if TMR entered into an early resolution agreement and gave up its right to challenge the infringement decision, it would still have its fine refunded if other alleged infringers who did not enter into such agreements won their appeals. When the infringement decision was overturned on appeal, the OFT kept to its assurance and paid TMR the amount of its penalty. However the OFT refused to refund Gallaher's penalty. Gallaher argued that this difference in treatment was contrary to a duty of equal treatment or fairness said to be owed by the OFT to those subject to investigation under the Competition Act 1998. The Supreme Court held that in the light of what the OFT had said to those involved in the tobacco investigation, Gallaher did have a legitimate expectation that they would be treated equally. But that in itself did not provide an answer to the case because it told one nothing about the legal consequences of such an expectation in the events as they developed. At paragraphs 31 onwards, Lord Carnwath JSC, with whom the other Justices agreed, then

considered what the concept of "fairness" added to a consideration of the rights and remedies in public law arising from a legitimate expectation. He said:

> "31 Fairness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law. Addition of the word "conspicuous" does not obviously improve the precision of the concept. Legal rights and remedies are not usually defined by reference to the visibility of the misconduct."

50. Lord Carnwath then described cases in which procedural unfairness founded a claim for judicial review and the emergence of a broader concept of "unfairness amounting to excess or abuse of power". He referred in that context to *Preston* and to *Unilever* on which the claimant in the appeal before him relied. He noted that in the Court of Appeal in *Unilever* the main issue seems to have been whether the taxpayer could succeed in the absence of a representation by the Revenue. Lord Bingham MR had held that on the unique facts of the case the Revenue's conduct towards Unilever had been so unfair as to amount to an abuse of power and so unreasonable as to be irrational. Lord Carnwath said that his analysis of the judgment in *Unilever* shows how misleading it can be to take out of context a single expression, such as "conspicuous unfairness" and attempt to elevate it into a free-standing principle of law. He noted that it had not been strongly argued (as it surely would be today) that a sufficient representation could be implied from the Revenue's conduct towards Unilever. The case was not authority for "conspicuous unfairness" as a free-standing ground of review but was simply an expression used to emphasise the extreme nature of the Revenue's conduct. Gallaher's claim therefore had to be judged according to the ordinary principles of judicial review, notably irrationality and legitimate expectation, and nothing was added by reference to unfairness, conspicuous unfairness or abuse of power as a distinct legal criterion.

51. I do not accept Mr Ewart's contention that *Gallaher* removes the need for the claimant who is relying on a representation or promise to show a high degree of unfairness in order to establish a legitimate expectation that HMRC will keep to that representation even if they later decide that their view of the law was wrong. Recent cases in which judicial review proceedings have been brought seeking to establish a substantive right arising from a representation made by HMRC in circumstances similar to the present have emphasised the high degree of unfairness that must be demonstrated in order for such a claim to succeed. I agree with the statement of the law by Simler J when she said in *Dixons*:

> "62. It is well-established that it is open to a public body to change a decision if it has acted under a mistake or adopted a mistaken view. However, it will not be permitted to do so where there is sufficient unfairness to justify preventing it from doing so. The authorities, as I have said, make clear that the unfairness must reach a high level."

52. It is therefore necessary in my judgment, that before Aozora UK can hold HMRC to a view of the law that HMRC has expressed but which they now believe to be wrong, it is necessary for Aozora UK to show a high degree of unfairness arising in its

particular circumstances in order to override the public interest in HMRC collecting taxes in accordance with a correct interpretation of the law. I turn then to how the Judge approached the issue of unfairness in the present case. My conclusion is that he arrived at the correct result although I would travel along a slightly different path to get there.

53. The Judge was correct to consider first the issue of how far Aozora Japan was influenced by the existence of the Manual in deciding to structure the loan through Aozora UK. There were two aspects to this; first the extent to which Aozora UK knew about the guidance and was influenced by it when arriving at a view on the tax position and secondly the extent to which its view on the tax position influenced the decision to use Aozora UK for its US investment. I agree, therefore, with the Judge that whether Aozora UK relied on the representation in forming a view on the tax position is an important factor. If a taxpayer is unaware of the existence of guidance or if, as in *Hely-Hutchinson*, he only becomes aware of it after he is committed to the transaction giving rise to the tax dispute, then that may well prove fatal to his claim. I part company with the Judge however on two points. The first is his expression of a precise dividing line between the degree of reliance that will be sufficient, namely real and substantial reliance, and the degree that will be insufficient, namely merely "drawing support or comfort" from the representation. I regard it as unrealistic and hence unsatisfactory to apply such a test when parsing the evidence of the person who formed the view as to the relevant tax position. It is notoriously difficult for someone to remember when they first knew something. That is particularly the case with a legal provision where an adviser may come across it first in the abstract so that it becomes part of his background knowledge about a topic and then is brought into sharper focus when the provision becomes relevant to a particular piece of advice he is asked to give. Mr Coles' evidence fairly describes how he was aware of the debate about the Treaty when it was first adopted and then had to look more closely at different aspects of it when advising clients with different problems. That is a familiar situation and it is not appropriate for reliance to be treated in a binary way as being present or absent, depending on a close textual analysis of how the witness expresses his different levels of awareness of the representation at any particular time.

54. I also differ from the Judge when he held that the fact that the taxpayer instructed an external adviser who looked at and relied on the representation rather than relying on it directly himself is fatal to the taxpayer's claim of legitimate expectation. Mr Rivett in his submissions to us conceded that the Judge had gone too far in this regard and in my view he was right to make that concession. I do not share the Judge's concern expressed in paragraph 87 of the judgment, that advisers will be tempted to exaggerate the influence that HMRC's representation had on them in order to shift the blame for an incorrect construction of the law onto HMRC. Mr Coles' careful evidence shows that that is not what happened here. The taxpayer's internal accounting function or Chief Financial Officer seeking to ensure that the company does not suffer financially from a decision that he took may be just as prone to exaggerate as an external adviser. I also do not see that it is right for the question of reliance to turn on the happenstance of whether the adviser mentioned the guidance expressly in any advice or communication to the client. The extent and content of what the adviser tells the client will be influenced by many other factors such as the degree of knowledge and interest on the part of the recipient – one company executive may be interested to read a lengthy analysis of the tax position; another equally

sophisticated person might insist that all advice is distilled to one side of A4. The extent to which an adviser relies on the representation from HMRC on behalf of the taxpayer is as relevant to fairness as reliance by the taxpayer himself.

55. That does not mean that the use of an external adviser to advise on the correct tax position is irrelevant to determining how much reliance there was. That is particularly the case with this kind of representation which simply states what the law is. If a taxpayer engages a specialist adviser to advise on the correct tax position that greatly diminishes the extent to which the taxpayer can then say that his view of the law was influenced by a representation of the kind given in this case. I accept that HMRC can be expected to have considered their opinion on the law carefully and they bring considerable expertise to bear in forming their opinion. But they are not in the same unique position in that regard as they are in relation to the other kinds of statements relating to how they interpret inherently uncertain terms used in the legislation or the criteria according to which they will exercise their discretion. The position might be different if the legal opinion needed to be based, as sometimes happens, on drawing together a number of heavily amended provisions found in a number of different taxing statutes and disparate schedules or sets of regulations. Here the opinion related to a single, relatively straightforward statutory provision. An expert tax adviser was not at so much of a disadvantage as compared to HMRC when it came to reading the Treaty in conjunction with section 793A and working out what it means. Further, ordinarily sophisticated taxpayers know that sometimes HMRC loses cases because the tribunals and courts prefer the taxpayer's construction of the legislation over that proposed by HMRC. A specialist tax adviser, whether an employee of the taxpayer or an external consultant, is engaged to come to his own conclusion about what the law says and not merely to read and repeat to his client the terms of guidance that is publicly available. That is the case regardless of whether in a particular case he in fact did a thorough job or took a short cut by simply relying on the guidance and presenting that to the client as his own work. It is the fact that the taxpayer receives advice on the law from someone whose expertise he expects to match that of HMRC that is the important point.

56. I accept the point that Mr Ewart makes that a tax specialist is advising his client not just as to the law but also as to how much time and expense he is likely to incur before HMRC accept his view and collect tax on that basis. Part of Mr Coles' advice was not just that unilateral relief would be available because section 793A would not be triggered by the operation of Article 23 but also that HMRC were likely to accept that construction of the provision. It is an important part of specialist advice to inform the client whether he is likely to have a fight on his hands to establish the favourable interpretation of the law that the adviser thinks should ultimately prevail. Clearly the presence of a representation of which the adviser was aware is an important factor feeding into that aspect of the advice given. HMRC are in a unique position to know what their own view of the law is and although, as this judgment illustrates, there are examples of HMRC changing their mind, there are of course many more instances which never come to court where HMRC consistently tax people on the basis of the law as set out in their guidance until a court either here or in Luxembourg decides that the law is different. That is another reason why I cannot accept the Judge's view that recourse to an outside specialist adviser rules out reliance.

57. I find therefore that the Judge was wrong to reject reliance primarily on the basis of analysing what Mr Coles said he did as against a "real or substantial" threshold criterion and because no mention of the guidance was made in the email traffic between Aozora Japan and Deloitte. But I would also conclude that Aozora Japan's reliance on the representation made in the Manual was weak because (i) the representation was merely as to HMRC's opinion about the construction of a relatively straightforward legal provision; and (ii) Aozora Japan sought and obtained specialist advice on the meaning of the legislation and how it would apply to its particular circumstances.

58. Under the heading "conspicuous unfairness" the Judge then dealt with a different aspect of detrimental reliance namely whether the tax advice received from Deloitte made any difference to Aozora Japan's decision to make the investment in the US through Aozora UK rather than directly from Japan or to start exploring whether another European jurisdiction would reduce the charge to tax. I have already explained that I do not accept Mr Ewart's submission based on what the Tribunal said in *Vacation Rentals* that it is up to HMRC to adduce evidence of some countervailing public interest to combat the unfairness arising from the making of the representation. That appears to have been how the case was argued by HMRC before the Tribunal in that case and the Tribunal found that there was no merit in the points on which HMRC relied there. In each case, in my judgment, it is up to the taxpayer to point if he can, to some detriment that he has suffered as a result of relying on the representation. That will need to be weighed in the balance by the court in deciding whether it is fair to allow HMRC to resile from their representation. The absence of any detriment, for example, if the only feasible jurisdictions imposed the same or a higher tax rate than applied on HMRC's interpretation of section 793A would, of course, create a significant hurdle for the taxpayer to overcome. I agree with Mr Ewart that the fact that the tax rate applicable if unilateral relief is not available is about 10 per cent higher than that which would apply if the interest were received in Japan does raise the issue of detriment. I do not, however, agree with Mr Ewart's submission that it is impossible to expect a taxpayer to adduce evidence about how the decision to structure a transaction in a particular way was arrived at. There must have been plenty of internal documentation discussing the advantages and disadvantages of different structures which might have cast light on how significant the tax position was in the eventual decision.

59. Again, the Judge went too far in holding that a 'but for' test applied so that there was only a relevant detriment to be weighed in the balance if Aozora Japan could show that they would not have made the investment through Aozora UK but for the belief that unilateral relief would be available. I see that it is tempting for HMRC to quote back at Aozora UK the representations they made to the US competent authority when urging them to grant a special dispensation under Article 23(6). The letter to the IRS in March 2008 stated that Aozora UK had been established based upon criteria that satisfied Aozora Japan's business goals including the proximity to the UK financial markets and European customers, being able to leverage Aozora Japan's existing presence in the UK and capitalising on Aozora Japan's UK business experience of investing in the UK itself. The force of this point is diminished, however, by the fact that the submission to the IRS appears to have assumed, at paragraph 8.5, that Aozora UK's liability to UK corporation tax might be fully creditable against any UK withholding tax presumably, though this is not spelled out

in the submission, because of the availability of unilateral relief. Nonetheless the Judge was entitled to describe the evidence before him as to the importance on the tax position on the decision to structure the investment through Aozora UK as sparse and unconvincing so that it was 'simply speculation' as to what Aozora Japan would have done if it had believed in 2006 that unilateral tax credit would not be available. The Judge does not state how the sums now asserted by HMRC as due in additional tax compare with the overall value of the investment so it is impossible to assess how significant those figures are in the context of the advantages accruing to Aozora Japan from basing the investment in the UK. He was also entitled to take into account that at the time that the decision was taken to incorporate Aozora UK, Aozora Japan may have hoped for success in its application to the IRS under Article 23(6).

60. I therefore consider that the Judge was right to hold that the degree of unfairness arising for Aozora UK if HMRC are now allowed to collect tax on the basis that Article 23 of the Treaty precludes the grant of unilateral relief is not sufficient to prevent HMRC from applying that interpretation of the law if their earlier, different interpretation is incorrect. The kind of representation relied on by Aozora UK, although clear, unambiguous and unqualified is weak in the sense that it is only a representation as to HMRC's opinion as to the law. The factors that are relevant to an assessment of whether Aozora UK has shown that it would be unfair to a high degree if HMRC were permitted to impose a charge on the basis of the correct interpretation of the law do not establish any unfairness here approaching an abuse of power. Aozora Japan obtained advice from specialist tax advisers who were not at any great disadvantage compared to HMRC when coming to their own view of the law and it is that view on which Aozora Japan relied. Aozora UK has not shown that it has suffered a serious detriment as a result of any reliance on the representation.

61. I would therefore dismiss the appeal.

Sir Bernard Rix:

62. I agree.

Underhill LJ:

63. I also agree.