

A HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)—3, 4, 5, 8 AND 9 MAY
AND 7 JULY 1989

B **Regina v. Commissioners of Inland Revenue *ex parte* MFK Underwriting
Agencies Ltd. and Others⁽¹⁾**

C *Judicial Review—Lloyd's Underwriting Agents—Alleged representations
by Inspector of Taxes—Whether Inland Revenue bound by representation—
Powers and duties of Inland Revenue—Inland Revenue Regulation Act 1890,
s 14 Taxes Management Act 1970, s 1.*

D The applicants, all of whom are underwriting agents for syndicates in the
Lloyd's insurance market, bought certain index-linked bonds upon behalf of
their syndicates which, according to the terms of issue, separated out from
the single return on the bonds an index-linked element described as capital
with the balance being interest. These bonds were attractive to the underwriting
agents only if the index-linked element of the bonds were subject to limited
taxation under the capital gains tax regime rather than income tax. When
the proper taxation treatment of these bonds became a matter of dispute, the
underwriting agents sought to rely upon assurances which they said had been
given to the promoters of the bonds and, in some cases, the underwriting
agents.

F The Board of Inland Revenue decided that they were not bound by any
alleged assurance which had been given, though in the case of three types of
bond the Board accepted that it would be proper not to seek to tax the whole
of the return on these bonds as income, in the light of the particular assur-
ances which had been given. In the case of the other bonds the Revenue con-
tended that the index-linked element in the return was also subject to income
tax.

G The applicants applied for judicial review of the Board's decision on the
ground that the Board should be bound by the representations of their
Inspectors of Taxes. The Inland Revenue had, it was alleged, repeatedly given
its view that the index-linked element in the bonds should be treated as capi-
tal which had led to the legitimate expectation that the bonds would be taxed
in this way. It would accordingly be grossly unfair upon the applicants and so
an abuse of the Revenue's statutory powers for the Revenue to change its
view of the taxability of the bonds.

I It was argued on behalf of the Revenue that judicial review could not lie
against the Revenue so as to oblige the Revenue to act contrary to its duty.
The Revenue's primary duty was to collect the taxes which Parliament put
into its care and control. Although the Revenue had a wide managerial dis-
cretion, this discretion could only be used for better, more efficient and eco-
nomical collection of tax and not otherwise. The Revenue could not lawfully
agree or indicate in advance that it would not collect tax which on the proper

⁽¹⁾ Reported [1990] 1 WLR 1545; [1990] 1 All ER 91; [1989] STC 873.

construction of the legislation was lawfully due. Furthermore, on the facts, no clear representations or assurances were in fact made by the Inland Revenue as to the bonds invested in by the applicants. A

Held, in the Divisional Court, dismissing the applications:

(1) Although the Revenue's primary duty was to collect tax it was not inconsistent with this duty for the Revenue to advise the public of their rights as well as their duties and generally to encourage co-operation between the Inland Revenue and the public. However, the public's only legitimate expectation was, *prima facie*, to be taxed according to statute, not concession or a wrong view of the law. The Revenue were (apart from specific statutory exceptions) not obliged to give any ruling when requested by a taxpayer, but if a ruling was given this might create an expectation in the public's mind as to its future conduct. Where the Revenue so conducted itself that it would be an abuse of the Revenue's powers and unfair not to give effect to the legitimate expectation which had arisen, the courts could, in their discretion, grant relief by way of judicial review. B C D

Regina v. Attorney General ex parte Imperial Chemical Industries Plc explained; *Preston v. Commissioners of Inland Revenue* [1985] AC 835 followed.

(2) In order to rely upon a statement of the Inland Revenue, a taxpayer must give full details of the specific transactions and the nature of the ruling sought from the Inland Revenue. The enquirer must also make it plain that a considered ruling is sought and an indication should be given as to the use the ruling is going to be put. The ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification. E

(3) On the facts of this case, insufficient indication had been given to the Revenue that a considered ruling was requested. Further, the evidence showed that the Revenue had not promised to follow or indicated that it would follow a certain course in advance of receiving full facts of any transaction so as to render any departure from that course unfair. Accordingly there was no abuse of power and the applications failed. F G

Dictum of Lord Oliver in *Regina v. Attorney General ex parte Imperial Chemical Industries Plc*. 60 TC 1 at page 64 G explained.

Regina v. Commissioners of Inland Revenue ex parte MFK Underwriting Agencies and Others

By leave of Rose J. given on 1 February 1989, MFK Underwriting Agencies Ltd. ("MFK") with six others made an application dated 7 February 1991 for judicial review. The stated grounds for the application were as follows:— I

[Paragraphs 1 and 2 of the grounds stated that the First to Fourth Applicants were underwriting agents at Lloyd's and the Fifth to Seventh Applicants were Names on syndicates for which the underwriting agencies had acted.]

A "3. By a letter dated 22 April 1986, Chemical Bank inquired of the Inland Revenue whether it was correct in thinking that in respect of Short Term Indexed Bonds (that is with maturities ranging from 6 months to 10 years), the indexation element would not represent income for tax purposes. It specifically asked whether it was correct in thinking that a 6 month bond would not have a tax treatment different from that of longer maturities.

B 4. In a letter to Chemical Bank dated 6 May 1986, the Inland Revenue confirmed that understanding (while noting that this was without prejudice to the facts).

C 5. The Inland Revenue was well aware that the tax treatment of such a bond would be a strong selling point which would be drawn to the attention of underwriters or those acting on their behalf, by those issuing the bond. As the Inland Revenue knew, or ought to have known, the terms of the letter of 6 May 1986 were drawn to the attention of the First to Fourth Applicants (and other underwriting agencies at Lloyd's) or those acting on their behalf. They reasonably relied upon the letter (on behalf of the Fifth to Seventh Applicants and other Names) to invest very substantial sums of money (totalling approximately £100 million invested by the First to Fourth Applicants) in index-linked bonds issued with a maturity date of 12 months or less. In such reliance, those investments were made from April 1986 until the end of March 1988.

E 6. The First to Fourth Applicants made those investments in the reasonable expectation that the Inland Revenue would treat the indexation element in the return of these bonds as a capital gain rather than income. This difference was of fundamental significance to the taxation consequences of such an investment, especially in the light of the significantly lower rate of taxation applied to a capital gain as opposed to income at those times and of the availability of indexation relief for capital gains tax purposes. But for the assurance given by the Inland Revenue, these investments would not have been made as they were unattractive to investors unless given the tax treatment indicated by the Inland Revenue.

G 7. In relation to the sums invested by the First to Fourth Applicants, the capital element which the Inland Revenue is seeking to treat as income rather than capital is about £5 million. In relation to the Lloyd's market as a whole, the additional tax payable is believed to be about £60 million, with the amount in dispute believed to be approximately £100 million to £120 million.

H 8. The First to Fourth Applicants were also aware of other similar statements made by the Inland Revenue, which the Inland Revenue knew or ought to have known would have been widely known in the market.

I 9. In or about the end of March 1988, the Inland Revenue indicated to Lloyd's that they would be reviewing the tax treatment of the capital element in these bonds and considering whether this capital element should be taxable as income.

10. By a letter dated 27 October 1988 (as expanded in later correspondence) the Inland Revenue informed Lloyd's that they had decided to assess all syndicates to income tax in respect of the capital element in these bonds (with the exception of three bonds with a three year maturity date, two of

which were issued in April 1986 at or around the time of the correspondence between Chemical Bank and the Inland Revenue, and a third in February 1987).

11. Pursuant to that decision, an Inspector of Taxes has made assessments dated 28th November 1988.

12. As the Inland Revenue have accepted in the correspondence, they cannot act in breach of a statement earlier given and reasonably relied upon as to the taxation treatment of a transaction. So as to act would be unfair and an abuse of power and therefore ultra vires and unlawful: see, for example, *R v. I.R.C. ex parte Preston* [1985] AC 835 (House of Lords).

13. The letter of 6 May 1986 was a statement as to the taxation treatment of short-term index-linked bonds upon which it was reasonable to rely. The Inland Revenue appear to have accepted this in their letter of 27 October 1988 in relation to the three bonds with a three year maturity date ("the three year bonds"). They have rightly concluded:

'After reviewing the correspondence between the Revenue and those concerned with the issue of these bonds, we take the view that in each case the terms of our response indicated that if the bonds were issued on the terms stated the capital element would not be charged to tax as income. We take the view that, without prejudice to the proper treatment in tax law of bonds with these characteristics had no statements been given, we should regard ourselves as bound by the assurances given in relation to those particular issues and not seek to impose tax upon a basis conflicting with the views we had expressed.'

14. In relation to those three bonds, only one of which was issued through Chemical Bank, the Inland Revenue have rightly not suggested that it is only the person to whom the assurances were given who may reasonably rely upon it for these purposes. If (as here) the Inland Revenue knew or ought to have known that their statements were being more generally relied upon, it would be unfair for the Inland Revenue to act inconsistently with the statements they made, at least without first warning the market either that they would charge the capital as income or that they reserved their position in relation to the taxation of such capital. The Inland Revenue gave no such warning.

15. However, in relation to other bonds—including those in which the Applicants have invested—the Inland Revenue have contended that the terms of these issues, in particular the maturity periods to redemption of 6 months or 12 months, mean that the Inland Revenue gave no assurance as to their tax treatment and so the indexation element should be treated as income.

16. Without prejudice to the Applicants' right to contend in an appropriate forum that the capital element is capital and not income for the purposes of tax law, the Applicants contend that

(1) The Inland Revenue correctly acknowledge that because of the statements in the letter of 6 May 1986, they cannot lawfully claim income tax in respect of the three year bonds.

(2) There was nothing in the terms of the issues in which the Applicants invested which materially distinguished them from the three

A year bonds in respect of which the Inland Revenue concede that the statements in the letter of 6 May 1986 apply so that no income tax should be charged.

B (3) Because the First to Fourth Applicants (on their own behalf and on behalf of the Fifth to Seventh Applicants) reasonably relied on the terms of the letter of 6 May 1986 (confirmed by later correspondence), it would be unfair and an abuse and therefore *ultra vires* and unlawful for the Inland Revenue now to claim income tax in relation to the issues in which the Applicants invested.

C (4) To the extent that it is suggested by the Revenue that the letter of 6 May 1986 was intended not to apply to issues with a maturity dated of 12 months or less, that is inconsistent with the fact that the letter from Chemical Bank specifically stated that a 6 month bond would not receive different tax treatment (a statement with which the Inland Revenue agreed in their reply). If the Inland Revenue wished to resile from this view, fair conduct required the Inland Revenue so to inform Lloyd's and its members."

D In support of the application an affidavit of Mr. D.W. Osborne sworn on 26 January 1989 was lodged with the Court.

E In reply Mr. L.J.H. Beighton, one of the Commissioners of Inland Revenue, swore an affidavit on 20 March 1989 which stated as follows:—

F "1. I am one of the Commissioners of Inland Revenue and a member of the Board of Inland Revenue (hereinafter referred to as "the Board") and a Director General of the Inland Revenue. I have been a Commissioner since 25 May 1988 when I became Director General (Technical), that is the board member with the responsibility for, amongst other things, the Technical Divisions of the Inland Revenue. I produce as Exhibit LJHB1⁽¹⁾ a chart showing the organisation of the Inland Revenue before 1 September 1988 in so far as it is relevant to these proceedings. An internal reorganisation took effect on 1 September 1988 and since then I have been a Director General with responsibility for the Oil and Financial, Insurance and Specialist, and Collection and Compliance Divisions of the Inland Revenue. The Oil and Financial Division is responsible for the handling of the tax affairs of the Lloyd's market in so far as it is relevant to the matters raised in this application. I make this affidavit with the authority of the Board.

2. In this affidavit I cover three main issues:

H — The relation between the Board's duties under the Taxes Acts to assess and collect the correct amount of tax according to the law and the use of its discretion to answer enquiries from taxpayers about the way the law operates.

I — The advice the Board has received as to the correct legal treatment for tax purposes of the bonds which are the subjects of this application.

— The circumstances in which the statements on which the applicants rely were given and whether they constitute rulings which debar the

(¹) Not included in the present print.

Revenue from raising assessments on the basis that the whole return on these bonds is income.

A

THE INTERACTION BETWEEN THE DUTY TO ASSESS AND THE DISCRETION TO GIVE ADVICE

The Board's duties

B

3. I have read the grounds upon which the Applicants herein seek relief and the affidavit and accompanying Exhibit DWO1⁽¹⁾ of David William Osborne in support of this application. The matters raised in the said Grounds and Affidavit raise the question of the rights and duties of the Board. The relevant statutory provisions are sections 13 and 39 of the Inland Revenue Regulation Act 1890 and section 1 of the Taxes Management Act 1970.

C

4. The task of the Board is to collect the proper amount of tax due under the law. The Taxes Acts do not in general provide any machinery for Inspectors of Taxes to give binding advance rulings upon transactions which have not taken place (though there are exceptions, for example section 707 of the Income and Corporation Taxes Act 1988).

D

5. Where there is no such machinery, the Taxes Acts require Inspectors of Taxes to assess the taxpayer after the events which give rise to a tax liability in the light of all the facts then known. Then the Taxes Acts provide special machinery for the resolution of disputes between the taxpayer and the Inland Revenue. This machinery is usually triggered by an assessment of taxes by an Inspector of Taxes under section 29 of the Taxes Management Act 1970. Upon receiving such an assessment an appeal may be made against the assessment to either the General or Special Commissioners who will, after a hearing, determine the appeal. If full disclosure is not made to an Inspector of Taxes before the determination of an assessment he may make a further assessment on discovery (section 29(3) of the Taxes Management Act 1970). From the General or Special Commissioners there is an appeal by way of case stated on a point of law to the High Court (section 56 of the Taxes Management Act 1970).

E

F

General statements of practice

G

6. Notwithstanding this general approach in administering the tax system, the Board see it as a proper part of their function and contributing to the achievement of their primary role of assessing and collecting the proper amounts of tax and to detect and deter evasion, that they should when possible advise the public of their rights as well as their duties, and generally encourage co-operation between the Inland Revenue and the public.

H

7. The Board are also concerned to treat people equally under the law. To this end the Board from time to time issue statements of practice so that all taxpayers may know how in general terms the Inland Revenue view certain transactions and circumstances. If any such statement of practice is felt to be necessary it is announced in a Press Release or in such other way that it will come to general public notice. In general, it is the Board's view that such statements should not be made only to a limited audience such as a few firms (albeit large firms) of accountants and solicitors.

I

(1) Not included in the present print.

A 8. In making such general statements the Board are always careful to
make clear that how an individual taxpayer's affairs are treated for tax pur-
poses remains a matter of the application of particular statutory provisions,
correctly interpreted, to the actual circumstances found to exist in his own
case. Moreover a taxpayer can always exercise his statutory rights of appeal
B where no agreement is forthcoming between himself and the Inland Revenue.

9. The concept of good administration which justifies the Board in issu-
ing a statement of practice also requires for that exercise to have any useful
or legitimate purpose that the Board will stick in actual cases to what they
have said they will do unless or until the statement is recalled. For the Board
C to do otherwise, in a case where the facts can be seen to fall squarely within
the circumstances contemplated, would plainly be bad administrative prac-
tice; and the Board are mindful of the position of a taxpayer who may have
reasonably relied on a statement of practice to his detriment. But such state-
ments are meant to be read subject to any caveats and exceptions which they
may contain and how they apply is always dependent upon the facts found
D to exist at the relevant time.

Individual enquiries from taxpayers

10. Inspectors of Taxes and other staff, whether in Somerset House or
in tax offices, are instructed to be as helpful as possible to members of the
public who make enquiries. Occasions can arise where taxpayers are given
E advice which later proves to be erroneous but by the time the error is discov-
ered and communicated to the taxpayers they have acted on it. As a matter
of good administration and in the exercise of their responsibilities of care and
management of the Inland Revenue, the Board are prepared not to pursue
tax in such cases provided that the taxpayer had sought advice, had given the
facts fully and accurately, had received an answer in writing which he could
F reasonably believe and rely on, and had acted on it in such a way that he
would suffer if the law were properly applied.

11. Each case, however, inevitably turns on its own facts. The Board do
not consider themselves bound unless the facts of any particular case have
been put to the Inland Revenue fully and accurately and have been acted on.
G They would not regard themselves as bound in relation to a different trans-
action from the specific one in respect of which advice was sought. A letter
giving advice on the way the law applies to a particular case cannot be
regarded as equivalent to a general statement of practice of the sort described
in paragraphs 7 and 8 above.

H 12. The Board takes the view that any wider view of its discretion not to
assess and collect tax where this would be contrary to previous advice would
be inconsistent with its duty to assess and collect tax in the light of the full
facts after the transaction has taken place. It would be difficult to reconcile,
in particular, with the ability of an Inspector of Taxes to make an assessment
I following a discovery where he concludes that a previous Inspector had taken
an incorrect view of the law and the point had not been settled on appeal or
by agreement under section 54 of the Taxes Management Act 1970.

13. The Board consider that expressions of view upon specific proposed
transactions cannot have an inhibitory effect when the Revenue at some later
date have to consider the taxation of other transactions in the ordinary way.

14. I am advised that the Board's view as set out in paragraphs 10 to 13 above is supported by a true reading of the case in *R v. CIR ex parte Preston* [1985] AC 825. A

THE CORRECT LEGAL TREATMENT OF THE BONDS (IN THE ABSENCE OF ANY STATEMENTS BY THE REVENUE) B

15. The Board consider, on legal advice, that the various 6 month bonds, one year and three year bonds which are relevant to these proceedings should be subjected to the same tax treatment; that is that the index linked uplift element in these bonds should be taxed as income. This is because the uplift in the face value of the bond is linked to the amount of interest payable on the bond so that the total return from the bond remains constant, being the total of the index linked element and the interest payable. This total return is determined by the interest rate on US Government bonds. If inflation rose sharply, the interest rate on the bonds would decrease to a limit of 0%. The uplift in the bond could not exceed the US Government bond rate plus a small adjustment. If inflation dropped to 0% then the interest rate would increase to the level of the US Government interest rate plus the small adjustment. The Revenue take the view that when all the facts concerning these bonds are examined in detail the index linked uplift element of the bonds should be taxed as income. In the rest of this affidavit I refer to bonds with these characteristics as 'capped indexed bonds'. C D

THE CIRCUMSTANCES AND APPLICATION OF THE REVENUE STATEMENTS IN THIS CASE E

The 1982 Press Release

16. On 25 June 1982 the Board issued a Press Release on Deep Discounted and Indexed Stock (pages 1 and 2 of Exhibit DWO1). Deep discounted stock is stock where part of the return to the investor takes the form not of periodic interest payments but of an uplift in the capital sum payable on redemption (compared with the amount originally subscribed for the bonds). In the case of indexed stock the amount of the uplift is calculated by reference to the movement of an index of prices (such as the retail price index) over the life of the bond. This Press Release stated the Board's general practice on corporate stock issued on an indexed basis. The part of this Press Release relating to non-indexed deep discount stock (paragraphs 2 to 4) was later superseded by legislation contained in section 36 and schedule 9 of the Finance Act 1984 which provided a regime for the taxation of such stocks. F G

17. Subparagraph a. of paragraph 5 of the Press Release sets out the principle that an uplift which enhances the value of the principal to take account of depreciation in its value due to inflation is treated as capital for tax purposes. The statement refers to corporate stock bearing a reasonable commercial rate of interest. It states that 'the precise tax treatment must have regard to the terms of any contract between the parties'. H I

18. In the Board's view, this statement does not apply to a capped indexed bond as described in paragraph 15 above. This is because the total return on such a bond is income and there is no additional element which can be truly described as a capital uplift for inflation.

Mr. Collen's letter to Mr. Harrup of 6 May 1986

A 19. The letter on which the applicants principally rely is a letter from
Mr. Collen to Mr. Harrup of Chemical Bank of 6 May 1986 (page 33 of
Exhibit DWO1). This letter was in response to one of 22 April 1986 from
Mr. Harrup (page 29 to 30 of Exhibit DWO1). In the Board's view Mr.
Collen's letter was not a binding representation that an investor would not
be required to pay tax on the 'indexed uplift' component of the total return.
B And it related to a specific programme of bonds which Chemical Bank pro-
posed to issue (but did not in fact issue) and cannot be regarded as having
any application to any other bonds.

C 20. In the Board's view Mr. Harrup's letter of 22 April 1986 is not
wholly clear. The true nature of the bonds which Chemical Bank proposed to
issue in its programme is not immediately obvious on the face of the letter,
and can be ascertained only by careful analysis and deduction. In particular
the fact that it was intended that the bonds were not to be truly indexed by
reference to the All Urban Consumer Price Index (para 4i of the letter) has
to be deduced from the other paragraphs, which on careful analysis imply
D that an amount calculated by reference to the restricted movement of the
index between zero and a fixed upper limit is merely to constitute part of a
fixed overall return on the bonds, and is not intended in any way to affect
the amount of that overall return. In addition it becomes apparent only on
careful analysis that the treatment of bonds in the proposed programme with
a life of 6 months is intended to be different from those with longer matura-
E ties. That is because the proposed reinvestment of the 'capital' increase for
every 6 months in a separate fund of 6 month US bonds can in practice
apply only to bonds with longer maturities.

F 21. What is clear about Mr. Harrup's letter of 22 April 1986 is that it
did not contain a request for a general statement of policy. Nor did it deal or
purport to deal with the bonds that were subsequently issued by the Student
Loan Marketing Association (hereinafter referred to as SLMA). The terms of
the prospectus of the SLMA bonds (now produced by me as Exhibit
LJHB2⁽¹⁾) show that they were different bonds from those proposed to be
issued by Chemical Bank. I now produce as Exhibit LJHB3⁽¹⁾ a list of the
differences. It is unclear from this Application whether bonds other than
G SLMA bonds are intended to be covered by it. In the absence of more spec-
ific information I am unable to comment.

H 22. In his letter of 6 May 1986 Mr. Collen replied to the specific ques-
tions in Mr. Harrup's letter relating to a specific programme stating 'since
the transaction involved has not yet taken place any Revenue comment is
entirely without prejudice to the facts'.

I 23. Furthermore Mr. Collen specifically stated that 'whether the bonds
bear a reasonable commercial rate of return is a matter of fact dependent on
the conditions in the market at the time of issue. I therefore cannot confirm
that the terms of a prospective issue bears such a rate. Items c. and g. are rel-
evant'. Item c. was the question whether the indexation element would repre-
sent income for tax purposes; item g. was whether the bonds would bear a
reasonable commercial rate of interest and so be brought within the terms of
the 1982 Press Release.

(1) Not included in the present print.

24. In the Board's view this letter was not and cannot have appeared to be a binding commitment on behalf of the Revenue not to investigate the facts further and, if necessary, raise assessments according to the Revenue's understanding of the proper tax treatment of the return on specific bonds subsequently issued by a different issuer. The letter reserved the right of the Revenue to consider the terms of specific bonds when they were issued.

25. Even if Mr. Harrup's letter of 22 April 1986 had related to the SLMA 6 month bonds, the Board considers that the qualifications in Mr. Collen's reply would have prevented it from providing an assurance on the capital treatment of the uplift. Mr. Collen made it clear that it could be decided only in the light of market circumstances whether the bond bore a commercial rate of interest within the terms of the Press Release of 25 June 1982. At the time the SLMA 6 month bonds were issued the 'interest' element, which the Applicants seek to argue is the only component taxable as income, was in some cases as low as around 0.5%. I am not aware of any evidence of genuine commercial indexed bonds being issued around that time with interest rates as low as that. Indeed the interest on indexed gilts has generally been in the region of 2% to 3%.

26. Nothing in Mr. Harrup's letter of 22 April 1986 said that the bonds were going to be bought on behalf of members of Lloyd's or that Mr. Collen's reply was going to be used, together with earlier correspondence, to market bonds widely to Lloyd's. Indeed the general impression given by the letter is that the take up of the bonds by UK residents would be incidental to the issue.

Reliance to be placed on Mr. Collen's letter of 6 May 1986

27. I accept that it would be reasonable to be guided by a letter in preparing a proposed programme of bond issues as indicating the Revenue's thinking, but I do not accept that it would be reasonable to regard it as a binding commitment in relation to specific issues. Moreover, I deny that the Inland Revenue was aware or ought to have been aware that Mr. Collen's qualified response on 6 May 1986 was to be used widely as a strong selling point to anyone, let alone underwriters of whose potential interest in such bonds the Revenue was unaware, or that it would be presented as a Revenue clearance of the tax treatment of the issue. I deny that the Inland Revenue knew or ought to have known that the letter of 6 May 1986 would be drawn to the attention of the First to Fourth applicants or other underwriters or those acting on their behalf. If the market were going to rely on the letter of 6 May 1986, then at the very least the Revenue should have been told what use it was intended to make of the letter and by whom: the only people who could have told them that were the proposed issuers of the SLMA bonds, the subscribers, Lloyd's or their professional advisers.

28. Furthermore the terms of the letter of 6 May 1986 and the context in which it was written are not in the Board's view such that it was reasonable to rely on it as a binding commitment not to raise any further enquiries or assessments treating the uplift as income before investing substantial sums in the bonds. In these circumstances I deny the assertions made in Grounds 5 and 16 that the Revenue knew or ought to have known of the use of that letter or that the applicants reasonably relied on it.

A *Chemical Bank's evaluation of Mr. Collen's 6 May 1986 letter*

29. Indeed the Chemical Bank itself did not at all times rely on Mr. Collen's letter of 6 May 1986. In the course of our examination of the Bank's representations on this issue, starting in April 1988, we received a copy of a letter of 10 December 1986 from Mr. Harrup to Mr. Quilter, at that time an employee of the Corporation of Lloyd's. This is now produced by me as LJHB4⁽¹⁾. This shows the basis on which Chemical Bank sought to market the 6 month bonds issued by SLMA to which this application relates.

30. Mr. Harrup's letter of 10 December 1986 makes clear two points:

- C — that the SLMA bonds were not the ones to which his letter of 22 April 1986 to Mr. Collen relates. Mr Harrup says that he has 'been working on new short term indexation concepts' and that the deal earlier discussed with the Revenue 'envisaged ourselves issuing a whole series of collateralised short/medium term debt. That deal failed because of the off-shore funds legislation'.
- D — that Mr. Harrup did not regard Mr. Collen's letter of 6 May 1986 as a binding commitment in the way now contended. He says 'You will notice we intend to use the UK RPI as the relevant index. All our relevant correspondence with the Technical Section of the Inland Revenue has concerned the use of the US CPI so *we are implicitly relying* on First Boston's clearance for the use of this index ... *We trust this is not a major problem*'. He also says 'Mr. Collen's reply would suggest that there are no structural problems except the usual caveat of a "fair and reasonable rate of return". Given that Mr. Collen's previous correspondence accepted that a return based on bills was fair and reasonable, *I assume this would not be a problem for the deal currently under discussion*', [My emphasis].

F 31. During our examination of this matter in the Summer of 1988 Lloyd's told us that Mr. Quilter no longer worked for them and that they were unable to find any response to Mr. Harrup's letter to him of 10 December 1986. We were therefore not able to reach any judgment as to what Lloyd's themselves had thought about the matter at that time. G Nonetheless, the conclusion of the Board from this correspondence was that Chemical Bank regarded the letters from the Inland Revenue as containing no more than an indication of the Department's thinking rather than a binding assurance on the taxation of the bonds which Mr. Harrup was discussing selling in his letter of 10 December 1986.

H *Other correspondence and contacts*

I 32. The Applicants also refer to other correspondence as supporting their view (Ground 8). Various letters are attached to their affidavits which can be analysed into separate sets of correspondence, in particular the correspondence between Price Waterhouse and Mr. Collen between 11 November 1985 and 10 January 1986 (pages 3 to 11 and 16 and 17 of DWO1) and several different exchanges between Linklaters and Paines and Mr. Parker. Each of these sets of correspondence relates to specific proposed bond issues. They provided varying amounts of detail and frequently stressed the urgency of a reply. None relates to the programme of 6 month bonds issued by SLMA

(1) Not included in the present print.

from later in 1986. None of them says that the answers from one letter were expected to be applied to bonds generally or to particular bonds other than those in the correspondence. None of them said that the bonds would be marketed to Lloyd's or that the Revenue's statements would be a crucial part of the basis on which the bonds would be sold to Lloyd's. A

33. The correspondence, and Mr. Harrup's letter of 22 April 1986, were just part of a large number of separate enquiries received by the section of Technical Division 1 responsible for the taxation of interest. I should mention that because of the enormous volume of outside enquiries to the Technical Divisions, and in particular the Interest section, the Board issued an instruction on 24 April 1986 to the Technical Divisions asking Inspectors of Taxes not to answer any queries that related to tax planning work but to refer queries to local tax offices unless they related to recent legislation or new procedures. B C

34. However notwithstanding this instruction, throughout the period with which this Application is concerned and the Applicants were taking decisions on whether to invest in these bonds, there were regular and close contacts on tax matters between the Corporation of Lloyd's and the section of Technical Division responsible for their affairs. At no time did Lloyd's or anyone else inform the Board that they proposed to interpret Mr. Collen's letter of 6 May 1986 as having the force of a general statement of practice, or ask us for advice on whether it should be so interpreted, before large sums of trust money were invested. D E

35. Only one person connected with the Lloyd's market (Mr. Whittingdale, managing director of a firm managing the investments of Lloyd's syndicates) ever raised the issue with the Lloyd's section of Technical Division. The circumstances in which he did so are to be described in Mr. Templeman's affidavit to be lodged herein. But I am informed and verily believe that Mr. Templeman has no recollection, and there is no written record, that at the first meeting on 12 November 1986 Mr. Whittingdale stated that he was concerned about 'capped indexed bonds' (as described at paragraph 15 above) where there is a single return, albeit apportioned between an indexed 'uplift' and an 'interest' component. F G

36. I am also informed and verily believe that at the second meeting on 12 October 1987 Mr. Whittingdale did raise the question of such bonds, and that Mr. Templeman made it clear that the Revenue would probably not regard the indexed uplift on such bonds as capital. H

The three year bonds

37. During their consideration of these matters the Board examined the correspondence referred to in paragraph 32 very carefully and decided that in three particular cases the Revenue had given unqualified assurances on specific bonds which had subsequently been issued in the light of those assurances. Although the Revenue considered and continue to consider that these bonds should strictly also be subject to a tax treatment whereby the uplift in capital is taxed as income, the Board upon advice concluded that they could properly take the view, in the proper administration of the tax system, that they should not seek to tax these bonds upon a basis which would be contrary to the specific unqualified assurances which had been given. I

- A 38. The bonds concerned are the three year bonds listed in paragraph 3 of my letter of 27 October 1988 to Mr. Lord (page 38 of DWO1). I produce as Exhibit LJHB5⁽¹⁾ the correspondence on which this view is based. This is:
- with respect of the SLMA bonds issued through Chemical Bank, the letters at p3 to 11 in Exhibit DWO1 and an undated letter from Price Waterhouse to Mr. Collen and his reply of 28 February (p 10 and 11 of Exhibit LJHB5)(1);
 - with respect to the SLMA bonds issued through First Boston, the letters at pp 18 to 20 in Exhibit DWO1;
 - with respect to the Canadian Federal Business Development Bank bonds, a letter of 12 January 1987 from Coward Chance to Mr. Whitear and replies dated 21 January 1987 from Mrs. Willetts and 5 February 1987 from Mr. Jones.

D 39. The Board do not accept that this decision was inconsistent with the decision they took in the case of the 6 month bonds. They accept that investors are entitled to rely on specific unqualified assurances given to the issuers of bonds in respect of the bonds about which the assurances were given. They do not accept that issuers and investors of other bonds are entitled to rely in the same way on correspondence which did not relate to the bonds in which they invested. It was reasonable for investors or agents investing money held on trust in these 3 year bonds to rely on the Revenue's letters since the assurances were unqualified and related to the bonds in which they invested. In relation to the 6 month SLMA bonds however it was not reasonable for investors to rely either on Mr. Collen's letter of 6 May 1986 or on this other correspondence since none of the letters related to the bonds. And in the case of Mr. Collen's letter of 6 May 1986, any assurance was highly qualified.

F 40. In Grounds 13 and 16 (i) of their application the applicants misunderstand the basis of the Board's decision in relation to the three-year bonds. To repeat, the correspondence on which the Board relied in reaching their decision on these bonds was that listed in paragraph 38 above and not Mr. Collen's letter to Mr. Harrup of 6 May 1986.

G 41. Another difference between these 3 year bonds and the 6 month SLMA bonds is that the Inland Revenue's correspondence in the former case was much less qualified than in Mr. Collen's 6 May 1986 letter. As I have explained at paragraph 25, Mr. Collen's 6 May 1986 letter reserved the Revenue's position on the reasonable rate of interest test and, in fact, some bonds had an initial 'interest' rate of around 0.5%. In the case of the 3 year bonds where the Board accept that assurances were given there was no such qualification and in any case the initial rates of 'interest' were much higher. In the case of the three year SLMA bonds issued through Chemical Bank, the initial 'interest' rate was around 4%; in the case of the three year SLMA bonds issued through First Boston a *minimum* interest rate of 2% was provided; in the case of the three year bonds issued by the Canadian Federal Development Bank a *minimum* interest rate of 1.5% was provided. These rates are much closer to commercial rates of interest such as those being paid for example on indexed gilts.

(1) Not included in the present print.

The Board's decision

A

42. The circumstances in which the Revenue learned of the actual terms of the SLMA bonds are to be set out in Mr. Templeman's affidavit.

43. When the Revenue learned about these particular bonds the Board took legal advice and decided that the index linked uplift in value should be taxed as income. The Lloyd's insurance market was then informed on 30 March 1988 of the Board's preliminary view by a telephone conversation between Mr. Painter, Deputy Chairman of the Board, and Mr. Lord, Deputy Chairman and Chief Executive of Lloyd's (part of a record of which is at pages 54 and 55 of DWO1). Mr. Painter said that the Board were going to institute a review of both the proper tax treatment of these bonds and of the circumstances in which it appeared that the Lloyd's market (unbeknown to the Revenue) had formed their view of the tax treatment of these bonds being taken by the Inland Revenue. This latter aspect was reviewed so that the Board could consider whether the policy described in paragraph 10 could be applied to any of the bonds to override what was now advised to be the correct treatment in law.

B

C

D

44. This review took some time as it was necessary to gather together information from many sources, interview various persons including Mr. Harrup and the Central Tax Department of Lloyd's, and obtain further legal advice in the light of the representations which had been made to us. In my letter of 27 October 1988 (pages 38 to 40 of Exhibit DWO1) I set out the Board's decision. There followed the correspondence contained in pages 41 to 63 of Exhibit DWO1 in which the Board reconsidered its decision in the light of the further representations made to us by Lloyd's. However, despite these representations the Board saw no reason to depart from its decision.

E

F

45. I would add that if letters such as those sent by Mr. Parker and Mr. Collen referring to specific matters were to be taken as general statements of Revenue policy upon which the Board would be bound, consideration would have to be given as to whether it was consistent with the Board's statutory duty to collect tax to allow any Inspector of Taxes or other official of the Board to answer any correspondence addressed to the Inland Revenue seeking advice about a proposed transaction. The Board have no doubt that the administration of the tax system would suffer very considerably as a result to the detriment of taxpayers generally.

G

46. I should like to make it clear, in view of some of the allegations which have been made against the Inland Revenue, that there is no vendetta against Lloyd's underwriters. I listed earlier a number of the considerations which the Board take into account in administering the tax system in accordance with their statutory duties, and said that one of these considerations is that people should be treated equally under the law. The Board interpret the law and apply their practice on when the Department is bound by assurances in the same way for Lloyd's as they do for taxpayers generally."

H

I

A further affidavit was sworn by Mr. M. Templeman one of H.M. Principal Inspectors of Taxes on 20 March 1989.



A *Regina v. Commissioners of Inland Revenue ex parte Merrett Underwriting Agency Management Ltd.*

By leave of Rose J. given on 3 February 1989, Merrett Underwriting Agency Management Ltd. ("Merrett") made an application dated 14 February 1989 for judicial review. The stated grounds for such a review were similar to the grounds stated for MFK above save that Merrett additionally relied upon two meetings between Mr. Whittingdale and Mr. Templeman, one of H.M. Principal Inspectors of Taxes. Mr. Beighton and Mr. Templeman lodged affidavit evidence for the Inland Revenue. The facts are as stated in the judgments of the Court.

C _____
Regina v. Commissioners of Inland Revenue ex parte Pieri (Underwriting Agencies) Ltd.

D By leave of Rose J. given on 1 February 1989 Pieri (Underwriting Agencies) Ltd. and Others ("Pieri") made an application for judicial review on 7 February 1989. The grounds for such a review were essentially similar to those for Merrett's application (above). Mr. Beighton and Mr. Templeman lodged affidavit evidence on behalf of the Inland Revenue. The facts are stated in the judgments of the Court.

E _____
Regina v. Commissioners of Inland Revenue ex parte R.J. Kiln and Co. Ltd.

F By leave of Rose J. given on 1 February 1989, R.J. Kiln and Co. Ltd. and Others made an application for judicial review dated 14 February 1989. The grounds for the application were essentially similar to those grounds in the MFK case above. Mr. Beighton and Mr. Templeman lodged affidavit evidence on behalf of the Inland Revenue. The facts are set out in the judgments of the Court.

G _____
Regina v. Commissioners of Inland Revenue ex parte D.P. Mann Underwriting Agency Ltd. and Another

H By leave of Rose J. given on 1 February 1989 D.P. Mann Underwriting Agency Ltd. and D.P. Mann made an application for judicial review on 8 February 1989. The stated grounds for such a review were essentially similar to the grounds in the MFK case above. Mr. Beighton and Mr. Templeman lodged affidavit evidence on behalf of the Inland Revenue. The facts are set out in the judgments of the Court.

I _____
The above applications were heard together by the Queen's Bench Divisional Court (Bingham L.J. and Judge J.) on 3, 4, 5, 8 and 9 May 1989

when the Court reserved its judgment. On 7 July 1989 the Court unanimously found in favour of the Inland Revenue with costs.

Jonathan Sumption Q.C., Colin Rimer Q.C., David Milne Q.C., David Pannick and Charles Flint for the Applicants.

Michael Beloff Q.C., Alan Moses, Nicholas Warren and Miss Alison Foster for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Mohamed Falil Abdul Caffoor and others, The Trustees of the Abdul Gaffoor Trust v. Commissioner of Income Tax, Colombo* [1961] AC 584; *Cenlon Finance Co. Ltd. v. Ellwood* 40 TC 176; [1962] AC 782; *Laker Airways Ltd. v. Department of Trade* [1977] QB 643; *O'Reilly v. Mackman* [1983] 2 AC 237; *Regina v. Board of Visitors of Hull Prison, ex parte St. Germain and others* (No. 2) [1979] 1 WLR 1401; *Regina v. H.M. Inspector of Taxes, Reading, ex parte Fulford-Dobson* 60 TC 168; [1987] QB 978; *Regina v. Inland Revenue Commissioners, ex parte J. Rothschild Holdings plc* (No. 1) 61 TC 178; [1987] STC 163; *Regina v. Licencing Authority Established under Medicines Act 1968, ex parte Smith Kline & French Laboratories Ltd.* (No. 2) [1990] 1 QB 574.

Bingham L.J.—In the ordinary course of their business Lloyd's underwriters receive payments of premium from which in due course claims must be paid. There is necessarily a time lag after premiums are received before claims are made and established. For a period of two years after the close of an underwriting year underwriters are accordingly required to hold funds representing premium payments in trust funds for the potential benefit of policy-holders.

Premium income received in United States dollars is required to be held in US dollar accounts or invested in US dollar securities. Premium income received in Canadian dollars is subject to a similar requirement, the account or investment being in Canadian dollars. Premium income received in all other currencies, including sterling, is held in a sterling account or invested in sterling securities.

Since the premium income received by Lloyd's syndicates is very large, it naturally follows that large funds become available for investment in the respective trust funds. Prudence requires that in investing these funds certain principles be observed. First, the funds must be readily accessible in case they are needed to meet claims. Long dated securities, unless readily marketable, will not provide the necessary liquidity. Secondly, the funds must, for the protection of policy-holders, be protected against devaluation through inflation. Thirdly, and for the same reason, investments must be secure and not speculative. There is also another, entirely legitimate, consideration. Such parts of the trust funds as are not needed to pay claims or meet expenses are available for distribution to members of the syndicates. The proceeds of the trust fund investments then become taxable in members' hands. It is in the interest of members that their tax liability on these proceeds should be min-

A imised. Throughout the period with which this case is concerned the rate of tax charged on income in this country was higher than the effective rate charged on capital gains. So it was advantageous to syndicate members, if the result could be achieved whilst observing the investment principles described above, so to invest the trust funds that they yielded capital gains rather than income.

B
C Investment of the sterling trust funds presented no problem. Index-linked gilt-edged stocks were available which were readily marketable, protected against inflation and secure. While the low coupon interest payable on such stocks was treated as income for tax purposes, there was never any doubt but that the indexation uplift in the redemption value of the stock was to be treated as capital and any gain taxed as a capital gain.

D
E Until April 1986 no similar index-linked security denominated in American or Canadian dollars was available for the investment of the American and Canadian dollar trust funds. Changes in United Kingdom legislation had made pressing the need for such a medium of investment. It had been the practice to buy American and Canadian interest-bearing securities early in the interest period and sell them at an increased price with the benefit of accrued interest shortly before the interest date, the price difference being taxed as a capital gain; but the Finance Act 1985 in ss 73–5 provided that accrued interest should be charged to income tax in the hands of the transferor and not to capital gains tax. The Finance Act 1984 (s 36 and Sch 9) provided that where securities (“deep discount securities”) bore low or zero rates of interest but were issued at a corresponding discount to the redemption value, the gain realized on sale as well as redemption became chargeable to income tax and not, as previously, capital gains tax.

F
G
H
I Other fiscal changes made at the same time served to increase the attractiveness of index-linked bonds to members of Lloyd’s syndicates or, more accurately, their managing underwriting agents and investment advisers. Section 68 of the Finance Act 1985 gave indexation relief against capital gains tax in respect of assets held for less than one year. This was of particular value to Lloyd’s syndicates, which are formally dissolved and re-formed at the end of each calendar year, the assets of the old syndicate being transferred to the new. Furthermore, the provisions governing indexation relief had the effect of reducing or even eliminating the charge to capital gains tax on the indexation uplift reflected in the sale price or redemption value of the securities. An express exemption in s 36(2)(b) of the Finance Act 1984 provided that this indexation uplift was not chargeable to income tax as a deep discount under the section. Nor was it chargeable to income tax apart from s 36 of the Finance Act 1984 unless it was in reality interest, that is, a reward for the use of money rather than compensation for depreciation in its value. Index-linked securities denominated in American or Canadian dollars would provide an attractive medium of investment of the respective trust funds if—and the conditions must be emphasised—the indexation uplift reflected in the sale price or redemption value of the securities was taxable here as a capital gain and not as income.

Between April 1986 and October 1988 some 62 issues of index-linked bonds were made, mostly in American but some in Canadian dollars. They were widely bought by Lloyd’s underwriting agents on behalf of their syndi-

ates, the total investment being said to be some £2 billion. Others unconnected with the Lloyd's market also invested, but on a smaller scale.

There are before the Court five applications for judicial review made by Lloyd's underwriting agents and syndicates. The facts differ somewhat from case to case but in each the central complaint is the same. In each case the agents bought American or Canadian index-linked bonds on (it is said) an indication, assurance or representation by the Inland Revenue that the indexation uplift reflected in the sale price or redemption value of the bond would be taxed as a capital gain and not as income. By a decision communicated on 27 October 1988 the Inland Revenue resolved that (save in the case of three specific issues of bond, which I shall identify) the indexation element should properly be taxed as income, and assessments in accordance with that decision have since been made. The applicants attack the Inland Revenue's decision, and the assessments based upon it, as being unfair, inconsistent and discriminatory and so an abuse of power.

In addition to the five applications before the Court there are some twenty-nine other applications to similar effect. The five present applications have been selected by consent as raising the legal and factual issues which must be determined to dispose of all thirty-four applications, but the other twenty-nine applicants have not formally agreed to be bound by the outcome of these five applications. We are told that in all thirty-four applications some £60m of tax is at stake.

It is common ground that we are not in these applications concerned to decide the correct tax treatment of these American and Canadian bonds. Should the applications fail the statutory machinery for resolving disputes as to tax liability will be activated. This Court is concerned with a different, public law question, which is whether the Inland Revenue by its words and conduct has precluded itself from even seeking to tax the indexation uplift element on these American and Canadian bonds as income rather than as a capital gain.

It is convenient first to summarise the general history leading up to these applications, then to give particulars of the five applications, then to summarise the contentions of the parties. I shall then define what I consider to be the correct approach in law and apply it to the facts of these applications.

A. *The Facts*

On 25 June 1982 the Inland Revenue issued a press release entitled "Deep Discounted and Indexed Stock". The first four paragraphs dealt with deep discounted stock and expressed the Inland Revenue's view that the premium over the discounted purchase price payable on redemption should be regarded as interest and taxed as such. A warning of forthcoming legislation was given. Paragraph 5 read as follows:

"5. The Inland Revenue also wish to clarify the tax position regarding corporate stock issued on an indexed basis and bearing a reasonable commercial rate of interest. Companies are already free to issue such stock subject to the arrangements described in paragraph 1. Although the precise tax treatment must have regard to the terms of any contract between the parties, in general

A a. if the indexation constitutes a capital uplift of the principal on redemption to take account of no more than the fall in real value because of inflation the lender, other than a bank or financial concern, will be liable only to capital gains tax on the uplift (subject to the provisions of the 1982 Finance Act). The borrowing company will not be able to claim a deduction for this uplift against its profits for corporation tax purposes.

B b. If the indexation applies to the interest element and additional sums of interest are rolled-up to be paid with the capital on redemption the indexed and the rolled-up interest, when paid, will be given the same tax treatment, both for the borrower and for the lender, as non-indexed interest. The legislation described in paragraph 3 above will apply to such stock also.”

C This statement is certainly consistent with, and may well reflect, the judgment of Lord Greene M.R. in *Lomax v. Dixon & Son, Ltd.*(1) 25 TC 353: both the press release and the judgment make clear that the circumstances of a particular contract will determine whether a payment is to be regarded as interest, and therefore income, or capital.

D After this press release and after the fiscal changes to which I have already referred, there took place considerable correspondence and two meetings involving banks, solicitors, accountants, underwriting agents' investment advisers and certain officials of the Inland Revenue. It was in the course of these exchanges that the statements were made upon which the applications are founded. I think it is possible to discern seven separable series of communications, some much more significant than others. A narrative summary is, however, liable to mislead if it is not remembered that at certain stages several of these series of exchanges were taking place at the same time, although usually with different officials of the Inland Revenue. The fact that a series of independent approaches was being made was unknown to the Revenue and, save as described below, to the applicants.

E (1) *Citibank*

F On 14 May 1985 a vice-president of Citibank wrote to Mr. Templeman, a Principal Inspector of Taxes in the Technical Division of the Inland Revenue with special responsibility for the affairs of banks, financial concerns and Lloyd's underwriters. The caption of the letter referred to Lloyd's syndicates and to Lloyd's American trust fund investments. The letter made plain that Citibank were considering the issue and marketing of US index-linked stocks, which they believed could be of interest as a trust fund investment “provided that the syndicates can be satisfied as to the tax position”. Details of the proposed bond were annexed to the letter in draft, from which it appeared that the indexation was to be governed by the US Consumer Price Index (CPI), that a 3-year maturity was envisaged and that a 4-5 per cent. annual coupon rate was to be provided for. No ceiling (or “cap”) on the overall return of the bond was suggested. Citibank's letter sought confirmation that the gains on disposal, end year revaluation or redemption would be treated as capital gains: “It is obviously critical to the calculation of the overall return that there should be certainty on this point” Citibank's letter was marked Most Urgent and asked for a very early response.

I

(1) [1943] 1 KB 671.

In his reply of 24 May 1985 Mr. Templeman confirmed that if the amount payable on redemption were determined by the CPI, the security would not be a deep discount security for purposes of the 1984 Finance Act. He continued:

“3. On the basis of the interest and indexation provisions set out in your example, we would be prepared to accept that any premium paid on redemption was assessable, if at all, to capital gains tax in the hands of an investor. This would not, of course, apply where the investor was a dealer in securities, a bank or a general insurance company where the premium on redemption will be treated as a Case I receipt of the financial trade. In general we would take the view that if the interest rate on a security of this kind was significantly below the rate payable on comparable securities with the same indexation terms, then some element of the final amount payable on redemption might be regarded as income. If you intend to proceed with the issue of securities of this kind, we would be prepared to indicate in advance whether on any particular security the whole amount payable on redemption will be treated as capital.

If the issue of such securities proceeds, I will be grateful for a note of the terms of any securities you issue in which it is believed the Lloyd’s syndicates are proposing to invest.”

After a gap of some months the vice-president wrote to Mr. Templeman again on 10 December 1985. With this letter he enclosed new draft terms, with the same maturity term as before and with no cap, but with a lower coupon. He reported considerable interest among Lloyd’s fund managers but little among American investors, to whom he thought that a shorter maturity term, “perhaps as low as 1 year”, might be more attractive. He invited comments on the proposed 3-year bond and on the proposed shorter term issue, and concluded “you will appreciate our main concern is the tax position of UK investors, in particular Lloyd’s syndicates.”

It does not appear that this letter was answered or acknowledged. There was no further correspondence. Citibank did not make the 3-year issue discussed in the letters. This correspondence was not circulated in the Lloyd’s market. It is accordingly not of great significance, but the applicants rely on it as showing the consistency of the Inland Revenue’s response and because it was seen by Mr. Osborne, whose role in these matters I describe below.

(2) *Chemical Bank*

On 1 November 1985 Price Waterhouse wrote to Mr. Harrup of Chemical Bank to advise on the UK tax treatment of an index-linked bond which Mr. Harrup had suggested might be suitable for Lloyd’s names. This was a bond denominated in American dollars with capital and interest linked to an American price index and interest and capital uplifts capped to give a return up to the average US 3 month Treasury Bill rate, and with a maturity of 3–15 years. Price Waterhouse’s advice was that if the bond bore a reasonable commercial rate of interest and was issued at a time when the market yielded a positive real return on non-indexed instruments, the indexation uplift should be taxed as a capital gain and the interest as income. The author, however, offered to contact the Inland Revenue’s Technical Division

“... to try to get a more unequivocal statement on the tax treatment though we cannot guarantee that they will reply to general questions with no specific instrument to demonstrate the position.”

A This offer was evidently accepted and on 11 November Price Waterhouse wrote to Mr. Collen of the Revenue's Technical Division. The letter made no reference to Lloyd's but described a 3-year American dollar bond, capped so that the total actuarial return would be the average US 3 month Treasury Bill rate plus a small premium. Indexation was to be based on the CPI, lagged for 8 months. Urgent confirmation was sought that the indexation uplift to the capital value of the bond would not constitute income subject to UK tax and that the redemption of the bonds would constitute chargeable disposals for capital gains tax purposes. Two days later, in a handwritten letter, Mr. Collen confirmed Price Waterhouse's "understanding" without qualification.

B
C On 2 December 1985 Mr. Harrup wrote and circulated within Chemical Bank a discussion paper on the proposed 3-year capped US bond, "intended primarily for Corporation of Lloyd's Syndicates". He recorded that taxation advice had been obtained from Price Waterhouse and Slaughter and May, and the proposed bond had been approved by the Inland Revenue. In this last respect he thought Chemical Bank was ahead of its competitors.

D
E Following a telephone conversation on 13 December 1985 Price Waterhouse wrote to Mr. Collen the same day seeking confirmation as a matter of great urgency that the Revenue's earlier view was unaffected by three additional characteristics of the proposed bond. These were, first, that they would be floating rate notes; secondly, if the average Treasury Bill 3 month rate were less over a 6 month period than the rise in the CPI, the effect would be to eliminate the interest payment and restrict the indexation uplift; and, thirdly, the lender (investor) was to have a right, on unattractive terms, to demand repayment at the end of any 6 month period.

F
G In replying on 20 December Mr. Collen referred to the difficulty of dealing with urgent requests "in depth" because of pressure of work. "Subject to that" he confirmed that the three new elements did not alter the confirmation given in his earlier letter "provided always that the terms of Note 5 of 25 June 1982 Press Release on indexed bonds is met, particularly that the bond continues to bear a reasonable commercial rate of interest". He continued:

H
I "Clearly where the total return is linked to the average United States three months Treasury Bill Rate plus a small premium and the capital indexation is inflation linked only, the Revenue can agree that the return is reasonable in that sense. If the total return falls below that level, however, as it may in Item 2 of your 13 December letter, the question arises whether the bond bears such a reasonable rate, but this would be a matter of fact in the light of the returns in the market place at that time."

I There was a further exchange of correspondence on the question whether the rate of interest had to be reasonably commercial at the time of issue or throughout the term, Price Waterhouse acknowledging the impossibility of dealing in depth with matters requiring urgent replies, but on 10 January 1986 Mr. Collen accepted that "in this particular case" the Revenue could agree that the bonds were issued bearing a reasonable commercial rate of interest. A further urgent request by Price Waterhouse for confirmation that amalgamation of basic and supplementary coupons into a single coupon

would not alter the UK tax treatment of the bonds led Mr. Collen to reply on 28 February 1986: A

“I confirm your understanding of the position subject to the usual rider that determination of the taxation status of the bonds is a matter for the inspector concerned subject to the events which happen.” B

On 18 March Price Waterhouse gave Mr. Harrup their advice on the UK tax treatment of index-linked US dollar bonds held by UK resident individuals. The bonds described were 3-year, floating rate, capped bonds. Price Waterhouse’s opinion was that if the bond at issue bore a reasonable commercial rate of interest the indexation uplift in the capital value of the bond would not constitute income subject to UK tax. The letter concluded: C

“We have received confirmation from the Technical Division of the Inland Revenue that they agree with our understanding.

Attached to this letter is a complete set of copies of the relevant correspondence which we have had with Technical Division. You have our permission to disclose, at your discretion, the contents of this correspondence to interested third parties provided the correspondence is always shown as a complete set and is not taken out of context.” D

On 10 April 1986 the Student Loan Marketing Association (“Sallie Mae”) issued and Chemical Bank as agent placed \$135m 3-year, index-linked, capped bonds as described to the Inland Revenue. In respect of this issue the Revenue has taken the view that whatever the proper tax treatment of the bonds it should regard itself as bound by the terms of the answers which it gave not to seek to tax as income the indexation uplift element in the return on these bonds. This issue is accordingly not itself the subject of any of these applications. Whether the view taken by the Revenue in this, and the other cases where the Revenue has taken the same stance, is correct in law is a matter not before us for decision. E

On the day after this first issue, 11 April 1986, Mr. Harrup wrote to Mr. Collen directly, with reference to a prospective issue of a similar capped US index-linked bond, this time with a maturity of not less than 6 months and not more than 2 years. Among other points Mr. Harrup sought confirmation that the indexation uplift would not constitute income but would be chargeable for capital gains tax purposes. Before this letter could be answered it was overtaken and superseded by a further letter from Mr. Harrup dated 22 April. In this he described an index-linked bond with a maturity “as short as 6 months to as long as 10 years”. The indexation provisions were said to be designed to compensate investors for their effective loss of capital due to inflation. The gross return would be capped, within very small margins, to levels available from United States Treasury or Federal Agencies debt for the particular maturity in question. Mr. Harrup expressed Chemical Bank’s understanding of the tax treatment of such a bond including— F

“c. the indexation element ... would not represent income under Schedule D Case V ... e. a 6 month bond would not have a taxation treatment different from that of longer maturities ... g. the bonds would bear a reasonable commercial rate of return as set out in Note 5 of the 25 June 1982 Press Release.” G

Mr. Harrup concluded: H

“c. the indexation element ... would not represent income under Schedule D Case V ... e. a 6 month bond would not have a taxation treatment different from that of longer maturities ... g. the bonds would bear a reasonable commercial rate of return as set out in Note 5 of the 25 June 1982 Press Release.” I

A “We trust that you agree with our understanding of the tax treatment of these bonds but any thoughts you might have would be gratefully received.”

On 6 May 1986 Mr. Collen replied in a letter described as the high water mark of the applicants’ case:

B “You will appreciate that since the transaction involved has not yet taken place any Revenue comment is entirely without prejudice to the facts. I would also add that given the work situation in the Revenue it is unlikely that comments of this nature can be given in the future. I confirm your understanding of the tax treatment of the bonds as set out on page 2 of your letter at items a–g except that whether the bonds bear a reasonable commercial rate of return is a matter of fact dependent on the conditions in the market at the time of issue. I therefore cannot confirm that the terms of a prospective issue bears such a rate. Items c and g are relevant.”

C
D It was not until 19 February 1987 that Chemical Bank placed a further issue of Sallie Mae index-linked bonds, this time with a maturity of 6 months, but they did so repeatedly thereafter, always with that maturity. The Revenue has not considered itself bound by any assurance in respect of these later bonds, which are very much in issue in these proceedings.

E There was some later correspondence. On 10 December 1986 Mr. Harrup wrote to the Corporation of Lloyd’s concerning prospective issues of US dollar bonds with 6 month maturity terms based on the UK RPI. He referred to the earlier correspondence:

F “... Mr. Collen’s reply would suggest that there are no structural problems except the caveat of a ‘fair and reasonable rate of return’. Given that Mr. Collen’s previous correspondence accepted that a return based on bills was fair and reasonable I assume this would not be a problem for the deal currently under discussion.”

G On 23 February 1987 Price Waterhouse again advised Chemical Bank, this time on index-linked, US dollar, capped bonds based on the CPI or the RPI with a 6 month maturity. They had seen the letters of 22 April and 6 May and expressed the opinion that “provided that at the date of issue the bond bears a reasonable commercial rate of interest having regard to all the factors specific to the bond” the indexation of the principal would not constitute income subject to UK tax.

H Price Waterhouse were then asked to consider a bond in which the lender could demand repayment after one month. Price Waterhouse observed in their reply of 12 May 1987:

I “The capital treatment of uplift of principal will be at risk if the option period is short. The risk is increased if the pricing of the bond reflects its short term nature. It is not possible to say with certainty what is the minimum period for a bond whereby uplift of principal will receive capital treatment. The treatment of index linked paper as set out in the Inland Revenue Press Release of [25 June 1982] derives from the case of *Lomax v. Peter Dixon & Son Ltd.* (25 TC 353). In this case it was held that a payment of premium on redemption should be treated as

capital if it can clearly be identified as being in respect of a risk to, rather than a return on, the principal.” A

Price Waterhouse then continued:

“Apart from periods of hyper inflation, it seems unlikely to me that the Courts would accept that there is any significant risk to principal for very short life paper. The shorter the maturity of the paper the greater the certainty from the outset that a known amount (in real and in nominal terms) will be paid on redemption. Technical Division of the Inland Revenue, by accepting the concept of 6 month indexed linked paper have accepted that there is sufficient uncertainty and therefore risk to capital to justify the treatment of the uplift as a capital receipt. I believe that a six month maturity is, in the current economic climate, at or very near to the minimum limit for index linked paper to be acceptable to the Revenue, and more importantly, the Courts. I do not therefore consider that it would be safe to assume that capital treatment would be accorded to the uplift of capital for shorter life paper and indeed, believe that it would be provocative to the Revenue to argue that paper structured so that it could be construed as being of a maturity shorter than 6 months is in fact index linked paper.” B C D

There was no further correspondence or exchange between Chemical Bank, Price Waterhouse and the Revenue. E

(3) *Whittingdale*

Whittingdale Ltd. were investment managers to two Lloyd’s syndicates.

In December 1985 Mr. Bazin of Whittingdale and Mr. Templeman of the Technical Division of the Revenue exchanged letters about zero coupon bonds (known as CATS, TIGERS and ZEBRAS). They did not touch on US index-linked bonds. A further letter from Mr. Bazin in April 1986 about the legislation on deep discount bonds appears to have received no answer. It seems that Mr. Bazin wrote again in July, and on 18 August 1986 Mr. Templeman answered, still with reference to deep discount securities and zero coupon bonds. F G

On 12 November 1986 Mr. Whittingdale and Mr. Bazin met Mr. Templeman at Somerset House. There is a dispute on the affidavits as to what exactly happened at the meeting, and there has been no cross-examination of the deponents. I do not, however, think that the details of the factual dispute greatly matter and the broad outline of events seems to me fairly clear. H

It does not appear from the evidence that the meeting was arranged in writing, and certainly Mr. Templeman was given no written notice of any point on which his opinion was sought. I infer that both sides saw the meeting as a continuation of the previous correspondence about zero coupon bonds, deep discount securities and the zoological instruments already mentioned. The meeting began with a detailed discussion of these, and I have no reason to doubt that Mr. Templeman fully expounded his views on them and made plain the Revenue’s intention to scrutinise attempts to circumvent the charge to tax on accrued income. This was a general, and as I think informal, discussion. Mr. Templeman made no note, and was accompanied by no assistant or secretary. Mr. Bazin did keep a note, but it not infrequently hap- I

A pens that a note of a meeting or conference begins well but somewhat peters out as the meeting progresses and the discussion becomes more general.

Paragraph 4 of Mr. Bazin's note reads:

B "Most importantly, MT admitted that *Lomax v. Dixon*⁽¹⁾ is the only case that could be used by the I.R. on bonds outside of 1984 legislation, and that it does not/cannot apply to the grey area where some interest is paid, i.e. *it only applies to zero coupon bonds* (that fall outside of 1984 legislation)."

C This does not read like a contemporaneous note, and I have some doubt whether it is a very accurate summary of what Mr. Templeman said. It is not, certainly, a very accurate reflection of what *Lomax v. Dixon* decided. Mr. Templeman himself does not directly challenge the accuracy of this part of the note, however, so perhaps he did say this. I do not think it much matters.

D It is common ground that index-linked bonds were raised during the meeting. I see no reason to doubt the general accuracy of the account given by Mr. Whittingdale in paras 25–27 of his affidavit:

E "25. In the course of the meeting, Mr. Templeman indicated that he was very interested to know how Lloyd's intended to realise capital gains in the post bond washing era and I therefore raised with him the question of index-linked bonds. I said that there were some index-linked bonds in issue, in respect of which I doubted the tax treatment which was being suggested. Mr. Templeman said that he had not examined all the prospectuses but was familiar with such issues and there were none which he had read which raised particular concerns. I was surprised. In order to test the boundaries of this attitude, I postulated a range of situations in which, I suggested, the Revenue might not be prepared to treat the indexation element of the bond as capital rather than income.

F
G
H 26. I specifically outlined the terms (as I then understood them) of an actual Credit Suisse First Boston SLMA one-year issue in which the inflation factor was calculated by reference to nine months' past inflation (which therefore known at the time of issue) and three months' future inflation (which was not known at the time of issue) that is, nine months' 'lagging'. Mr. Templeman said that he understood the practical necessity for a time lag and he accepted this period of lagging. He said that a bond issued in 1986 tied to the inflation rate of four or five years previously was clearly too long a lag. This reaction was a considerable surprise to me because I regarded the Credit Suisse First Boston issue as an extreme example—certainly the longest 'lagging' I have seen applied to index-linked bonds.

I 27. I also asked Mr. Templeman about the choice of inflation indices on which the indexation factor might be based. Mr. Templeman said that the choice of index had to be reasonable and he agreed that an indexation factor based on the rate of inflation in Argentina or Israel would not be acceptable. He pointed out that the inflation index had to have some connection with the borrower and lender and confirmed that

the UK RPI and the US CPI were both acceptable in the context of US dollar denominated bonds marketed to UK investors.” A

This account makes several things clear. Index-linked bonds were mentioned by Mr. Whittingdale in response to a probing enquiry by Mr. Templeman. The discussion centred on the permissible period of lagging and the choice of inflation indices. No document of any kind was produced and no ruling sought on any specific proposal. It was, again, a general discussion of principles. The drift of the discussion is reflected in Mr. Bazin’s note: B

“5. On the topic of index linked securities that would not be subject to the 1984 legislation, PCW raised the question as to when an inflation indexed issue becomes a fixed coupon issue? MT agreed that this was a very grey area, but that there was a legitimate reason for some time lag between the rate of inflation used and the payment of the coupon.” C

It is common ground that no express reference was made to capping. Mr. Whittingdale and Mr. Bazin no doubt knew that there had been many recent issues of capped bonds, and may well have thought Mr. Templeman knew this too (if, which I doubt, they specifically directed their minds to capping). Mr. Templeman says that he was unaware of any issue of capped bonds, and I see no reason to disbelieve him. Mr. Templeman says that by “prospectuses” he meant the draft term sheets shown to him by Citibank, which had been for 3-year uncapped bonds. Again, I see no reason to disbelieve him. I do not, on the evidence as it stands, accept that reference was made during the meeting to the fact that index-linked bonds were being marketed as having written Inland Revenue approval. Had this been said, I find it hard to think Mr. Templeman would not have enquired further. D E

The evidence is clear, and I accept, that Mr. Whittingdale and Mr. Bazin were encouraged and reassured by Mr. Templeman’s sympathetic reaction to index-linked bonds. I do not, however, think that they (still less he) believed him to have given a ruling or a considered statement of the Revenue’s position. Had they done so, I am sure his confirmation in writing would have been sought, or at least his approval of para 5 of Mr. Bazin’s note. Neither of these things was done. F

On 8 April 1987, five months after the meeting, Mr. Bazin wrote to Mr. Templeman seeking confirmation of his understanding of the substantive points made at the meeting. The letter broadly followed parts of Mr. Bazin’s note, to which I have already referred, including the observation attributed to Mr. Templeman, that *Lomax v. Dixon* could not be applied where some coupon interest is paid. The letter was directed to zero coupon securities such as CATS and TIGERS, and made no reference to index-linked bonds. It was not answered. G H

On 7 August 1987 Mr. Whittingdale wrote to Mr. Templeman in these terms: I

“Last November you were kind enough to give us some of your time to consider the tax treatment of Deep Discount Securities. During our conversation we discussed index-linked securities.

At the time we had not purchased any such securities on behalf of our clients. Subsequent to our meeting we have been purchasing increasing amounts of such issues. Although satisfied with the advice we have

A had and the comfort of the conversation in November that these issues
would cause no tax problem, the resulting overall effect might at some
stage in the future cause you some concern. I appreciate you might pre-
fer that we should address you with specific questions but also remem-
ber your intention to review Lloyd's syndicate portfolios from both a
B detailed and a global perspective. It is difficult to put in writing the
details of that which might become known to you through time."

This letter led to a meeting between Mr. Whittingdale, Mr. Bazin and
Mr. Templeman at Somerset House on 12 October 1987. At this meeting the
scale of investment of Lloyd's American trust funds in Sallie Mae and similar
index-linked bonds was disclosed. Mr. Templeman himself had not been told
C before of any maturity date shorter than 3 years nor of any cap on the total
return on the bonds, but these features of current issues became clear in the
course of the meeting and Mr. Templeman expressed the opinion that these
features would or might affect the Revenue's willingness to regard the index-
ation uplift element of the total return as a capital gain.

D On 13 October, the day after the meeting, Mr. Bazin telephoned Mr.
Templeman to resolve the conflict between what Mr. Templeman had said
the previous day and what had been said in letters to Mr. Harrup and Price
Waterhouse. Mr. Templeman in effect replied that whatever Mr. Collen or
the Revenue might have thought or said earlier, the Revenue did not now
E regard the indexation uplift on capped 6-month bonds as a capital gain tax-
able as such rather than as income. Asked to confirm Mr. Bazin's under-
standing of this telephone call Mr. Templeman on 21 October 1987 stated
that the exemption in s 36(2)(b) of the Finance Act 1984 would not apply to
a capped bond and that in the case of a 6-month bond he would have
thought that the initial approach would be that the whole of the return was
F income unless the taxpayer could demonstrate that any part was capital.

(4) *First Boston*

On 21 January 1986 Linklaters & Paines acting on behalf of The First
Boston Corporation wrote to Mr. Parker of the Technical Division of the
Revenue seeking urgent confirmation that the indexation uplift payable on
G redemption would be treated as a capital item taxable as such at the time of
redemption or prior sale only. The bonds were described as having a 10 year
term and no cap was mentioned. Mr. Parker gave the confirmation sought
but made clear that he had had little time to consider the matter and was not
the Technical Division expert on capital gains. He couched his reply in tenta-
tive terms. In a telephone conversation on 24 January 1986 Mr. Parker
H advised, still in qualified terms, that if the interest rate were that generally
prevailing in the UK, or were variable, it should not affect his earlier conclu-
sion.

On 28 February 1986 Linklaters wrote to Mr. Parker again and enclosed
detailed draft terms for issue of an index-linked Sallie Mae US dollar bond
I based on the RPI with a 3-year term and a cap. They also enclosed details of
the advice they proposed to give their clients First Boston, including the
statement that the indexation uplift would not be taxed as income but rather
as a capital item taxable as such at the time of redemption or maturity. Mr.
Parker was asked to confirm or otherwise comment on this advice as a mat-
ter of urgency. On 10 March Mr. Parker confirmed that "the amounts paid

to holders of Notes by way of principal revaluation will not be charged to UK tax as income but rather as a capital item taxable as such at the time of redemption or maturity".

On 4 April 1986 First Boston placed \$100m Sallie Mae bonds. These were based on the RPI, were capped and had a 3 year term. As with the First Chemical Bank issue the Revenue has held itself bound by its answers not to seek to tax as income the indexation uplift element in the return on these bonds. This issue is not itself, therefore, the subject of any of these applications.

On 17 April 1986 Linklaters spoke on the telephone to Mr. Parker about a proposed one year bond. They reported the upshot of this conversation to First Boston the following day in a letter which was copied to Mr. Parker:

"Although the Inland Revenue indicated that the views they expressed over the telephone would not be as considered as views expressed in writing, they confirmed that in principle they had no difficulty with Notes issued on the terms set out in the attached summary falling within section 36(2)(b) and hence outside the definition of 'deep discount security'. There is nothing in section 36(2)(b) to require the RPI taken for revaluing the principal to be that of any particular period or periods; nor to require the period chosen to be wholly prospective. The Inland Revenue indicated, therefore that a revaluation of principal as outlined in the attached summary appeared to them to fall within section 36(2)(b).

In my view in giving this indication the Inland Revenue are applying a legitimate interpretation of section 36(2)(b) and are not affording concessionary treatment to the issue. I have, as you requested, written to the Inland Revenue asking them to confirm the views expressed over the telephone; and I enclose a copy of my letter. I can see no reason why they should change their views from those they indicated over the telephone."

On 28 April 1986 Mr. Parker in general confirmed his view that the proposed index-linked issue would not fall within the deep discount regime because it would come within the definition in s 36(2)(b) of the Finance Act 1984. In the course of his answer Mr. Parker referred back to para 5(a) of the June 1982 press release and observed "This clearly means that if the lenders gain merely reflects the depreciation of his capital due to inflation between issue and redemption, then capital treatment is appropriate".

In December 1986 First Boston sought Linklaters' advice on the tax treatment of 3-6 month index-linked bonds. In advising, Linklaters referred back to the earlier correspondence with the Inland Revenue and saw no reason why the same tax treatment should not be afforded to amounts payable by way of principal revaluation on notes having a 3-6 month life. In a further letter to First Boston written on 13 May 1987 Linklaters considered the effect of giving the lender a right to demand repayment before the maturity date. They referred again to the Revenue's earlier confirmation and recognised that the lender's right might be said for s 36 purposes to reduce the life of the security. They thought the earlier analysis, agreed with the Revenue, should apply, but advised that there should be an interest return which could be regarded as a commercial income return and they favoured a floor below which the interest element could not fall.

A (5) *Slaughter and May*

The evidence includes part of a correspondence between Slaughter and May, acting for unidentified clients, and Mr. Parker of the Technical Division.

B On 16 May 1986 Slaughter and May sought confirmation that the indexation uplift of a proposed bond would be treated as a capital receipt. The proposed bond appears to have been capped by the return available on a matching US Government security, so that the rate of interest would float. A 3 year term may have been envisaged. Mr. Parker sought clarification in July, which he received in September. Mr. Collen answered on 24 November
C 1986, confirming that on the basis of the information provided and the June 1982 press release the capital uplift payable on redemption would be treated as capital for tax purposes.

This correspondence was not circulated generally in the Lloyd's market. The applicants relied on it as showing the consistency of the Revenue's
D response.

(6) *Coward Chance*

E On 12 January 1987 Coward Chance wrote to the Technical Division concerning a proposed issue of Canadian dollar index-linked bonds based on the Canadian CPI. They supplied a draft of the proposed terms and mentioned sale to the trustees of Lloyd's investment funds. I understand these to have been 3-year bonds. They sought confirmation that the notes would not be regarded as deep discount securities within s 36(2)(b) of the 1984 Act and that the amount paid to holders on a disposal would not be taxed as income. Mrs. Willetts, for the Revenue, gave the confirmation sought subject to immaterial qualifications on 21 January. After another letter from Coward
F Chance, Mr. Jones for the Revenue was on 5 February 1987 willing to accept that the sum described as "revalued principal" payable on redemption of the security was liable only to capital gains tax, although he thought the Revenue would aim to treat as income any accrued return realised other than
G that attributable to indexation of the principal.

Following the correspondence an issue of Canadian dollar bonds with a maturity of 34 months was made on 23 February 1987. The Revenue has accepted that it is bound by its assurances not to seek to tax the indexation uplift element in the return on these bonds as income.

H (7) *Bear Stearns*

I On 9 April 1987 Bear Stearns International Ltd. told the Technical Division of a proposed issue of US dollar index-linked bonds and sought confirmation that increments to capital would not constitute income for UK tax purposes. A maturity date of between one and five years was mentioned and the bonds were to be capped, but so that the interest payable could never fall below 1.5 per cent. Mr. Pardoe for the Revenue, in replying, made certain qualifications which do not appear material and subject to those gave the confirmation asked. It appears that the issue to which this exchange related did not in the event proceed for commercial reasons. That was the end of this exchange.

A
B
C
A meeting was held between Lloyd's representatives and Mr. Templeman on 8 March 1988 to discuss the doubts which had arisen following the meeting of 12 October 1987 with Whittingdale about the tax treatment of the indexation uplift element on these American and Canadian bonds. Mr. Templeman repeated his doubts whether this was properly to be treated as a capital gain on a short-term bond on which the total return was capped. It appears that at first Mr. Templeman may have indicated that the Revenue would be willing to make no income tax assessment on this part of the return on bonds already issued and bought, while reconsidering the matter for the future, but by a letter of 30 March 1988 it was made clear that the Revenue was also examining the tax treatment of bonds already issued and bought. Some of the applicants continued to buy short-term capped bonds even after this date, but no claim is made in respect of them since it is accepted that the effect of the letter was to withdraw any earlier representations.

D
After a long investigation Mr. Beighton, Director-General of the Inland Revenue, communicated the Revenue's decision to Lloyd's on 27 October 1988. The letter included the following paragraphs:

E
F
G
"3. I will deal first with our conclusions in relation to the three bond issues with a 3-year maturity period to redemption. One of these was an issue in April 1986 through the agency of Chemical Bank of 3-year floating rate inflation indexed notes issued by the Student Loan Marketing Association (Sallie Mae). Another—also in April 1986—was an issue, through the agency of First Boston, of 3-year fixed rate notes issued by Sallie Mae. The third issue of bonds in this category was of bonds with a 3-year maturity issued by the Canadian Federal Business Development Bank, issued through Burns Fry in February 1987. As we understand the position, no issues of these bonds have been made on or after 30 March 1988. On this assumption, we do not intend to contend that the purported capital element in the return on these bonds should be taxed as income. After reviewing the correspondence between the Revenue and those concerned with the issue of these bonds, we take the view that in each case the terms of our response indicated that if the bonds were issued on the terms stated the capital element would not be charged to tax as income. We take the view that, without prejudice to the proper treatment in tax law of bonds with these characteristics had no statements been given, we should regard ourselves as bound by the assurance given in relation to those particular issues and not seek to impose tax upon a basis conflicting with the views we had expressed.

H
4. We will be writing to those concerned with the issue of these bonds to inform them of our conclusions.

I
5. I now turn to the position of the other bonds of which we have details which have been issued to Lloyd's members. All of these have maturity periods to redemption of 6-months or 12-months which, taken together with the other terms of issue, give the bonds significantly different characteristics from the bonds described at paragraph 3 above. We are advised that, taking the effects of the terms of these bonds as a whole, in tax law the purported capital component in the return is income, and should be taxed as such.

6. We have considered the representations that, if this was our view of the tax law, it should not be applied to the 6-month Sallie Mae bonds issued through the agency of Chemical Bank before 30 March 1988.

A 7. As you are aware, we have considered these representations at a
high level, and in detail. This has involved a scrutiny of all the corre-
B spondence drawn to our attention and discussion separately with
Chemical Bank and with Lloyd's taxation department. It has also
involved a general internal examination of Revenue replies to questions
about the interpretation and application of the terms of paragraph 4 of
the Revenue's 1982 press release which dealt with the tax position of
C corporate stock issued on an indexed basis. The range of information
and evidence that we have had to assess means that it has taken us
longer to reach conclusions on this issue than we had originally hoped
or expected. It has also, I am afraid, taken us longer to complete our
review of these issues than we had hoped when Ian Spence wrote to Ken
Doddard on 5 August.

D 8. Our conclusion, based on the advice we have received, is that no
assurances were given which committed the Revenue to any particular
tax treatment of the 6-month Sallie Mae bonds that were issued through
E Chemical Bank's agency, and that we could not justifiably give up tax
which we are entitled to charge on the basis of our Solicitor's view of the
proper application of tax law to these particular bonds.

F 9. We therefore intend to assess the holders of the 6-month Sallie
Mae bonds issued through the agency of Chemical Bank on the basis
that the purported capital element in the return is taxable as income in
E respect of bonds issued before 30 March 1988, as well as for bonds
issued after that date. We will apply the same treatment to the other
indexed bonds which we have seen which have been issued to Lloyd's
members apart from those referred to in paragraph 3 given that, to the
best of our knowledge, nothing has been said by the Revenue to those
involved in the issue of these bonds which constitutes—or is purported
to constitute—an assurance about the tax treatment of these bonds."

G A letter in similar terms, but more argumentative vein, was written to
Chemical Bank. Assessments were later made on the applicants as foreshad-
owed in Mr. Beighton's letter. It is the Inland Revenue's decision contained
in Mr. Beighton's letter (except that contained in para 3) and the assess-
ments which the applicants move to quash.

B. *The Applications*

(1) *MFK*

H The first four applicants in this application are Lloyd's underwriting
agencies; the remaining applicants are members of syndicates which they
manage.

I Mr. Osborne acted as an investment manager to these agencies from
1986 onwards, having spent 1985 on secondment to Citibank. He was famil-
iar with the Revenue's June 1982 press release. During his secondment he
knew of the correspondence referred to in (1) of section A above. During
1986 he was shown the correspondence between Price Waterhouse and
Chemical Bank and the Revenue detailed in (2) of section A. Early in 1987
he saw the Linklaters' correspondence with the Revenue in (4) and the Bear
Stearns' exchange in (7).

Mr. Butler was, to begin with, the investment manager of the first of the applicants but in January 1987 he joined corporate forces with Mr. Osborne and thereafter they worked closely together. He was familiar with the Revenue's press release. Early in 1987 he saw the April and May 1986 correspondence between Chemical Bank and the Revenue and learned of the earlier correspondence between Price Waterhouse and the Revenue. He also knew of some of the Linklaters' correspondence and of the Bear Stearns' correspondence.

The applicant agencies bought various issues of bonds between April 1986 and the end of March 1988. They did so on the advice of Mr. Osborne and Mr. Butler. The evidence is that in giving that advice Mr. Osborne and Mr. Butler were influenced by their understanding of what they believed to be the Revenue's assurance that the indexation uplift would be regarded as capital and taxed, if at all, as such. There is no reason to doubt this evidence.

(2) *Merrett*

This applicant acts as managing agent for Lloyd's syndicates and manages funds on their behalf. It also engages investment managers, including Whittingdale and Irving Trust Company and Fischer Francis Trees & Watts Inc. in New York.

Mr. Randall is and was at the material time a director and the deputy chairman of the applicant. He exercised general supervision over the activities of the applicant's investment managers, overseeing investment strategy but leaving particular investment decisions to the investment managers. He was aware of previous disputes between Lloyd's and the Inland Revenue and wanted to avoid any repetition.

Mr. Randall knew of the Revenue's June 1982 press release. He saw Mr. Harrup's discussion paper (A(2) above) in late 1985 or early 1986 and discussed it with Mr. Harrup in January 1986. Early in 1986 he saw the Revenue's letter of 10 March 1986 to Linklaters (A(4) above).

He saw the Price Waterhouse's and Chemical Bank's correspondence with the Revenue (A(2) above) in late 1986 or early 1987. Early in 1986 he gave Irving Trust and Fischer Francis the green light to invest in index-linked bonds if they thought fit. They did, and both entered the market early. There is no reason to doubt that Mr. Randall was influenced in his decision by the approval he believed the Revenue to have given.

Before investing, Fischer Francis discussed the bonds with Chemical Bank and First Boston, who reported the Revenue's willingness to treat the indexation uplift as capital not income. This reinforced Fischer Francis' decision to buy. Irving Trust appear to have been similarly influenced by discussions with and documents shown by Mr. Harrup of Chemical Bank.

Mr. Whittingdale was slow to invest in index-linked bonds, partly because he was seeking acceptance of a US short-dated Government bond fund of his own, partly because he was actively exploring other possibilities and partly because he was sceptical whether the indexation uplift could escape taxation as income. His approach was cautious and he wanted to avoid confrontation with the Revenue. He knew of the June 1982 press release, and during 1986 came under increasing pressure to invest in these

A bonds as other investment managers were doing. In November he had the meeting with Mr. Templeman which I have already described, and was reassured. It was not, however, until after he saw the Price Waterhouse's and Chemical Bank's correspondence (A(2) above) in December 1986 that he finally decided to invest. Even then, I think, he was sceptical about the taxation of the indexation uplift as a capital gain, which explains his further approach to Mr. Templeman in August 1987, leading to the meeting in October. After that he bought no more bonds.

B
C There can be no doubt on the evidence that this applicant's investment in the bonds was influenced, not wholly but partly, by the approvals the Revenue was thought to have given.

(3) *Kiln*

D The applicants here are an underwriting agent, responsible for the management of various syndicates, and two syndicate members applying on their own behalf and as representatives of the other members. Mr. Burrage is one of the applicant members. He is also a director of the underwriting agent. He acted as investment manager and had overall responsibility for all investment decisions. He deposes that

E "It was crucial to the attractiveness of these bonds for UK investors that the index-linked element payable on redemption would be regarded as capital, taxable (if at all) only as capital gains and not as income."

F It appears that Mr. Burrage had discussions with First Boston and with Chemical Bank before investing in the bond issued in February 1987. At some time during 1986 or 1987 Mr. Burrage acquired copies of the Chemical Bank/Price Waterhouse's correspondence with the Revenue, and also Linklaters', but he cannot be sure exactly when. He obtained copies of the Bear Stearns' correspondence shortly after it took place, but this cannot have affected his purchase on 1 April 1987.

G The evidence of reliance in this case is less strong than in some others, but I have no doubt Mr. Burrage's investment decisions were influenced by the general understanding of the Revenue's attitude prevalent in the Lloyd's market.

(4) *Pieri*

H This application is made by a number of underwriting agents and by and on behalf of a number of syndicate members. Their common link is that Whittingdale acted as their investment manager, although in this case (unlike Merrett) there was no other investment manager.

I I have considered Whittingdale's knowledge (by Mr. Whittingdale and Mr. Bazin) in connection with the Merrett application and need not repeat the facts. I reach substantially the same conclusion on reliance as in that case.

(5) *Mann*

The applicants in this case are a Lloyd's underwriting agency and a member of a syndicate for whom the agency acted.

The applicants' investment manager was Mr. Butler, whose knowledge of the Revenue's statements on index-linked bonds has been summarised above in relation to MFK, for whom he also acted. From January 1987 Mr. Osborne's expertise also became available to these applicants, who made one investment during 1986 and a number in 1987 and 1988.

The same conclusion on reliance which I have reached in relation to MFK in my view applies in this case also.

C. *The contentions of the parties*

We have had the benefit of most interesting, able and economical argument on both sides. It is not easy to do justice to them in a summary.

Mr. Sumption Q.C. for the applicants submitted that decisions of the Inland Revenue are subject to judicial review on the same grounds as those of any other public authority. These grounds include abuse or excess of power. The overriding criterion for deciding whether there has been an excess or abuse of power is to decide whether the authority's (here the Inland Revenue's) conduct has been unfair. The Inland Revenue's conduct was *prima facie* unfair if it conflicted with an undertaking or assurance of the Inland Revenue which would (were the Inland Revenue not a public body) give rise to an estoppel or breach of contract. If a public authority has a policy which it makes known or announces it may not act inconsistently with that policy without sufficient notice, and then not retrospectively. This rule applies even where, in private law, there might be no estoppel. It is a principle of public law that decisions of public bodies may not be internally inconsistent. A public body must recognise and give effect to the legitimate expectations of those who deal with it, in matters both of procedure and decision. For these propositions of law Mr. Sumption relied in particular on *Regina v. Inland Revenue Commissioners ex parte Federation of Self Employed and Small Businesses*⁽¹⁾ [1982] AC 617 (the *Fleet Street casuals* case); *Regina v. Inland Revenue Commissioners ex parte Preston*⁽²⁾ [1985] AC 835; *HTV v. Price Commission* [1976] ICR 170; *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629; *Regina v. Home Secretary, ex parte Khan*⁽³⁾; and *Regina v. Home Secretary ex parte Ruddock* [1987] 1 WLR 1482.

On the facts Mr. Sumption submitted that the policy of the Inland Revenue before March 1988 plainly was not to challenge as disguised interest the indexation uplift on bonds of this kind provided that the bonds paid a commercial rate of interest in addition to the indexation uplift. This policy was made known to potential investors and their advisers by answering the same sort of questions in the same way. The circumstances in which the answers were given were such that it was highly probable the answers would be passed to investors. On any view of the evidence the Revenue's statements were an effective inducement to these applicants to buy bonds.

The thrust of the applicants' argument was thus very simple. The Revenue had repeatedly made known its view of these bonds. It need not have done so, but it did. It would be grossly unfair to these applicants, and so an abuse of the Revenue's statutory powers, if the Revenue were now free to alter its position with retrospective effect to the prejudice of the applicants.

⁽¹⁾ 55 TC 133.

⁽²⁾ 59 TC 1.

⁽³⁾ [1984] 1 WLR 1337.

A Mr. Beloff Q.C. for the Inland Revenue accepted that his client was not immune from judicial review. The *Fleet Street casuals* case and *Preston* made this concession inevitable, although Mr. Beloff understandably relied on *dicta* of Lord Wilberforce and Lord Scarman ([1982] AC at 632E; [1985] AC at 852 D) to submit that collateral challenges to decisions of the Revenue would rarely be successful. Mr. Beloff further accepted that unfairness might in principle amount to an abuse of power and that there could be an exceptional case where it would be unfair for the Revenue to resile from a representation made or undertaking given, when the making of the representation or giving of the undertaking involved no breach of the Revenue's statutory duty. Judicial review could not, however, lie to oblige the Revenue to act contrary to its statutory duty. Such would be the case if these applications succeeded. It is for Parliament, and Parliament alone, to decide what taxes shall be paid. It is for the Inland Revenue to collect the tax Parliament has ordained. The Revenue has no general discretion to remit taxes Parliament has imposed (*Vestey v. Commissioners of Inland Revenue*⁽¹⁾ 54 TC 503). While the Inland Revenue has under the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970

D "... a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge, the highest net return that is practicable having regard to the staff available to them and the cost of collection" (*per* Lord Diplock in the *Fleet Street casuals* case at 636 G⁽²⁾),

E this was a discretion which could only lawfully be exercised for the better, more efficient and more economical collection of tax and not otherwise. The taxing acts provided for inspectors to make assessments on individual taxpayers year by year. One inspector could not bind another, nor one inspector bind himself from one year to another. When an assessment was disputed, a familiar and well-lubricated machinery existed to resolve the dispute. Special or General Commissioners, or on questions of law the courts, were the ultimate arbiter. The Revenue could not without breach of statutory duty agree or indicate in advance that it would not collect tax which, on a proper construction of the relevant legislation, was lawfully due.

G In any event, Mr. Beloff argued, the Revenue had here done no such thing. Even if the Revenue might in principle be bound by clear and unqualified answers to questions put with reference to specific and fully detailed transactions, it could not be bound by general and qualified statements of its current thinking given in relation to different transactions. Such, he submitted, was the material on which the applicants relied. In contrast with *Ng, Khan* and *Ruddock* the statements relied on fell far short of any statement of official policy.

I Mr. Sumption in reply accepted that the Inland Revenue could not bind itself to act in conflict with its statutory duty. If its statutory duty left the Revenue no choice but to collect taxes then there was no scope for any binding representation. But the representations here were made in pursuance of the Revenue's duty to collect tax and fell within its reasonable area of managerial discretion. This was the Revenue's own view as reflected in its evidence. Hence the Revenue's proper acceptance, in respect of the three bond

(1) [1980] AC 1148.

(2) [1982] AC 617.

issues, that it could not properly resile from its representations whatever the taxpayer's true liability in law. But the Revenue had no tenable basis in law for distinguishing between the cases where it agreed it was bound and those (the subject of these applications) which it disputed. The factual questions here were whether the applicants had expectations that the capital indexation uplift on these bonds would be taxed as capital, if at all; if so, whether those expectations were reasonable; and if so whether they were created by the Revenue. All these questions should be answered in favour of the applicants.

D. *The correct approach in law*

I take as my starting point the following passage from Lord Templeman's speech in *Preston*⁽¹⁾ (at 866G), expressly adopted by the other members of the House:

"However, the H.T.V.⁽²⁾ case and the authorities there cited suggest that the commissioners are guilty of 'unfairness' amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of contract or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."

It was not suggested in *Preston* that the bargain allegedly made, if made, would have been a breach of the Revenue's statutory duty, but the applicants here accept that they must fail if the Revenue could not lawfully make the statements or representations which (it is said) it did. So if, in a case involving no breach of statutory duty, the Revenue makes an agreement or representation from which it cannot withdraw without substantial unfairness to the taxpayer who has relied on it, that may found a successful application for judicial review.

I cannot for my part accept that the Inland Revenue's discretion is as limited as Mr. Beloff submitted. In the *Fleet Street casuals*⁽³⁾ case the Revenue agreed to cut past (irrecoverable) losses in order to facilitate collection of tax in future. In *Preston* the Revenue cut short an argument with the taxpayer to obtain an immediate payment of tax. In both cases the Revenue acted within its managerial discretion. The present case is less obvious. But the Inland Revenue's judgment on the best way of collecting tax should not lightly be cast aside. The Inland Revenue might stick to the letter of its statutory duty, declining to answer any question when not statutorily obliged to

(1) 59 TC 1, at pages 37G/38B.

(2) [1976] ICR 170.

(3) 55 TC 133.

A do so (as it sometimes is: see, for example, ss 464 and 488(11) of the Income
and Corporation Taxes Act 1970) and maintaining a strictly arm's length
relationship with the taxpayer. It is, however, understandable if the Revenue
has not in practice found this to be the best way of facilitating collection of
the public revenue. That this has been the Revenue's experience is, I think,
B made clear by Mr. Beighton who, having described the machinery for assess-
ment and appeal, continues:

C "6. Notwithstanding this general approach in administering the tax
system, the Board see it as a proper part of their function and contribut-
ing to the achievement of their primary role of assessing and collecting
the proper amounts of tax and to detect and deter evasion, that they
D should when possible advise the public of their rights as well as their
duties, and generally encourage co-operation between the Inland
Revenue and the public."

I do not think that we, sitting in this Court, have any reason to dissent
from this judgment. It follows that I do not think the assurances the Inland
D Revenue are here said to have given are in themselves inconsistent with the
Revenue's statutory duty.

I am, however, of opinion that in assessing the meaning, weight and
effect reasonably to be given to statements of the Inland Revenue the factual
context, including the position of the Revenue itself, is all-important. Every
E ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting
agency, not a tax-imposing authority. The taxpayers' only legitimate expecta-
tion is, *prima facie*, that he will be taxed according to statute, not concession
or a wrong view of the law (*Regina v. Attorney-General ex parte Imperial
Chemical Industries Plc* 60 TC 1 at page 64G, *per* Lord Oliver of Aylmerton,
CA, 1986). Such taxpayers would appreciate, if they could not so pithily
F express, the truth of Walton J.'s aphorism "One should be taxed by law, and
not be untaxed by concession" (*Vestey, supra*,⁽¹⁾ at 544 H). No doubt a state-
ment formally published by the Inland Revenue to the world might safely be
regarded as binding, subject to its terms, in any case falling clearly within
them. But where the approach to the Revenue is of a less formal nature a
more detailed enquiry is in my view necessary. If it is to be successfully said
G that as a result of such an approach the Inland Revenue has agreed to
forego, or has represented that it will forego, tax which might arguably be
payable on a proper construction of the relevant legislation it would in my
judgment be ordinarily necessary for the taxpayer to show that certain condi-
tions had been fulfilled. I say "ordinarily" to allow for the exceptional case
H where different rules might be appropriate, but the necessity in my view
exists here. First, it is necessary that the taxpayer should have put all his
cards face upwards on the table. This means that he must give full details of
the specific transaction on which he seeks the Revenue's ruling, unless it is
the same as an earlier transaction on which a ruling has already been given.
It means that he must indicate to the Revenue the ruling sought. It is one
thing to ask an official of the Revenue whether he shares the taxpayer's view
I of a legislative provision, quite another to ask whether the Revenue will
forego any claim to tax on any other basis. It means that the taxpayer must
make plain that a fully considered ruling is sought. It means, I think, that the
taxpayer should indicate the use he intends to make of any ruling given. This

(1) 54 TC 503.

is not because the Revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be published in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification.

In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. Mr. Sumption accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation.

E. Conclusions

Against that legal background I return to the representations relied on here to consider whether they meet the conditions specified.

The June 1982 press release made plain that "the precise tax treatment must have regard to the terms of any contract between the parties". This statement was not enough for the applicants' purposes. Had it been, the ensuing correspondence would not have taken place.

The Citibank correspondence (A(1)) was addressed to the appropriate Inspector in the Technical Division (Mr. Templeman) and made explicit the Lloyd's dimension. The bond described, however, had different characteristics from those now in contention. The terms of Mr. Templeman's reply show clearly that he was not at that stage giving advance clearance, although willing to do so if full details of a proposed issue were in future to be given. They never were.

I need not consider the Chemical Bank/Price Waterhouse's correspondence up to 10 April 1986, since the Revenue has treated itself as bound in respect of the bond issue then in question. It is, however, noteworthy that no reference was made to Lloyd's, so that the correspondence did not reach Mr. Templeman, who might otherwise, I infer, have considered it. Mr. Collen made plain his difficulty in giving a considered view under pressure of time. He entered "the usual rider that determination of the taxation status of the bonds is a matter for the Inspector concerned subject to the events which happen". The bond under consideration had a maturity of 3 years. Price Waterhouse describe the Revenue as agreeing with their understanding, not as giving an undertaking on the future tax treatment of the bonds.

A In his letter of 6 May 1986 to Chemical Bank Mr. Collen stated "You will appreciate that since the transaction involved has not yet taken place any Revenue comment is entirely without prejudice to the facts". This may not be very well expressed, but I think it makes clear that while Mr. Collen was doing his best to be helpful he was not intending to fetter the Revenue's freedom of future action. Had the full extent of the assurance sought been made plain to Mr. Collen he would, I feel sure, have declined to give it, particularly if he had had any inkling of the circulation his answers were to receive. Price Waterhouse themselves appreciated that it was the judgment of the courts that really mattered. Both they and Chemical Bank, I need hardly say, acted honourably and professionally throughout. There was no deception or misleading of the Revenue. But they faced a familiar problem: while any favourable expression of opinion by the Revenue was of value, any request for a commitment by the Revenue in more general or explicit terms risked a blank refusal, which would be unhelpful. I do not think this later correspondence, even when read with the earlier exchanges, can be relied on as creating a legitimate expectation that the Revenue would not tax the later issues of bonds on what they believed, on legal advice, to be the correct principles, whether this accorded with earlier expressions of opinion or not.

E In the Whittingdale cases (A(3)) no correspondence assists the applicants. I have already made my findings on the important meeting of 12 November 1986. I am quite satisfied that no assurance or ruling was then sought or given, and although Mr. Whittingdale doubtless regarded this "conversation" as a source of "comfort" (see his letter of 7 August 1987) I do not think he regarded it as any more. It was, I think, his disbelief that the Revenue would really tax these bonds in the manner suggested which led him to suggest the meeting which took place in October 1987. No details of any proposed issue were at any stage given to the Revenue and no precise and unambiguous representation was at any stage made by it.

G In the case of First Boston, Linklaters did not alert Mr. Parker to the proposed Lloyd's application, and were dealing with a 3-year bond. But they gave Mr. Parker full and precise details of a specific proposed issue and although Mr. Parker was put under considerable pressure of time I am not altogether surprised that the Revenue has felt bound by his answers before 4 April 1986.

H Thereafter Mr. Parker expressed a tentative view over the telephone and "in general" confirmed his earlier view in writing. He was not shown the full details of this proposed issue. Although the 1 year term was made clear the existence of a cap was not. The question he was asked to answer was whether the Revenue would regard the proposed bonds as deep discount bonds within s 36(2) of the 1984 Act. He was not asked to confirm and did not confirm that any inflation uplift on those bonds would not be assessed to income tax. He had no idea his views were to be circulated in the Lloyd's market.

I According to Mr. Beighton,

"The Board consider therefore, that Mr. Parker's letter of 28 April 1986 did not constitute a binding commitment not to raise any further enquiries or assessments treating the uplift as income on the one year SLMA bonds placed by First Boston."

The Inland Revenue's own judgment, while not conclusive, is not irrelevant, since

"... the court cannot in the absence of exceptional circumstances decide to be unfair that which the Commissioners by taking action against the taxpayer have determined to be fair"

(*per* Lord Templeman in *Preston*⁽¹⁾ at 864 E).

The Slaughter and May's correspondence (A(5)) was relied on as showing the consistency of the Revenue's response. It does indeed appear that Mr. Collen and Mr. Parker (like Mr. Templeman, initially, Mrs. Willetts, Mr. Jones and Mr. Pardoe) were inclined to take the same view. But I do not think these disjointed responses can be aggregated into an Inland Revenue policy. The contrast with cases such as *Ng*,⁽²⁾ *Khan*⁽³⁾ and *Ruddock*⁽⁴⁾ is striking. Had there been an Inland Revenue policy it would, I think, have been formulated and made known (if at all) as such.

I need not dwell on the Coward Chance's correspondence (A(6)). The draft terms were in this instance disclosed. Sale in the Lloyd's market was mentioned, although not an intention to circulate the correspondence in the market. A clear assurance was sought that the amount paid to holders on a disposal "will not be charged to UK taxation as income". There might be room for argument whether this assurance was ever given, but the Revenue has concluded that it was. Even if the Revenue is right, I do not think that this correspondence can fairly be read as giving a general assurance to the Lloyd's market as a whole as to future tax treatment of other issues on different terms.

Had the issue which was the subject of the Bear Stearns' correspondence in A(7) ever been made, consistency might, I think, have required the Revenue to hold itself bound in respect of it. But the correspondence related to one specific proposed issue. No hint was given that any general assurance for circulation in the Lloyd's market was being sought. If Mr. Pardoe had understood himself to be giving clearance for any future bond issue of a similar type I very much doubt if he would have taken it upon himself to give such clearance. As it was, the proposed issue was not made and I do not think any legitimate expectation can be derived from it.

The materials before us in this case make plain how strongly the applicants feel that the Inland Revenue's conduct, in taxing the indexation uplift on these bonds as income, is unfair. I do not, however, think that in the disputed cases the Revenue has promised to follow or indicated that it would follow a certain course so as to render any departure from that course unfair. I do not accordingly find any abuse of power. I would therefore refuse relief. Had I found that there was unfairness, significant enough to be an abuse of power, I would not exercise my discretion to refuse relief.

Judge J.:—The Board of Inland Revenue ("Inland Revenue") has a statutory duty to collect taxes which are properly payable in accordance with current legislation (Inland Revenue Regulation Act 1890 ss 1 and 13). This primary statutory duty is not fulfilled in an administrative vacuum. The Inland Revenue also has statutory responsibility for the administration care

(1) [1985] AC 835. (2) [1983] 2 AC 629. (3) [1984] 1 WLR 1337. (4) [1987] 1 WLR 1482.

A and management of the system of taxation (Taxes Management Act 1970 s 1). It must therefore administer the taxation system in the way which in its judgment is best calculated to achieve the primary statutory duty.

B This administrative function is performed in different ways. The Inland Revenue may enter into agreements which in theory have the effect of reducing the amount of tax which may be collected. Such agreements could on one view be *ultra vires* the Inland Revenue's statutory obligation to "collect every part of inland revenue". Nevertheless if the Inland Revenue concludes that such arrangements would be likely in practice to result in a greater tax yield overall it is entitled to make them. It does so as part of its administrative function: *Commissioners of Inland Revenue v. National Federation of Self Employed and Small Businesses Ltd.*(¹) [1982] AC 617.

D Another example of its administrative function more closely connected with the present application is the long established practice by which the Inland Revenue gives advice and guidance to taxpayers. This is sometimes done by public statements of the Board's approach to a particular fiscal problem. Sometimes advice is given in answer to a request from an individual taxpayer. The practice exists because the Inland Revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield.

E There is a detailed procedure for resolving disputes between the Inland Revenue and the taxpayer and if necessary for bringing such disputes to the courts for decision. In addition, however, as the Inland Revenue is an "administrative body with statutory duties" (*per* Lord Wilberforce in *Regina v. Commissioners of Inland Revenue ex parte National Federation of Self Employed*(²) at page 632) it is not immune from an order for judicial review. F Since the decision in the House of Lords in *Regina v. Commissioners of Inland Revenue ex parte Preston*(³) [1985] AC 835 the principle has been established that acts which are an abuse of the Inland Revenue's powers or acts done outside those powers may be subject to judicial review.

G Abuse of power may take the form of unfairness. This is not mere "unfairness" in the general sense. Even if "unfair", efficient performance of the statutory obligations imposed on the Inland Revenue will not, of itself, amount to an abuse of power.

H In *Regina v. Commissioners of Inland Revenue ex parte Preston* the House of Lords considered the question whether the Inland Revenue was entitled to re-open an assessment which it had agreed on the basis of a presumed mutual benefit to the Revenue and the taxpayer should not be re-opened. There was therefore an agreement about the taxpayer's liability after all the relevant facts were supposed to be known. In fact they were not known. Accordingly it was held that the Inland Revenue was not acting unfairly in seeking to re-open the assessment. The principle adopted was that I unfairness amounting to an abuse of power may arise if the Inland Revenue has conducted itself in such a way that if private law applied it would be liable to the taxpayer for damages or an injunction for breach of contract or breach of representation. It was also accepted that delay could on its own in

(¹) 55 TC 133.

(²) [1982] AC 617.

(³) 59 TC 1.

certain circumstances (which did not obtain) have converted otherwise lawful actions by the Inland Revenue into an abuse of power. A

It was argued for the applicants in the present case that unfairness amounting to an abuse of power could arise in any circumstances in which the Inland Revenue had created a legitimate expectation in the mind of a taxpayer about how his affairs would be approached if, after he acted on that expectation, the Inland Revenue resiled from the undertakings it had previously given. Such conduct would be unfair and an abuse of power and subject to estoppel within the principles laid down in *Preston*. B

“Legitimate expectation” has been considered in a number of authorities. These include *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629; *HTV Ltd. v. Price Commission* [1976] ICR 170; *Regina v. Home Secretary ex parte Khan* [1984] 1 WLR 1337; *Regina v. Home Secretary ex parte Ruddock* [1987] 1 WLR 1482 and *Council of Civil Service Unions v. Minister for The Civil Service* [1985] AC 374. The correct approach to “legitimate expectation” in any particular field of public law depends on the relevant legislation. In *Regina v. Attorney General ex parte Imperial Chemical Industries Plc* 60 TC 1 the legitimate expectation of the taxpayer was held to be payment of the taxes actually due. No legitimate expectation could arise from an *ultra vires* relaxation of the relevant statute by the body responsible for enforcing it. There is in addition the clearest possible authority that the Inland Revenue may not “dispense” with relevant statutory provisions (*Vestey v. Inland Revenue Commissioners*⁽¹⁾ [1980] AC 1148). C D E

For the Respondents it was accordingly argued that “unfairness” for present purposes was limited to agreements reached in the context of past events and on the basis that the Inland Revenue would receive some benefit. “Unfairness” could not arise if the Inland Revenue had made representations about its future conduct and policy and probable interpretation of fiscal provisions or if there was no benefit to it. Despite the use of the word “estoppel” in *Preston* it could not as a statutory body be “estopped” from performing its statutory duty. (*Brodie v. Commissioners of Inland Revenue* 17 TC 432; *Gresham v. Attorney-General*⁽²⁾ 7 TC 36; and *Western Fish Products Ltd v. Penwith D.C.* [1981] 2 All ER 204). F G

I accept without hesitation that (a) the Inland Revenue has no dispensing power and (b) no question of abuse of power can arise merely because the Inland Revenue is performing its duty to collect taxes when they are properly due. However neither principle is called into question by recognising that the duty of the Inland Revenue to collect taxes cannot be isolated from the functions of administration and management of the taxation system for which it is responsible. H

The decision in *Preston* was not, in my judgment, confined exclusively to those cases in which there had been an agreement relating to past matters which conferred mutual benefits both on the taxpayer and the Inland Revenue. If so references to breach of representation and estoppel and delay would all have been inappropriate. Estoppel may arise without consideration: it may arise in relation to future conduct. Delay could never have been considered to be a possible ground for judicial review. Moreover the “amnesty” I

(1) 54 TC 503.

(2) [1916] 1 Ch 228.

A in *Regina v. Commissioners of Inland Revenue ex parte Federation of Self Employed* was not—despite the citation of the *Vestey* case—castigated in the House of Lords as an instance of a pretended dispensing power. It was on the contrary treated as a proper performance of the Inland Revenue's administrative functions. If the argument for the Inland Revenue were correct any application for judicial review on the grounds of unfair abuse of power B would be bound to fail if the Revenue were able to show that its actions were dictated by its statutory obligation to collect taxes. However it was clearly recognised in *Preston* that in an appropriate case the Court could direct the Inland Revenue⁽¹⁾

C “to abstain from performing their statutory duties or from exercising their statutory powers if the Court is satisfied that ‘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 ... ”

D (*per* Lord Templeman at 864). Nothing in *Regina v. Attorney General ex parte Imperial Chemical Industries Plc* conflicts with that statement of principle because, although the Inland Revenue may not indulge in “*ultra vires*” relaxation of the relevant statutory fiscal provisions, it is not “*ultra vires*” the Inland Revenue to administer the tax system fairly.

E In the present case the Inland Revenue promulgated a number of guidelines and answered questions by or on behalf of taxpayers about the likely approach to a number of given problems. The Inland Revenue is not bound to give any guidance at all. If however the taxpayer approaches the Inland Revenue with clear and precise proposals about the future conduct of his fiscal affairs and receives an unequivocal statement about how they will be F treated for tax purposes if implemented, the Inland Revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to Inland Revenue statements of policy. In those cases where the taxpayer has G approached the Inland Revenue for guidance the Court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the Inland Revenue with complete frankness about his proposals. Applying private law tests the situation calls for utmost good faith on the part of the taxpayer. He should make full disclosure of all the material facts known to him.

H For the reasons given by Bingham L.J. the evidence in the present case does not establish abuse of power by the Inland Revenue. Accordingly I agree that these applications should be refused.

I If contrary to my conclusion it had been established that the Inland Revenue had abused its powers the case for granting judicial review as a matter of discretion would have been clear. In expressing that view I have recognised that it is only in an exceptional case of this kind that the process of judicial review is permitted and the Court should be extremely wary of deciding to be unfair actions which the Commissioners themselves have determined are fair.

(1) 59 TC 1, at page 35H.

The suggestion that a huge amount of tax would be lost to general funds as a consequence of an order for judicial review is an argument without force. The remedy of judicial review for improper abuse of power—if established—should be available equally to all taxpayers irrespective whether their potential liability is huge or small. If persuaded that judicial review would otherwise have been appropriate I should have exercised my discretion in favour of granting it.

Applications dismissed with costs.

[Solicitors:—Messrs. Ashurst Morris Crisp (for MFK);
Messrs. Titmuss Sainer and Webb (for Merrett);
Messrs. Clyde and Co. (for Pieri);
Messrs. Barlow Lyde and Gilbert (for R.J. Kiln and Co. Ltd.);
Messrs. Carter Faber (for D.P. Mann Underwriting Agency Ltd.);
Solicitor of Inland Revenue.]

A

B

C

D

E