HIGH COURT OF JUSTICE (CHANCERY DIVISION)—10TH FEBRUARY 1970 A

COURT OF APPEAL—14TH AND 15TH JANUARY AND 12TH FEBRUARY 1971

HOUSE OF LORDS—14TH AND 15TH FEBRUARY AND 22ND MARCH 1972

Pearlberg *v.* Varty (H.M. Inspector of Taxes)(1) B

Income tax—Procedure—Back duty—Neglect—Assessments made after six years, but within six years of determination of assessment for normal year—Taxpayer not entitled to make representations on application for leave to assess out of time—Finance Act 1960 (8 & 9 *Eliz.* 2, *c.*44), *s.*51(3); *Income Tax Management Act* 1964 (*c.*37), *s.*6. C

Pursuant to a written application by the Inspector of Taxes, on 25th January 1968 *a General Commissioner granted leave for the making of assessments to income tax under Schedule D on the Plaintiff for the years* 1946–47 *to* 1950–51 *on the ground of neglect, the assessment for the normal year,* 1951–52, *being not yet finally determined. The Plaintiff had made no returns of income for those years. On being informed by the Inspector of his intention to apply for* D *leave to make the assessments the Plaintiff's solicitors had asked for their client to be given an opportunity to appear and be heard at the hearing, but had been told that he would be entitled to appeal if and when the assessments were made.*

After receiving notice of the assessments the Plaintiff brought an action in the Chancery Division for a declaration that they were ultra vires *and of no effect, on the ground that he was given no opportunity of appearing and being* E *heard by the Commissioner or making written representations to him before leave to make them was granted. The Plaintiff contended that the principles of natural justice required him to be given such an opportunity.*

Held, (1) *that the Commissioner's function in giving leave to make assessments out of time was administrative and not judicial or quasi-judicial;* (2) *that since the person assessed had the right of appeal against the assessments, there was* F *no injustice in his not being heard on the application for leave to make them.*

Day *v.* Williams (1969) 46 T.C. 59 *approved; dicta in* Wiseman *v.* Borneman 45 T.C. 540; [1971] A.C. 297 *applied.*

The facts are stated in Lord Denning M.R.'s judgment.

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The case came before Pennycuick J. in the Chancery Division on 10th February 1970, when the Plaintiff conceded that the issue was concluded against him in that Court by the decision of the Court of Appeal in *Day* v. *Williams* (1969) 46 T.C. 59. Judgment was given accordingly in favour of the Crown, with costs.

The Plaintiff having appealed against the above decision, the case came H before the Court of Appeal on 14th and 15th January 1971, when judgment

(1) Reported (C.A.) [1971] 1 W.L.R. 728; 115 S.J. 388; [1971] 2 All E.R. 552; (H.L.) [1972] 1 W.L.R. 534; 116 S.J. 335; [1972] 2 All E.R. 6.

A was reserved. On 12th February 1971 judgment was given unanimously in favour of the Crown, with costs.

Michael Miller for the Plaintiff.

H. H. Monroe Q.C. and *J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the judgments: *Cozens* v. *North Devon Hospital Management Committee* B [1966] 2 Q.B. 330; *Slaney* v. *Keen* 45 T.C. 415; [1970] Ch. 243; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; *Amis* v. *Colls* (1960) 39 T.C. 148; *Ranaweera* v. *Wickramasinghe* [1970] A.C. 951.

Lord Denning M.R.—This case raises a point of procedure in tax matters. It concerns " out-of-time " assessments, that is, assessments made more than C six years after the end of the year to which the assessment relates. The statutory provisions are very hard to understand, but they are best shown by taking three periods of six years each.

The first six years

Suppose that in March 1957 the Revenue authorities believe that the Crown has lost tax for many years past, and that the loss is attributable to D the neglect of the taxpayer to make proper returns of his income. The Revenue authorities determine to take steps to make good the loss. They can assess him for the six years before 1957, which I will call the " first six years ". They can make the assessment for those first six years of their own motion, without the leave of anyone: see s. 46(1) of the Income Tax Act 1952. They can, for instance, make an assessment on him for the year 1951–52 so as to make good E the loss of tax in that year due to his neglect. If they make such an assessment it becomes what is called " the normal year ": see s. 51(1) of the Finance Act 1960.

The second six years

Now suppose the taxpayer accepts that assessment for the " normal year " as correct, so that it is finally determined in 1957: or suppose that the F taxpayer appeals against that assessment for the " normal year ". It may be many years before his appeal is finally determined. Let us assume that it is not finally determined for the ten years from 1957 until 1967. During the whole of the time, until it is finally determined, the Revenue authorities can go back for the six earlier years before the end of the " normal year " 1951–52. I will call those earlier six years the " second six years " back: see s. 51(1), (2) G and (3) of the Finance Act 1960. The Revenue can, for instance, make assessments on him for the earlier years 1945–46 onwards down to 1950–51, provided that they do it for the purpose of making good a loss of tax due to his neglect. But in the case of those " second six years " the assessment may only be made " with the leave of a General or Special Commissioner ": see s. 6(1)(*c*) of the Income Tax Management Act 1964. One Commissioner is enough, but they H must get his leave. If there is an appeal against the assessment the Commissioner who gave the leave must not be present at the appeal: see s. 6(2) of the Income Tax Management Act 1964.

The third six years

Now suppose that the Revenue authorities in 1957 made such an assessment for the year 1945–46. That year 1945–46 then becomes what is called the I " earlier year ": see s. 51(5) of the Finance Act 1960. The taxpayer appeals,

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and it is many years before that appeal is finally determined. Let us suppose it is not finally determined for the ten years from 1957 to 1967. During the whole of that time, until the assessment is finally determined, the Revenue authorities can go back for six years before the end of the year 1945–46, which I will call the " third six years " back. But in the case of the " third six years " they have to get leave from two of the Commissioners, and it is expressly provided that " the person to be assessed shall be entitled to appear and be heard ": see s. 51(4), (5), (6) and (7) of the Finance Act 1960. If the Commissioners give such leave the Revenue authorities can make assessments on the taxpayer for the years 1939–40 onwards down to 1944–45. And so on for the " fourth six years ". The process can be repeated again, but not further back than 1936. A B

The facts of this case C

In this particular case the Revenue authorities claim to go back for the " second six years " but not for the " third six years ". The facts are as follows.

In March 1957 the Revenue authorities made an assessment on Mr. Pearlberg for the year 1951–52 for untaxed interest. It was within the " first six years " back. So 1951–52 was the " normal year ". He appealed against that assessment. The appeal was not determined for many years. The Crown told us that it has not been finally determined even now. In December 1967 the Revenue authorities decided to charge Mr. Pearlberg, if they could, for " the second six years " back. To do this they had to obtain leave from one Commissioner. This requirement of leave is contained in s. 6(1) of the Income Tax Management Act 1964, which says that an assessment for the second six years back: D E

> " . . . may only be made with the leave of a General or Special Commissioner given on being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person."

In pursuance of that request the Inspector of Taxes on 19th December 1967 made an application for leave to make assessments on Mr. Pearlberg, on a printed form no. 64D–2. The form, so far as material, was as follows: F

" LEAVE TO MAKE INCOME TAX OR SURTAX ASSESSMENTS OUT OF TIME

Person assessable and address

H.H. Pearlberg, 18 Wilton Crescent, S.W.1.

Description of income G

Profits on sale of property and chief rents.

Income Tax Schedule D

Section 51, Finance Act 1960.
Normal year (Section 51(1), Finance Act 1960) 1951–52.

Years and amounts H

	1946–47	1947–48	1948–49	1949–50	1950–51
	£	£	£	£	£
Assessment proposed:	7,743	11,825	314,634	1,224	313

Inspector's signature: L. A. Varty *Date:* 19th December 1967

LEAVE TO ASSESS GIVEN

Commissioner's signature: *Date:* 25th January 1968 "

A The Inspector on 19th December 1967 sent with the form a letter to the Clerk to the Commissioners, saying:

> "...I attach the forms for consideration by one of the General Commissioners and for his signature if he approves these assessments. The application is made under Section 51(1) (3), Finance Act 1960, on the grounds of neglect or wilful default . . . The facts are as follows: (*a*) No B Income Tax Returns were made by Mr. Pearlberg for the years 1936–37 to 1950–51. (*b*) Statutory notices to Mr. Pearlberg to render returns of income were given as follows: 1945–46, 26th April 1945; 1946–47, 12th April 1946; 1947–48, 6th May 1947; 1948–49 to 1950–51 inclusive, 6th December 1950. (*c*) No returns of income were completed by Mr. Pearlberg for the years 1945–46 to 1949–50 inclusive. For 1950–51 C a further return was issued by this District on 3rd July 1956, and completed by Mr. Pearlberg on 17th November 1957."

In addition, the Inspector sent to Mr. Pearlberg's solicitors on 12th December 1967 a letter setting out the facts on which he relied in precisely the same words. On 2nd January 1968 Mr. Pearlberg's solicitors wrote to the Inspector denying that there was any neglect, let alone fraud or wilful default. They added D two significant sentences:

> ". . . It appears to us to follow that your proposed assessments are out of time, and that your intended application to the Commissioners is wholly misconceived. If, notwithstanding the above, you propose to continue with your application for leave, we shall be obliged if you will please arrange for us to be notified of the Hearing because our E clients wish to appear and be heard."

On 5th January 1968 the Inspector of Taxes replied saying that Mr. and Mrs. Pearlberg had consistently neglected all requests to make income tax returns. He impliedly turned down the request to be heard, because he said that if the Commissioner agreed to the making of the assessments the taxpayer would receive notice in the usual way and have the right to appeal against them.

F The result was that on 24th January 1968 the form of application for leave, together with the covering letter setting out the facts, were put before one of the Commissioners, Sir William Carr. He granted leave without hearing the taxpayer and signed the form accordingly. On 19th February 1968 the Inspector of Taxes gave to Mr. Pearlberg five notices of assessment to income tax for the years ended 5th April 1947, 1948, 1949, 1950 and 1951. On 30th G April 1968 Mr. Pearlberg issued the writ in this action against the Inspector of Taxes. He claimed that each of the five assessments was *ultra vires* and of no effect. The reason given in his statement of claim was that he was given no notice of the hearing, nor any opportunity of commenting on or controverting the facts and matters relied upon in the application for leave.

The construction of the Statutes

H It is quite plain that Parliament intended that there should be a difference between leave given for the " second six years " and leave given for the " third six years ". In the third six years the Legislature expressly said that " the person to be assessed shall be entitled to appear and be heard ": see s. 51(7) of the Finance Act 1960; whereas in the second six years the Legislature significantly omitted that provision: see s. 6 of the 1964 Act. That omission I speaks volumes. It shows that the Legislature, in the case of the " second six years ", did not intend that the taxpayer should have any right to appear

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or to be heard. This is in keeping with the practice before 1964. Mr. Phillips, for the Crown, took us through the legislative history. I need not repeat it now. But it shows that before 1964 the taxpayer was not entitled to be heard in respect of the " second six years ". I think the position was the same after 1964. A

Finally, in *Day* v. *Williams* (1969) 46 T.C. 59 this Court held that, on the construction of the Statute, in the case of the second six years the taxpayer was not entitled to be heard on the application for leave. I think we should follow that decision until convinced that it was wrong. Far from thinking it was wrong, I agree entirely with it, and gladly abide by it. B

The impact of Wiseman *v.* Borneman

The decision in *Day* v. *Williams* turned entirely on the Statute. There was no discussion as to the impact of *Wiseman* v. *Borneman*(1), which had been decided by the House of Lords a little earlier. In these circumstances I think we are at liberty to consider its impact. C

Mr. Miller submitted that *Wiseman* v. *Borneman* had altered the whole approach to these cases. He formulated for us some propositions which seemed to suggest that there was no difference in principle between a *prima facie* decision and a final decision, and that in each case the party affected was entitled to be heard. He relied particularly on the words of Lord Wilberforce(2) [1969] 3 W.L.R., at pages 718G–719B (2). But the other Lords did not go so far as Lord Wilberforce in this respect. Lord Reid said plainly, at page 710(3), that there is a difference: D

> " It is very unusual ", he said, " for there to be judicial determination of the question whether there is a *prima facie* case . . . there is nothing inherently unjust in reaching such a decision "—i.e. a *prima facie* decision— " in the absence of the other party. " E

I cannot accept Mr. Miller's submission. I would go so far with him as to say that in reaching a *prima facie* decision there is a duty on any tribunal to act fairly: but fairness depends on the task in hand. Take an application to a Court which by Statute or by the Rules or as a matter of practice is made *ex parte*. The Court itself is the custodian of fairness. If the matter is so urgent that an order should be made forthwith, before hearing the other side, as in the case of an interim injunction or a stay of execution, the Court will make the order straight away. We do it every day. We are always ready, of course, to hear the other side if they apply to discharge the order. But still the order is made *ex parte* without hearing them. It is a *prima facie* decision. I agree that before some other tribunal a *prima facie* decision may be a little different. The party affected by it may not be able to apply to set it aside. The case must go forward to a final decision. Here again, I think the tribunal itself is under what Lord Wilberforce described as a " residual duty of fairness ": see [1969] 3 W.L.R., at page 722(4). The tribunal is itself the custodian of fairness. If the members of the tribunal think that the evidence placed before them is so cogent and credible that they can fairly say, " This must go forward ", they can grant the application forthwith. But if they are in doubt, such as to say, "We think it would only be fair to the other side to hear them before letting it go forward ", then they should give them a chance to deal with it. F G H

(1) 45 T.C. 540; [1971] A.C. 297. (2) 45 T.C. 540, at p. 561.
(3) *Ibid.*, at pp. 553–4. (4) *Ibid.*, at p. 564. I

A I would insert a word or two here, in parenthesis. Although the tribunal in determining whether there is a *prima facie* case is itself the custodian of fairness, nevertheless its discretion is open to review. If it should refuse an application on a ground which is arbitrary or capricious the Court can intervene by mandamus or declaration: cf. *Reg* v. *Adamson* (1875) 1 Q.B.D. 201: or, if it should grant an application when there was no ground for it, or when they B clearly ought to have heard the other side, again the Court can intervene by prohibition or injunction. Needless to say, the Court would only intervene in extreme cases where the tribunal had gone wrong. But that the Court has power to intervene, I have no doubt.

Reverting to my thesis that in making a *prima facie* decision the tribunal itself is the custodian of fairness, I would hold that in this case the Commis- C sioner himself was entitled to give leave without hearing the taxpayer. If it were otherwise, I would ask, What is the result? Mr. Miller submitted that in every case the Commissioner is bound to hear the other side, or at any rate to give the other side an opportunity of contradicting or correcting statements to his prejudice. This duty is, he says, an absolute duty. So absolute, indeed, that, if not fulfilled, the whole proceedings are a nullity: not only bad, but D incurably bad. He recognises that if he is right every assessment which has been made hitherto with the leave of a Commissioner is a nullity: for in no case has the Commissioner given the taxpayer a chance of being heard. The assessment in *Day* v. *Williams*(1) was, he says, a nullity. I asked Mr. Miller: " What does this mean? Can the taxpayer who has paid under such an assessment get the money back? " He shied at the question. He suggested that it might be E money paid under a mistake of law and could not be recovered. I doubt it. In any case, I decline absolutely to believe that in every case hitherto the leave given by a Commissioner was a nullity. As a result of his leave, the case has gone forward. The taxpayer has not appealed: or, if he has, the appeal has been decided against him: and he has paid. It is impossible to suppose all this to be a nullity simply because the Commissioner did not invite the taxpayer to F a hearing.

So I hold that the Commissioner was not under an absolute duty to hear Mr. Pearlberg. He was only bound to act fairly, and that he did. He had before him the letter of the Inspector which set out these very cogent grounds: Mr. Pearlberg failed for twenty years—from 1937 to 1957—to make any returns at all of his income. Let it be assumed that during the war he had some excuse. G After the war the Revenue authorities served him year after year with notices to render returns of his income. None was received for any year until the year 1950–51, and that was not completed until 17th November 1957. The Inspector reckons that in the five years 1946–47 onwards tax was lost on sums amounting to over £300,000. Those facts were laid by the Inspector before the Commissioner. They afforded reasonable grounds for believing that tax may have been H lost to the Crown owing to the wilful default or neglect of Mr. Pearlberg. The facts were so strong that I think the Commissioner was entitled to give leave straight away. After all, the granting of leave only meant that the assessments would be made on Mr. Pearlberg. He was at perfect liberty to appeal against them to the Commissioners. Sir William Carr would not be one of those hearing the appeal. So the procedure was entirely fair throughout.

I

Conclusion

In the circumstances, I think the appeal fails: and it is unnecessary to consider the points in the cross-notice.

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(1) 46 T.C. 59.

Sachs L.J.—Under the provisions of s. 51 of the Finance Act 1960 a subject who has been guilty neither of fraud nor of wilful default may find himself cast with additional assessments reaching back on a potentially escalating time scale of six-year steps well beyond the normal six years laid down by s. 47 of the Income Tax Act 1952. So tortuous are those provisions—which we were told were intended to form a simplifying section—that at the end of the day I am still not clear whether in any given set of circumstances (and if so which set) the Revenue can go back 18 years, or to 1936, or quite indefinitely. Suffice it to say it is, as in the instant case (where the Revenue at present seeks by use of the " second six years " procedure to go back to the financial year 1946–47, thus incidentally raising the possibility of being able to claim to open up at any rate yet a further six years), for a daunting period; that all this procedure can be triggered off by an initial single act of neglect in the original " normal " year; and that neglect is so defined in s. 63 of the 1960 Act as to embrace some minor error over some relatively small sum. (Before 1952 neglect—other than wilful default—had provided no ground for going back beyond the six years.)

Such a formidable power ought obviously only to be exercised after careful consideration and with discretion in appropriate cases. As some safeguard against its unjustified use at the initial (" second six years ") stage the Legislature in 1964, when handing over hitherto unexampled powers to Inspectors of Taxes, enacted that, unlike the position as regards additional assessments made within the normal six years, they are not to have the power to make assessments under s. 51(1), (2) and (3) unless the leave of a Commissioner has previously been obtained. It is accordingly the Commissioner who is entrusted with the key to the gate which can open what may prove to be an almost limitless vista of examination of past years, and to a consequent potential flood of controversy with all its anxieties and all those expenses which the subject can never recover even if he is later proved right on all points. Section 6(1) of the Income Tax Management Act 1964, in so far as relevant, reads:

> " 6.—(1) An assessment to income tax made by virtue of any of the following enactments (which allow assessments out of time in cases of fraud, wilful default or neglect), that is —. . . (*c*) sections 51 and 52 of the Finance Act 1960 so far as they relate to an assessment for a year ending not earlier than six years before the end of the normal year mentioned in the said section 51 . . . may only be made with the leave of a General or Special Commissioner given on being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person."

The same provisions were applied, *inter alia*, to certain other provisions of other Acts concerned with fraud and wilful default.

In the present case it is submitted on behalf of the subject that upon the principles enunciated in *Wiseman* v. *Borneman*[1] [1969] 3 All E.R. 275 he is entitled to an opportunity to make representations to the Commissioner before the latter decides whether or not to give leave. That issue was not raised in *Day* v. *Williams* 46 T.C. 59, as determined by this Court on a Case Stated which was settled before *Wiseman* v. *Borneman* was decided. In *Day's* case, moreover, the subject appeared in person, and there is no sign of the Court's attention having been directed to the relatively recent speeches of the House of

(1) 45 T.C. 540.

A Lords: accordingly the judgments in *Day's* case(1) are solely concerned with the construction of the relevant Statutes—and whether the provisions of s. 51(7) of the 1960 Act could be imported into s. 6 of the 1964 Act. In those circumstances this Court is clearly entitled to consider the natural justice point—it is not the same as the construction point.

The first question for consideration is whether the Commissioner called B upon to decide whether to give leave is exercising a function akin to that of the tribunal whose position under s. 28 of the 1960 Act was examined in *Wiseman* v. *Borneman*(2). In each case the point to be considered is whether the Revenue has shown that there is a *prima facie* case for initiating a procedure which may result in the subject being held liable to taxation; in both cases an affirmative answer will lead to the commencement of a process which, win C or lose, will cause the subject trouble, anxiety and irrecoverable expense. If there is a variation in degree of responsibility it may well be that an examination of long past transactions resulting from the provisions of s. 51 may potentially be the more burdensome. I find no substance in any distinction drawn between the decisions being made by a single Commissioner as opposed to by a tribunal. Nor am I attracted by the submission that, despite the changes wrought by D the 1964 Act being revolutionary (to use Mr. Phillips's phrase), yet the functions of the General or Special Commissioner when giving leave under s. 6 of that Act should be judged as being in no way different from those of an Additional Commissioner when previously dealing with additional assessments under a different type of procedure. The function of the single Commissioner under s. 6(1) of the 1964 Act is thus in my judgment akin to that of the tribunal acting E under s. 28 of the 1960 Act. Has that function a judicial quality? It is the nature of what is directed by a Statute to be done rather than any label attached to it (see *Ridge* v. *Baldwin* [1964] A.C. 40 and the cases cited by Lord Morris at page 124) or the history of what previously happened that matters. Whatever label be given to it—and I would favour quasi-judicial—the decision to be made under s. 6(1) is clearly one of judicial quality and so is the consideration F to be given to making it. (Incidentally, I would find it more than difficult to hold that the giving of leave under s. 6(1) of the 1964 Act has no such character when that given under the parallel provisions of s. 51(5) and (7) manifestly has it.)

Next to be examined is the position of that function in that range of preliminary decisions referred to by Lord Wilberforce in the *Wiseman* case(3) G [1969] 3 All E.R., at page 285, coupled with the question whether it is one where natural justice calls for an opportunity to be given to the subject to make representations before a decision is reached. It is appropriate first to consider what would be the answer if there was not available to the Crown what may be termed the exclusion argument, which I will examine later in this judgment. To this end one can, for instance, assume that s. 6 dealt solely H with cases arising under s. 47(1) of the 1952 Act and that neither s. 51 of the 1960 Act nor any other relevant section contained provisions such as those of s. 51 (7). On that basis it again seems to me that the functions of the single Commissioner are so much akin to those of a tribunal acting under s. 28 of the 1960 Act and are of such a considerable responsibility that following the reasoning in the *Wiseman* case the subject must obviously be entitled to I an appropriate opportunity to make representations to the Commissioner upon such material as the Inspector may have submitted. For the Crown

(1) 46 T.C. 59. (2) 45 T.C. 540. (3) *Ibid*, at p. 561.

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it is submitted that in such a case as the present the Inspector can obtain leave by submitting to the Commissioner some statement without even informing the subject that application for leave is being made—and, *a fortiori*, without telling him the grounds being advanced. Moreover, the subject would have no opportunity to seek to have the leave set aside before the floodgates of controversy on the past years fell to be examined in full. This would leave the subject at the mercy of representations by the Inspector which were inadvertently inaccurate or which omitted facts which the Inspector did not know or which he erroneously considered irrelevant. If and in so far as discretion may be involved the Commissioner might be left without essential material. When one bears in mind the number of back years that may in due course be involved, there seem to be really strong grounds for saying that the subject should in all fairness have (to adapt the words of Lord Wilberforce [1969] 3 All E.R., at page 285D[1] " the opportunity of eliminating, in limine, a claim which may otherwise have to be fought expensively ", not to mention the time, trouble, and anxieties involved. Accordingly in my view the principles to be found in *Wiseman's* case[2] are, on the basis adopted at this stage of examining the position, applicable: and on that footing the subject should plainly in fairness and natural justice be given an opportunity to make representations before a decision is given.

There thus only remains for consideration the exclusion point. Does the fact that by s. 51(4) to (7) of the 1960 Act provision is made that on an application for leave the subject is entitled to *appear and be heard* before leave is given, whereas in s. 6(1) of the 1964 Act there is no such parallel provision, result in the exclusion in the latter section of the subject's *prima facie* right in natural justice to some opportunity to eliminate the Revenue's claim *in limine*? As I understand the principles laid down in the *Wiseman* case and in the others cited to us, the application of an otherwise appropriate rule of natural justice is only to be regarded as excluded if the Legislature expressly so states or if there is a clear implication to that effect. In the instant case there is no express exclusion, and accordingly the question is whether there has been manifested a clear implication. When examining this question it is necessary in this Court to accept the decision in *Day* v. *Williams*[3] on the construction to be applied to s. 6(1) of the 1964 Act, a point on which no arguments were addressed to this Court. It thus follows that, by some unfathomable process of—or I suspect confusion of—thought, when a case of fraud or wilful default is laid against the subject under s. 47(1) of the 1952 Act, under which there is no limitation whatsoever of the period for which the Revenue may go back (save the limit of 1936 imposed by s. 528(3) of that Act—following the 1936 limit originally introduced for such cases by s. 33 of the Finance Act 1942) he has no right to appear and be heard *in limine:* on the other hand, if fraud or wilful default is laid against him under s. 51(4), (5) and (6) of the 1960 Act, by which the period for the Revenue to go back is regulated by an escalating time scale, then he is entitled thus to appear and be heard. Naturally I am in full agreement with the adverse comments of Russell and Salmon L.JJ. on this point. It can only be a matter of speculation as to how this odd distinction came to be proposed, but it is at any rate possible that the Commissioners referred to in s. 51(7) had by 1964 found the burden of listening to the subject in person or his representative less acceptable than do the Courts, which are more accustomed to hearing them. There has naturally been no argument addressed to us on this point of construction, and I prefer

(1) 45 T.C. 540. at p. 561. (2) 45 T.C. 540. (3) 46 T.C. 59.

A not to discuss further a matter which I am bound to assume has been correctly decided.

I accordingly turn first to the submission on behalf of the Crown that the difference between the wording of that part of s. 6(1) of the 1964 Act which reads:

> " with the leave of a General or Special Commissioner given on being B satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person "

and that of so much of s. 51(5) of the 1960 Act as reads:

> " it appears to the General or Special Commissioners, on an application made to them . . . that there are reasonable grounds for believing that C tax . . . was or may have been lost to the Crown owing to the neglect of that person, they may give leave for the making on him of an assessment . . . "

is such as to assist the implication of exclusion. For my part, the relevant wording of s. 6(1) appears to do no more in substance than to set out in words what an Inspector would be bound to do to satisfy the Commissioners under D s. 51(5) of the earlier Act that leave should be given. I find it quite unsafe to base any conclusion on the difference in wording. On the basis of the conclusion in *Day* v. *Williams*(1) there is, however, undoubtedly some distinction intended by the Legislature between the procedure to be adopted when leave is sought under s. 6(1) of the 1964 Act as opposed to that when leave is sought under s. 51(4) of the 1960 Act. It seems reasonably clear that the Legislature E did not intend the Commissioner normally to be burdened by the parties *appearing and being heard*. That, however, does not necessarily conclude the matter. When one examines the tenor of all the speeches in *Wiseman's* case(2) (e.g. Lord Wilberforce, [1969] 3 All E.R., at page 285E(3)) it would appear that laying down some specific form of procedure to be followed by a tribunal does not exclude its being bound to follow the dictates of natural justice on F other points closely touching that specified procedure. Indeed, otherwise the whole of the argument which was so carefully examined in that case would have been otiose. The dominant reason why in that case it was decided that the subject did not have a right to reply to the Revenue's counter-statement was that such a reply could normally not serve a sufficiently useful purpose in the circumstances. It seems to me that if *inclusion* of some specific form G of procedure does not exclude the general right of the subject to natural justice, then the mere *omission* of the Legislature to provide a specified form of procedure (e.g. involving an appearance and hearing) does not necessarily exclude the subject altogether from a right in natural justice to make representations *in limine*. It may still be open to him to ask the Courts to say that other forms of making representations (e.g. in writing) are not excluded. In this behalf H one must remember that adjudications upon written representations can normally be made and examined by a relatively speedy and undemanding process—though sometimes it might be necessary for the Commissioner to make certain further enquiries for the purpose of achieving a just result.

It thus seems to me a very evenly balanced question whether the Legislature intended a complete exclusion of the subject's right in natural justice to have I some opportunity of making representations. The difficulty of finding the

(1) 46 T.C. 59. (2) 45 T.C. 540. (3) *Ibid.*, at p. 561.

(Sachs L.J.)

correct answer is increased by the fact that in 1964 it was probably not appreciated either by the draftsman or by the Legislature that preliminary hearings might to some extent be the subject of rules of natural justice similar to those of final proceedings: and it may be argued that the Legislature should not be deemed to have excluded rights which they did not have in mind. In these circumstances my views as to the answer fluctuated more than once both during the hearing before the Court and also afterwards when the issue fell to be considered on an analysis of the submissions that had been made. In the end I have, with some hesitation and regret, come to the conclusion that the omission in s. 6(1) of any reference to a right to make *in limine* representations contrasts so strikingly with the right given by s. 51(7) that the Crown's submission should be upheld and the appeal should accordingly be dismissed. A B

Thus the question does not arise as to what would be the effect of a contrary conclusion on the proceedings in the instant case or in cases where the Revenue has collected tax upon additional assessments. That question was only lightly touched on *arguendo* and no authorities cited, so it would serve no useful purpose for me to express a view on the position. I would merely observe that conflicting views have been expressed on this question in cases of high authority. C

Buckley L.J.—Under the Income Tax Act 1952, s. 36, assessments under Schedule D were normally made by Additional Commissioners. Under s. 12 of the Act one Additional Commissioner was competent to act for this purpose. Under s. 47(1) the time within which an assessment was required to be made in a normal case was not later than six years after the end of the year to which the assessment related; but under the proviso to that subsection in any case of fraud or wilful default an assessment for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default since the fiscal year 1935–36 (see s. 528(3)) could be made at any time. Under s. 47(3) an objection to an assessment on the ground that it was made out of time could only be taken on appeal from the assessment. D E

By the Finance Act 1960, s. 51, power was given for the first time to make assessments more than six years after the time to which they related for the purpose of making good to the Crown a loss of tax attributable to neglect on the part of the taxpayer not involving fraud or wilful default. The relevant provisions of that section have already been read, and I will not repeat them. Under subss. (1) and (3) an assessment could be made for any year ending within six years before the end of the " normal year ". The effect of this was to allow the making of assessments for the purpose of making good to the Crown a loss of tax attributable to neglect over a maximum period of twelve back years. Thus, for example, if an assessment were made on 5th April 1967 for the purpose of making good to the Crown a loss of tax wholly or partly attributable to fraud, wilful default or neglect in respect of the fiscal year 1960–61, ending 5th April 1961, the last-mentioned fiscal year would constitute a "normal year" for the purposes of s. 51(1). In these circumstances an assessment could be made under the section in respect of any year ending not earlier than six years before the end of that normal year, that is to say, ending not earlier than 5th April 1955. So an assessment could be made for the year 1954–55. An Additional Commissioner could make such an assessment of his own initiative and without seeking the approval or leave of anyone else. If, however, the circumstances require the making of an assessment in respect of a year ending earlier than six years before the end of the normal year, such an assessment can only be made under s. 51(4) with the leave of the General or Special Commissioners given under the section. A quorum for this purpose is two General or F G H I

A Special Commissioners: Income Tax Act 1952, s. 12. The circumstances in which the General or Special Commissioners can give such leave are set out in s. 51(5). There must have been an assessment for a year referred to as " an earlier year " made more than six years after the end of that earlier year on the ground of (*a*) neglect or (*b*) fraud or wilful default, and it must appear to the General or Special Commissioners on an application made within a limited time B that there are reasonable grounds for believing that tax for a year ending not earlier than six years before the end of the earlier year was or may have been lost to the Crown owing to the neglect of the taxpayer. Section 51(7) provides that on any application for such leave the person to be assessed shall be entitled to appear and be heard.

In 1964 the Income Tax Management Act of that year remodelled the C administrative provisions relating to the assessment and collection of income tax. The office of Additional Commissioner was abolished. By s. 5 of the Act it was provided that, save where assessments were required to be made by the Board—that is to say, the Commissioners of Inland Revenue—assessments to income tax should be made by Inspectors. Section 6 required that certain assessments which hitherto could have been made without leave should be D made only with the leave of a General or Special Commissioner given on such Commissioner being satisfied by an Inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person. Section 6 of the Act of 1964 applies to any assessment made under s. 51(3) of the Act of 1960. Accordingly the making of an assessment under s. 51(3) of E the Act of 1960 become in 1964 for the first time subject to the requirement of leave of a General or Special Commissioner.

In the present case both the years 1950–51 and 1951–52 were " normal years " for the purposes of s. 51 of the 1960 Act. The assessments under consideration relate to the years 1946–47 to 1950–51 inclusive, and all fall within six years before the normal years. The case comes within s. 51(3) and F not within subs. (4). But for s. 6 of the 1964 Act no leave would have been required to justify the making of the assessments, but the assessments could not be made without leave under that section. The Defendant Inspector applied to the General Commissioners for leave under the section to make the assessments, and leave was given by one of the General Commissioners. The Inspector's application for leave was made in writing. There was no hearing. G The General Commissioner's leave was given in writing on 25th January 1968. In the meantime the Plaintiff's advisers, having been informed of the Inspector's intention to apply for leave, wrote to the Inspector asking to be notified of the hearing (which they apparently presumed would take place) because, as they stated, the Plaintiff wished to appear and be heard. The Inspector did not reply directly to this part of the Plaintiff's solicitors' letter, but in his reply said: H " If the Commissioners agree to the making of these assessments, you will of course receive notices in the usual way and have the right of appeal against them." In the event the Plaintiff had no opportunity of being represented before the General Commissioner or of being heard by him or of making any representations to him in any manner. In these circumstances and on this particular ground the Plaintiff now asserts that the assessments are nullities.

I The Appellant concedes that in this Court he cannot contend that upon the true construction of s. 51 of the 1960 Act and s. 6 of the 1964 Act the sections either expressly or inferentially require as a matter of statutory enactment that he should be allowed to appear before the Commissioner or to be heard by him.

(Buckley L.J.)

The contrary was decided, and in my view rightly decided, in *Day* v. *Williams* 46 T.C. 59. *A fortiori* it cannot, I think, be successfully contended in these circumstances that the sections require that the Appellant should be allowed some other kind of opportunity, as for instance by written submissions, of putting forward his case to the Commissioner. It is said, however, that, in so far as the sections make no such provision, this void will be filled by operation of legal principles of natural justice, which Byles J. in *Cooper* v. *Wandsworth Board of Works* (1863) (14 C.B. N.S. 180, at page 194) called " the justice of the common law ". This line of argument was not presented or considered in *Day* v. *Williams* and is unaffected by that decision. Reliance is placed on the House of Lords decision in *Wiseman* v. *Borneman*(1) [1969] 3 W.L.R. 706. The House there had to consider a reference to the tribunal established for the purposes of the Finance Act 1960, s. 28. It was common ground in that case that the tribunal in question was a judicial body. The learned Lords recognised that natural justice requires that the procedure before any tribunal acting judicially shall be fair in all the circumstances, but they reached the conclusion that the statutory procedure prescribed by the section, which affords the taxpayer an opportunity of putting forward his case in a statutory declaration, gave him a sufficient opportunity of stating his case to the tribunal, who were only concerned with whether *prima facie* liability under the section was made out, and that in the circumstances fairness did not require that the taxpayer should also see and have a chance of commenting on any counter-statement put before the tribunal by the Commissioners of Inland Revenue.

It is said that, just as in the case of a tribunal under s. 28 of the 1960 Act the question for determination by the tribunal is whether a *prima facie* case of liability is made out, so also the question for determination by a Commissioner on an application for leave under s. 6 of the 1964 Act is whether a *prima facie* case is made out that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of the taxpayer. It is said that in considering this question the Commissioner is acting judicially in as true a sense as a tribunal under s. 28 of the Act of 1960 acts judicially or as the General or Special Commissioners act judicially in considering an application for leave under s. 51(4) of the 1960 Act. In determining whether these principles of natural justice apply in a particular case a prime consideration is, I think, whether the person or body who has to decide whatever question is involved will be acting judicially or quasi-judicially or whether he will be acting merely administratively. As Lord Reid pointed out in *Wiseman* v. *Borneman*(2) [1969] 3 W.L.R., at page 710, not every decision as to whether a *prima facie* case exists is a judicial decision. He said:

> " Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

At page 718(3), Lord Wilberforce said:

> " . . . I cannot accept that there is a difference in principle as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a *prima facie* case for taking action. The suggestion that there is

(1) 45 T.C. 540. (2) *Ibid.*, at p. 554. (3) 45 T.C. 540, at p. 561.

A some such difference which was sought to be extracted from the decision of the Court of Appeal and from the later case of *Parry-Jones* v. *Law Society*[1] is one that I cannot accept. Even if there were anything to be said in favour of treating one class of decision in a different manner from the other, this would be of little value, so great is the range of difference between *prima facie* decisions themselves. At one end, the decision may B be merely that of an administrative authority that a *prima facie* case exists for taking some action or proceedings as to which the person concerned is to be able in due course to state his case; at the other end, a decision that a *prima facie* case has been made out may have substantive and serious effects as regards the person affected as by removing from him an otherwise good defence . . . or by exposing him to a new hazard, C or as when he is prevented, however temporarily, from taking action which he wishes to take."

So it is, in my opinion, relevant in the present case to consider primarily whether a Commissioner who grants leave to make assessments under s. 6 of the 1964 Act is acting administratively or in a judicial or quasi-judicial capacity.

The judicial character of the tribunal under consideration in *Wiseman* v. D *Borneman* is in my opinion indisputable. Section 28 provides statutory machinery enabling the taxpayer and the Commissioners of Inland Revenue to place their respective contentions before the tribunal. The function of the tribunal is to decide an issue, where one arises, between these parties, albeit on a *prima facie* basis. So also I think there can be little doubt that the General or Special Commissioners act judicially when they give leave under s. 51(4) E and (5) of the Act of 1960 to make back assessments. This is apparent from the fact that s 51(7) gives the taxpayer the right to appear and be heard. The draftsman of s. 6 of the 1964 Act must have had the provisions of s. 51 of the 1960 Act in mind when he drafted s. 6. It is in my judgment very significant that he did not put into s. 6 any provision corresponding to s. 51(7) of the 1960 Act or anything which would have made s. 51(7) applicable to applications for F leave under s. 6. It is a reasonable inference, I think, that it was not envisaged that a Commissioner when giving leave under s. 6 would be acting judicially.

It is in my opinion instructive to compare the position in respect of assessments made under s. 51(3) of the 1960 Act before 1964 with the position in respect of such assessments after the Act of 1964 came into force. With a view to assessment under Schedule D, the surveyor, as Inspectors of Taxes were then G designated, laid a statement of the profits or gains of a taxpayer under Schedule D before the Additional Commissioners. These statements were considered by the Additional Commissioners at meetings appointed for that purpose. The quorum for any such meeting was one Additional Commissioner. If the assessment was one to be made under s. 51(3) of the 1960 Act the Commissioner had to satisfy himself that the assessment was for the purpose of making good to the H Crown a loss of tax attributable to the taxpayer's neglect. At any meeting of Additional Commissioners convened for the purpose of considering statements of profits or gains under Schedule D the surveyor might make objections to any such statement, but subject thereto the Additional Commissioners were directed by s. 36 of the Income Tax Act 1952 to make an assessment in accordance with the statement, if they were satisfied that it had been made in good faith and if they I had no information as to its insufficiency. It has not been suggested to us, and in my opinion could not properly be suggested, that an Additional Commissioner in making such an assessment was acting otherwise than in a purely

[1] [1969] 1 Ch. 1.

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administrative capacity. I do not forget the fact that it has been said that the rules of natural justice may apply to cases where the act in question is more properly described as administrative than judicial or quasi-judicial: see *Ridge* v. *Baldwin* [1964] A.C. 40 and *Schmidt* v. *Secretary of State for Home Affairs* [1969] 2 Ch. 149; but I have never heard it suggested that a Commissioner or Commissioners making an assessment under the 1952 Act were obliged to give the taxpayer an opportunity of being heard before they did so. The act of making the assessment in my opinion fell within that class referred to by Lord Wilberforce in *Wiseman* v. *Borneman*[1] as decisions of an administrative authority that a *prima facie* case exists for taking some action or proceedings as to which the person concerned is to be able in due course to state his case. So before 1964 an assessment under s. 51(3) of the 1960 Act was made or could be made by a single Additional Commissioner upon information placed before him by the surveyor and after hearing any comments upon that material which the surveyor thought fit to make to the Commissioner, but the taxpayer was not entitled under any requirement of natural justice to receive notice of the proceedings before the assessment was made or to have any opportunity of putting forward any submissions to the Commissioner. Since 1964 it is for the Inspector of Taxes in the first place to determine whether the circumstances justify an assessment under s. 51(3) of the 1960 Act, and it is he who eventually as a matter of form makes the assessment. He cannot, however, make such an assessment without obtaining the leave of a Commissioner. A Commissioner to whom any such application for leave is referred must satisfy himself that the assessment is for the purpose of making good to the Crown a loss of tax attributable to the taxpayer's neglect. He must satisfy himself that it is a proper case for an assessment under s. 51(3). Although differing from the position before 1964 in some procedural respects, the post-1964 position is in substance exactly parallel to the pre-1964 position. It would not be surprising if the Legislature had thought that the function of the Commissioner in granting leave under s. 6 of the 1964 Act was exactly analogous to that of the Additional Commissioner making an assessment before 1964. In my judgment, s. 6 contains indications that this is precisely the case.

In the first place, the leave of only one Commissioner is required by s. 6, whereas an application for leave under s. 51(4) of the 1960 Act must come before a meeting of General or Special Commissioners consisting of two or more Commissioners. Secondly, under s. 6 the leave of the Commissioner is to be given on his being satisfied by an Inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of the taxpayer. This language would, I think, at least be inept if the intention was that the Commissioner should decide any possible issue arising between an Inspector or other officer of the Board on the one hand and the taxpayer on the other. Thirdly and most importantly, s. 6 contains no language making an application for leave under that section subject to the requirements of s. 51(7) of the 1960 Act, nor does s. 6 itself contain any express provision that the taxpayer shall be entitled to appear or be heard such as is found in s. 51(7). These circumstances, in my opinion, all point to a conscious differentiation by the draftsman of s. 6 and by the Legislature between an application for leave under that section and an application for leave under s. 51(4) of the 1960 Act, and between the functions of the Commissioner giving leave under the former section and of the Commissioners giving leave under the latter.

If upon the true interpretation of s. 6 the Legislature intended inferentially to exclude any right of appearance or of being heard or of making representa-

(1) 45 T.C. 540, at p. 561

A tions on the part of the taxpayer on an application for leave under that section, that is the end of the matter. I am inclined to take this view, but I think it is right to consider whether this would lead to any manifest unfairness to the taxpayer. I do not think that this can be said to be so. Assuming it to be right that the taxpayer is not entitled to any form of hearing on an application for leave under s. 6, he is in no worse position than he was before the commencement B of the 1964 Act. Under that Act he was not entitled to any kind of hearing before an assessment was made under s. 51(3) and yet this was not thought to be unfair. He is, of course, entitled to appeal against any assessment when it has been made. In 1960 the Legislature thought it fair to give to a taxpayer against whom an assessment was proposed to be made under s. 51(4) an opportunity of being heard before the assessment could be signed, but it was not thought C unfair at the same time to confer no like privilege upon a taxpayer against whom an assessment was proposed to be made under s. 51(3); nor has a taxpayer against whom an assessment is proposed to be made on the ground of fraud or wilful default under the proviso to s. 47(1) of the 1952 Act ever been accorded a right to be heard before the assessment was made. Accordingly, in my judgment, there was nothing unfair in the Commissioner in the present case D granting leave for the making of the assessment without first giving the taxpayer an opportunity of making representations to him. Consequently I agree that this appeal should be dismissed.

A point was taken by the Crown under s. 47(3) of the 1952 Act, which, so far as relevant, is in the following terms: " An objection to the making of any assessment to income tax on the ground that the time limited for the making E thereof has expired shall only be made on appeal from the assessment ". It was said that in order to avoid these assessments the onus would be upon the taxpayer to show (*a*) that they were made out of time and (*b*) that they were not duly made in accordance with the requirements of s. 51 of the 1960 Act and s. 6 of the 1964 Act. It would thus, it was said, be incumbent on the taxpayer to take an objection on the ground that the assessments were made out of time. F I find myself unimpressed by this argument. It must appear on the face of the assessments that they were made outside the six-year time limit prescribed by s. 47(1) of the 1952 Act. The proviso to that subsection is not applicable in the present case, for no suggestion of fraud or wilful default is made. Accordingly the assessments can only be justified if they are made under the provisions of s. 51 of the 1960 Act and s. 6 of the 1964 Act. Under the latter section they could G only be made with the leave of a Commissioner, and the only objection that the taxpayer need take, if he can take it successfully, is that no effective leave was ever obtained. The objection to the assessments would therefore be, not that they were made out of time, but that they were never properly made at all.

Lord Denning M.R.—The appeal will be dismissed.

Warner—My Lord, I ask that it should be dismissed with costs.

H **Lord Denning M.R.**—That follows—dismissed with costs.

Miller—My Lord, I cannot resist my learned friend's application; but my instructions were that, notwithstanding the very fair and full hearing your Lordships gave, in the event of your Lordships' judgment being against the appeal, I should ask for leave to appeal to the House of Lords. If your Lordships wish to hear me very briefly on that, there are points I would seek to I make in support of that application. First of all, from the general public point of view, the character of the functions discharged by the Commissioners in a case of this sort is of great public importance and has given rise to some

divergence of opinion between the members of your Lordships' Court. I have not yet had a full opportunity of studying your Lordships' judgments, but it is at present my impression that Buckley L.J. was taking the view that the function was an administrative one; whereas Sachs L.J. gave me the impression that it would be at least quasi-judicial; and I think it was inherent in your Lordship's judgment that your Lordship was considering it from that point of view; because, of course, had the decision been regarded by your Lordship as being an administrative one, no question I think would have arisen.

(*The Court gave leave to appeal on the Plaintiff's undertaking to prosecute the appeal with all possible expedition.*)

The Plaintiff having appealed against the above decision, the case came before the House of Lords (Lord Hailsham of St. Marylebone L.C., Viscount Dilhorne and Lords Pearson, Cross of Chelsea and Salmon) on 14th and 15th February 1972, when judgment was reserved. On 22nd March 1972 judgment was given unanimously in favour of the Crown, with costs.

Michael Miller and *Michael Mark* for the Plaintiff.

Leonard Bromley Q.C. and *J. P. Warner* for the Crown.

The following cases were cited in argument in addition to those referred to in the speeches:—*Rex* v. *Housing Appeal Tribunal* [1920] 3 K.B. 334; In re *Pergamon Press Ltd.* [1971] Ch. 388; *Dean* v. *Wiesengrund* [1955] 2 Q.B. 120.

Lord Hailsham of St. Marylebone L.C.—My Lords, the facts leading up to the appeal in these proceedings are stated in the opinion about to be delivered by my noble and learned friend Viscount Dilhorne.

The point, and the only point, at issue in the appeal is whether the taxpayer has a right of audience before, or a right to make written representations to, the single Commissioner before he gives leave under s. 6(1) of the Income Tax Management Act 1964 to raise back assessments on an application of the Inspector of Taxes or other officer of the Board made under that section. The Appellant argues in favour of such a right on the basis of natural justice, or, as it was called by Byles J. in *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.N.S. 180, at page 194, " the justice of the common law ". I am decisively of the opinion that the section affords no such right, and because I so wholly agree with the judgment of Buckley L.J. in the proceedings before the Court of Appeal, and with the opinions of my noble and learned friends, particularly those of Lord Pearson and Viscount Dilhorne, about to be delivered, I will content myself with a few short observations on my own account. A number of factors have influenced my opinion. None of them, in the absence of the others, would be conclusive. But the totality is cumulative, and in the absence of countervailing points is in my view decisive in the result.

First amongst the factors influencing me I must mention the language of s. 6 of the Income Tax Management Act itself. There are two points here to be made. First, subs. (1), which provides that the late assessments to which the section applies can only be raised by leave of a single General or Special Commissioner, makes no reference to a right of audience or to make representations, and, read grammatically, is rather consistent than otherwise with the view that the only person whose views are to be before the Commissioner

A is the Inspector or other officer of the Board. I would not attach so much importance to this factor if I thought that the result of excluding the right to a hearing would be to produce a substantial injustice to the taxpayer—which, as I shall show, it does not—or if the contrast between the language of s. 6 and the statutory procedures existing before that section was enacted did not make it quite obvious, at least to me, that the draftsman's omission of B mention of any right to make representations was deliberate and that the procedure envisaged the exclusion of any such right.

The second point to note about the language of s. 6 of the Act of 1964 is the disqualification imposed by subs. (2) on the single Commissioner giving leave from any part in the subsequent proceedings—even extending the prohibition to his presence thereat—if the taxpayer subsequently appeals against C the assessments which he has allowed. I can see no reason for this exclusion unless the draftsman envisaged that the application for leave prescribed by subs. (1) was to be *ex parte*, and that the Commissioner's function, although in a sense judicial in character, in that the Commissioner must be satisfied on evidence, was to be administrative to the extent that the taxpayer had no right of audience or representation. It was thus improper for the single D Commissioner, with his mind so influenced by material adduced in the taxpayer's absence, to participate in the subsequent proceedings at which the function was judicial.

This brings me to the next factor which influences my opinion, and that is the contrast between the language of the section under discussion and the language both of s. 51 of the Finance Act 1960, which preceded it and still E governs back assessments to which s. 6 of the Act of 1964 does not apply, and, for instance, s. 28 of the same Act, which was considered in *Wiseman* v. *Borneman*(1) [1971] A.C. 297, and which provides a system of written statement and counterstatement by the taxpayer to which, or to something like it, the draftsman of s. 6 of the Act of 1964 might well have had recourse had he desired to provide for a right to make representations.

F The more relevant contrast, however, is that between the provisions of s. 51 of the Finance Act 1960 and s. 6 of the Income Tax Management Act 1964. Prior to the Finance Act 1960 late assessments of the kind under discussion could be made only in case of fraud and wilful default, and these did not require leave before they were raised. Section 51 of the Finance Act 1960 introduced for the first time provision for late assessments in the case of neglect. G At this time the raising of assessments was a function of the Commissioners and not of the Inspector. In practice an assessment was made by a Commissioner, in the relevant cases normally an Additional Commissioner. Late assessments in the case of neglect, as distinct from fraud or wilful default, could be made without leave of any kind in respect of any year within the first period of six years before the "normal year". For any earlier period H of six years the leave of the General or Special Commissioners was required, and, on an application for such leave, a full oral hearing was required by s. 51(7), at which the taxpayer was entitled to be present and take part. The hearing would be before a quorum of a minimum of two Commissioners, and these are not subject to the disability imposed by s. 6 of the Income Tax Management Act 1964 on the single Commissioner, and thus are able to take I part in any subsequent proceedings on the hearing of an appeal from the assessment. This, presumably, was because they had heard both sides and were acting judicially. I do not mean by this that they ordinarily do take part

(1) 45 T.C. 540.

(Lord Hailsham L.C.)

in the subsequent proceedings, or should necessarily be encouraged to do so. A I simply point out that there is nothing in the Statute to prohibit them from doing so. A late assessment for a year within the first period of six years before the " normal year ", raised, as I have said, ordinarily by an Additional Commissioner and requiring no leave, was made under s. 51(3). It was conceded that the function of this Commissioner at this date in raising the assessment was administrative and not judicial, and that the taxpayer was not entitled B to be heard or make representations. It is this function which was superseded by s. 6 of the Income Tax Management Act 1964, which is now under discussion. Late assessments on the ground of fraud or wilful default continued under the Finance Act 1960 to be made, as before, without leave under the Income Tax Act 1952, s. 47(1) proviso and s. 229(3) proviso.

To understand the changes in the procedures introduced into the law by C the Income Tax Management Act 1964 it is necessary to remember that the policy was to transfer to the Inspector the function of raising assessments, which had hitherto been a function of the Commissioners. This transfer meant that Parliament thought it necessary to provide a fresh safeguard for the taxpayer where before the change a late assessment could be made by a Commissioner without leave. It was not thought right in such circumstances D that a late assessment should be made by the Inspector without reference to a Commissioner. Where, however, the Act of 1960 provided that leave was necessary but could only be given by two Commissioners after a full judicial hearing under s. 51(7) no such additional protection was necessary. But where a single Commissioner could raise late assessments without leave either by virtue of s. 51(3) or by virtue of the provisos to ss. 47(1) and 229(3) of the E Income Tax Act 1952 or by virtue of s. 53 of the Act of 1960 (which deals with the case where the taxpayer at fault had died) so much of the Commissioner's function was retained as to demand that the Inspector, whose function it was now to raise the assessment, had to obtain the leave of the single Commissioner before he did so and satisfy this Commissioner that he had a *prima facie* case for so doing. By this Parliament neither converted nor intended to convert F the function of giving leave into a judicial hearing. This is the clue to the apparent contrast between the language of s. 6 of the Act of 1964 and s. 51 of the Act of 1960. It follows from this that I do not agree with Sachs L.J. in regarding the contrast as illogical. Nor, incidentally, do I find the code contained in these clauses so difficult to follow as did Russell and Salmon L.JJ. in *Day* v. *Williams* (1969) 46 T.C. 59, where the point was discussed G before them by a litigant in person, and decided, correctly in my opinion, but without hearing counsel for the Crown, who could have expounded the matter more fully. The sections in question are, in my opinion, complicated but neither illogical nor obscure.

The third factor which affects my mind is the consideration that the decision, once made, does not make any final determination of the rights of H the taxpayer. It simply enables the Inspector to raise an assessment, by satisfying the Commissioner that there are reasonable grounds for suspecting loss of tax resulting from neglect, fraud or wilful default, that is that there is a *prima facie* probability that there has been neglect, etc., and that the Crown may have lost by it. When the assessment is made the taxpayer can appeal against it, and on the appeal may raise any question (*inter alia*) which would have I been relevant on the application for leave, except that the leave given should be discharged. It is true, of course, that, as was said repeatedly in *Wiseman* v.

A *Borneman*(1) [1971] A.C. 297, the fact that a decision is only that a *prima facie* case has been made out is not itself a reason why both parties should not be heard. But it is a significant factor. As Lord Reid observed in that case, at page 308(2):

> " It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether B there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party. Even where the decision C is to be reached by a body acting judicially there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him."

With that observation I respectfully agree. As in that case, I do not think that the provisions of the section read as I have read them involve any substantial injustice to the subject.

D Despite the majestic conception of natural justice on which it was argued, I do not believe that this case involves any important legal principle at all. On the contrary, it is only another example of the general proposition that decisions of the Courts on particular Statutes should be based in the first instance on a careful, even meticulous, construction of what that Statute actually means in the context in which it was passed. It is true, of course, E that the Courts will lean heavily against any construction of a Statute which would be manifestly unfair. But they have no power to amend or supplement the language of a Statute merely because on one view of the matter a subject feels himself entitled to a larger degree of say in the making of a decision than the Statute accords him. Still less is it the function of the Courts to form first a judgment on the fairness of an Act of Parliament and then to amend or F supplement it with new provisions so as to make it conform to that judgment. The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases. As Tucker L.J. observed in *Russell* v. *Duke of Norfolk* G [1949] 1 All E.R. 109, at page 118, in a passage repeatedly cited with approval in your Lordships' House:

> " There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal H is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

The taxpayer in this case will be given a reasonable opportunity of present- I ing his case at the proper time, if not at the stage he demanded it, that is when the proceedings had not yet reached the point of judicial determination. If

(1) 45 T.C. 540. (2) *Ibid.*, at pp. 553–4.

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this comes a little late for his liking, it is at least in part because he thought it fit to make no income tax returns at all from 1936 to 1957, although he was repeatedly invited by the Revenue authorities to do so by the service of the statutory notices, at least in the years of assessment relevant to this appeal. A

In my view this appeal should be dismissed with costs.

Viscount Dilhorne—My Lords, on 19th December 1967 the Respondent, Her Majesty's Inspector of Taxes, wrote to the Clerk to the Commissioners of Taxes for the Chelsea Division seeking to obtain the leave of a Commissioner to the raising of assessments on the Appellant for each of the years 1946–47 to 1950–51 inclusive for income tax and for each of the years 1946–47 to 1949–50 inclusive for surtax. For the year 1948–49 it was sought to make an assessment of £314,634 for income tax and £314,963 for surtax. In his letter the Inspector asserted that no income tax returns had been made by the Appellant for any of the years 1936–37 to 1950–51 inclusive; that statutory notices requiring the Appellant to make returns had been served upon him but that the only return that he had made was for the year 1950–51 and that had been made on 17th November 1957. As the Crown was not called on to reply to the arguments advanced on behalf of the Appellant, they had no opportunity of explaining why it was that in this case the Appellant had been allowed to ignore the statutory notices served upon him and to fail to make returns of his income for the years in question. It may be that there were good reasons, but it must surely be unusual for this to happen and for a taxpayer to be allowed until 1957 to make a return of his income for 1950–51, and unusual, one hopes, for the Revenue to seek to raise assessments for years so long ago. B C D

Prior to the passage of the Finance Act 1960 such assessments could only be made where there had been fraud or wilful default. Sections 47(1) and 229(3) of the Income Tax Act 1952 permitted assessments for income tax and for surtax to be made E

> " at any time not later than six years after the end of the year to which the assessment relates or the year for which the person liable to income tax ought to have been charged " F

and provided that

> " where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments . . . to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be . . . made as aforesaid at any time." G

By the Finance Act 1960, s. 51, power was given to make assessments for the purpose of making good to the Crown a loss of tax attributable to neglect on the part of the person assessed, assessments which but for the provisions of the section would be out of time. This section did not affect the right to make assessments on account of fraud or wilful default at any time, and the power to make an assessment on account of neglect for a year earlier than six years before the date of the making of the assessment was only exercisable on certain conditions being fulfilled. Only if an assessment had been made on a person on account of fraud, wilful default or neglect for a year not more than six years before the time of making the assessment (referred to as " the normal year ") could any assessment on account of neglect be made for a year more than six years ago. If that had been done, then assessments could be made for any year not more than six years before the normal year; but H I

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A only assessments for the purpose of making good to the Crown a loss of tax due to the taxpayer's neglect. Such assessments could only be made not later than the end of the year of assessment following that in which the tax covered by the assessment for "the normal year" was finally determined: s. 51(1), (2) and (3).

An assessment for a year earlier than six years before the normal year B could only be made to recover tax lost through a taxpayer's neglect on further conditions being satisfied. Where an assessment on account of neglect or fraud or wilful default had been made for a year, called "the earlier year", in the six years preceding the normal year, then with the leave of the General or Special Commissioners an assessment for the purpose of recovering tax lost by neglect could be made for any year in the six years preceding the year C for which the assessment on account of fraud, wilful default or neglect had been made. If such an assessment was made for any year in those six years then, with the consent of the Commissioners, assessments for a year in the next preceding six years for that purpose could be made: s. 51(5). So no leave was required for the making of an assessment for a year in the six years preceding the normal year, but the leave of the Commissioners had to be D obtained to make an assessment for a year earlier than that. Leave could only be given if it appeared to the Commissioners that there were reasonable grounds for believing that tax for such a year was or might have been lost to the Crown through the neglect of the taxpayer, and on applications for leave the person to be assessed was entitled to appear and to be heard: s. 51 (7).

In 1964, by the Income Tax Management Act of that year, the functions E of the General and Special Commissioners with regard to the making of assessments were transferred to the Board of Inland Revenue and to Inspectors of Taxes. By s. 6 of that Act it was, however, provided that assessments out of time—that is to say, assessments for a year more than six years before the date when the assessment is to be made—in cases of fraud, wilful default or neglect could only be made with the leave of a General or Special Commissioner. But F in relation to ss. 51 and 52 of the Finance Act 1960 it was expressly provided that this should apply only in relation to an assessment for a year ending not earlier than six years before the end of the normal year. If it was sought to make an assessment for a year earlier than that the provisions of s. 51 were unaffected, and the leave of the Commissioners had to be obtained and the person to be assessed was entitled to appear on the application and to be heard.

G It is to be noted that for the first time leave had to be obtained for the making of assessments out of time in cases of fraud and wilful default. Leave in those cases and "neglect" cases could only be given on a Commissioner

> "being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person",

H and the section further provides that the Commissioner who gives leave shall take no part in the proceedings and shall not be present when any appeal against the assessment is heard or determined.

In this case it is not disputed that, on the materials submitted to him, the Commissioner was entitled to come to the conclusion that there were reasonable grounds for believing that tax had or might have been lost through neglect in I the years in question and so to give leave for each of the assessments to be made if he came to that conclusion, but it is said that before giving leave he

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had to give the Appellant an opportunity of being heard or of making representations on that question. A

Whether the Commissioner's function in deciding to give leave is to be described as judicial or administrative, he must obviously act fairly and be satisfied that there are reasonable grounds for believing that tax has or may have been lost owing, in this case, to neglect. The form sent to the Commissioner in this case by the Inspector with a letter states that " the normal year " was 1951–52. It does not state, nor did the Inspector's letter, that the assessment made for that year was " for the purpose of making good to the Crown a loss of tax wholly or partly attributable to the fraud, wilful default or neglect " of the Appellant, a requirement imposed by the Finance Act 1960, s. 51(1). It gives particulars of the amounts of each proposed assessment, but the fact that an Inspector of Taxes seeks leave to make an assessment of a certain figure does not lead to the inference that tax has or may have been lost in relation to the year to which that assessment relates as a result of neglect. The form contains no allegations of neglect. They were contained in the Inspector's accompanying letter. It gives no particulars of the loss alleged to have been suffered; but in this case the Commissioner was, in my opinion, entitled to infer from the nature of the neglect alleged that in each of the years in question there had been a loss of tax due to that neglect. While, if only the form had been submitted to him, it might have been contended that there were no materials before him on which he could properly have granted leave, no such contention has been advanced in this case. A Commissioner to whom an application for leave is made has not just to sign his name in the appropriate space on the form submitted. He must consider the matters he is required to consider by s. 6 of the Income Tax Management Act and only give leave if satisfied that the requirements of that section and of s. 51 of the Finance Act 1960 are *prima facie* fulfilled. In his accompanying letter the Inspector alleged wilful default or neglect. It has been common ground throughout this litigation that the case is one of neglect. B C D E

By his statement of claim the Appellant sought a declaration that each of the assessments made pursuant to the leave granted by the Commissioner was *ultra vires*. He contended that natural justice required him to have been given the opportunity of appearing and being heard on the application for leave or of making representations with regard thereto. No such opportunity was given though it was asked for. By their defence the Crown first contended that the Court had in consequence of the provisions of s. 47(3) of the Income Tax Act 1952 no jurisdiction to grant such a declaration. Pennycuick J. did not express an opinion on this question, which was not the subject of consideration in the Court of Appeal or in this House. Pennycuick J. gave judgment for the Crown. The Appellant's appeal to the Court of Appeal (Lord Denning M.R., Sachs and Buckley L.JJ.) was dismissed, and now the Appellant contends that the four judgments given against him were wrong. F G H

The first obstacle that lies in the Appellant's path is the fact that s. 6 of the Income Tax Management Act 1964 does not provide that a person to be assessed shall have any such opportunity. That section has to be considered with the relevant sections of the Income Tax Act 1952 and with ss. 28 and 51 of the Finance Act 1960. Section 51(7) of that Act, as I have said, provides that such a person has the right to appear and be heard on an application for leave under that section. Section 28 provides that a person can submit to the Tribunal appointed under that section a statutory declaration stating the circumstances and facts on which his opinion is based if in his opinion the provisions of that I

A section do not apply to him. With these two recent precedents it is, to my mind, inconceivable that s. 6 of the Income Tax Management Act should not have expressly provided for a hearing or at least the making of written representations if it was Parliament's intention that on an application for leave under that section the person to be assessed should have any such rights. I cannot regard the omission to do so as inadvertent. It was, in my opinion, deliberate. The B contrast between s. 6 and ss. 28 and 51 of the Finance Act 1960 is significant. I think that it was Parliament's intention that an application for leave under s. 6 should be made *ex parte*, and this view is, I think, supported by the fact that the section expressly stipulates that the Commissioner to whom application is made can grant leave " if satisfied by an inspector or other officer of the Board that there are reasonable grounds ", etc. I do not think that the inclusion C of these words was made just to indicate that the onus lay on the applicant for leave to satisfy the Commissioner. It would not be necessary to enact that. Their inclusion, bearing in mind ss. 28 and 51, tends to show that the application is to be made *ex parte*.

It was not suggested that there was any unfairness to the person to be assessed before 1964 when assessments to recover loss of tax due to fraud or D wilful default could be made by the Commissioners at any time, and when assessments to recover tax lost through neglect could be made by them for any of the six years preceding the normal year without the person to be assessed having any opportunity of contending that the assessments should not be made. It is contended now that that which could be done before 1964 without leave, now that since that date leave has to be obtained, is unfair and contrary E to natural justice if the person to be assessed is not given such an opportunity. By s. 6, it is said, the Commissioner to whom such an application is made is entrusted with a judicial or quasi-judicial function. I do not think that this contention is sound. I do not think that by the Income Tax Management Act it was intended to interpose a judicial function before the performance of an administrative act, one before 1964 wholly performed by the Commissioners. F Since 1964 they have not had to make the assessments, but Parliament has left them with a part to play. Parliament in its wisdom has not entrusted to the Board or to inspectors sole responsibility for the making of such assessments. It may well have been thought that it was a safeguard to the taxpayer that the leave of a Commissioner should have to be obtained. I do not think that the character of a Commissioner's act in relation to such assessments was altered G by the 1964 Act. The exercise of the residual power of granting or refusing leave to make such assessments is still, in my opinion, administrative. This conclusion is, I think, supported by s. 6(2) of the 1964 Act, which provides that a Commissioner who grants leave shall take no part in the proceedings and shall not be present when any appeal against an assessment is heard or determined. If the granting of leave is an administrative function, it would clearly H be wrong for him to take part in any subsequent judicial proceedings. I can find nothing in the statutory provisions which points to a contrary conclusion, quite apart from the improbability that an Income Tax Management Act would introduce in place of an administrative act a judicial process.

The Appellant's case depended on its being held that deciding whether or not to grant leave was a judicial or quasi-judicial function. His counsel I recognised that if it was not the appeal failed. In my view it was not, and on this ground I would dismiss the appeal. It follows that in my opinion *Day* v. *Williams* (1969) 46 T.C. 59 was rightly decided by Cross J. at first instance and by the Court of Appeal (Russell, Salmon and Megaw L.JJ.).

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Even if I were of the opinion that it was a judicial or quasi-judicial function, I am far from satisfied that the requirements of natural justice necessitate the supplementing of the statutory provisions. In this connection counsel for the Appellant relied very strongly on certain observations in *Wiseman* v. *Borneman*[1] [1971] A.C. 297. That was a case in which s. 28 of the Finance Act 1960 had to be considered. Under that section the appellants had submitted a statutory declaration stating the facts and circumstances which in their opinion showed that the section did not apply to them and the Revenue had filed a counter-statement, both being seen by the Tribunal appointed under that section. The substantive question to be decided was whether natural justice required that the appellants should be able to see the counter-statement, be able to reply to it and have their reply taken into account by the Tribunal. It was held that they were not. In the course of his speech my noble and learned friend Lord Reid said, at page 308[2]:

> "Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances . . . For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

I respectfully agree. I would only emphasise that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown. And Parliament thought it fair that the person affected should have the right to be heard where leave was sought under s. 51 of the Finance Act 1960, and have the right to make representations to the Tribunal under s. 28 of that Act. The omission so to provide in s. 6 of the Income Tax Management Act 1964 cannot, as I have said, in my opinion be regarded as anything other than deliberate, and, if deliberate, it should be assumed that Parliament did not think that the requirements of fairness made it advisable to provide any such rights for the person affected. If this was the view of Parliament, it would require a very strong case to justify the addition to the Statute of requirements to meet one's own opinion of fairness. Lord Reid went on to say:

> "It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

This passage supports my view that the decision of the Commissioner in this case was not a judicial determination and also that there was nothing inherently unjust in his reaching that decision in the absence of the Appellant.

Just as the Tribunal appointed under s. 28 of the Finance Act 1960 has to determine whether there is a *prima facie* case, so too here it may be said that

(1) 45 T.C. 540. (2) *Ibid.*, at p. 553.

A to grant leave the Commissioner has to be satisfied that there is a *prima facie* case that tax has been or may have been lost through the taxpayer's neglect and satisfied that the other statutory conditions precedent to the granting of leave are fulfilled.

I agree with Lord Donovan's view (*Wiseman* v. *Borneman*, at page 316[1])) that it cannot be said that the rules of natural justice do not apply to a judicial B determination of the question whether there is a *prima facie* case, but I do not think they apply with the same force or as much force as they do to decisions which determine the rights of persons. It would clearly be contrary to natural justice for a judicial determination affecting a person's rights and liabilities to be made without his having an opportunity of being heard or of making written representations with regard thereto. In some cases the right to make C written representations may not suffice. Where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the application, it by no means follows that he suffers an injustice in not being heard on that application. *Ex parte* applications are frequently made in the Courts. I have never heard it suggested that that is contrary to natural justice on the ground that at that stage D the other party is not heard. The fact that it is possible to get an order obtained on an *ex parte* application to the Courts amended or annulled without delay does not, in my view, bear upon the point. The fact is that he is not heard on the making of the application. And that is the Apellant's complaint here. He can appeal against the assessments; and on the hearing of an appeal he can if he wishes put forward any point he would have made if heard on the applica- E tion. His liability to tax will not be finally determined without his being heard, if he wishes to be heard. Before 1964 he could not have objected to the assessments being made. He cannot, in my opinion, object now, but he can object to the assessments when they are made if he appeals against them.

In *Wiseman* v. *Borneman* the decision in *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 330 was criticised. That case was cited F in the course of the argument in this appeal. I am by no means satisfied that that case was wrongly decided. If it was, I do not consider that that decision on a very different Statute has any relevance to the question to be decided on this appeal.

For the reasons I have stated, in my opinion this appeal should be dismissed, with costs.

G **Lord Pearson**—My Lords, on 25th January 1968 a Commissioner gave to an Inspector of Taxes leave under s. 6 of the Income Tax Management Act 1964 to make tax assessments on the Appellant for the years 1946–47 to 1950–51 inclusive under s. 51(1) and (3) of the Finance Act 1960. No opportunity was given to the Appellant to present his case in opposition to the Inspector's application for such leave. The Appellant contends, and the Crown denies, H that the Appellant was entitled to have such an opportunity and that because it was not given the assessments were *ultra vires*. That is the issue in this appeal.

Section 6(1) of the Act of 1964 provided that such assessments:

> " may only be made with the leave of a General or Special Commissioner given on being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been I lost to the Crown owing to the fraud or wilful default or neglect of any person. "

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[1]) 45 T.C. 540, at p. 560.

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The question at issue, as I see it, is one as to the true construction of the enactment. What is the Parliamentary intention manifested by the wording and content of the enactment when read in conjunction with its context and any other relevant enactments and with the aid of any applicable canons of construction? In *Wiseman* v. *Borneman*(1) [1971] A.C. 297, at page 310, my noble and learned friend Lord Guest said: A

> " It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made upon the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. The dictum of Byles J. in *Cooper* v. *Wandsworth Board of Works* 14 C.B.N.S. 180, 194 is clear to this effect and has been followed in many subsequent cases. " B C

A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions, unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as " Parliament is not to be presumed to act unfairly ", the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed. The disadvantage of a plurality of hearings even in the judicial sphere was cogently pointed out in the majority judgments in *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 330, at pages 343, 346–7. D E

Treating the question at issue as being one of construction of the enactment in s. 6(1) of the Act of 1964, I am of opinion for several reasons that the Appellant was not entitled to the opportunity which he has claimed of presenting to the Commissioner his case in opposition to the Inspector's application for leave to make the assessments. First, I think that the wording of the enactment tends in favour of the view that the decision is to be given after hearing, or receiving representations from, only the Inspector or other officer of the Board. It may be contended that the enactment contemplates a judicial hearing or consideration of conflicting representations, and places the burden of proof on the Crown. But I think the wording is more naturally to be understood as describing the procedure to be followed on an application for leave: the Inspector or other officer of the Board presents his grounds for believing that tax has or may have been lost to the Crown owing to the neglect of any person (in this case the Appellant), and the Commissioner decides whether or not the grounds presented are reasonable. There is no provision for the person to be assessed presenting evidence or arguments to the contrary. F G H

Secondly, the decision is predominantly of an administrative or executive character. It is true that the Commissioner has to be satisfied that there are reasonable grounds for a belief, and this might have formed part of a judicial operation. But he does not determine any rights or liabilities. He merely I

(1) 45 T.C. 540 at pp. 555–6.

A gives leave for something to be done, i.e., for assessments to be made. The determination of rights and liabilities, if there is any dispute about them, comes later, when the person who has been assessed to tax appeals against the assessment and his appeal is heard in a judicial or quasi-judicial proceeding. The Commissioner's decision to give leave for an assessment to be made is analogous to a decision by the Attorney-General or the Director of Public Prosecutions B to give his consent to a prosecution in cases where such consent is required by Statute. This function differs in character from the decision of a magistrate or a bench of magistrates that there is a *prima facie* case for the prosecution justifying committal of the accused for trial, when in accordance with statutory provisions there is a formal sitting in Court and each side has an opportunity to present evidence and argument, and plainly a judicial jurisdiction is being C exercised.

Thirdly, in respect of safeguards against oppressive or careless exercise of the powers to make late assessments, there is a graduated system of no safeguard, minor safeguard and major safeguard. (*a*) If the assessment is made not later than six years after the end of the year to which the assessment relates, no leave is required: see s. 47 of the Income Tax Act 1952. (*b*) If the D assessment is to be made for any year in the period of six years before the "normal year", which is defined in s. 51 (1) of the Finance Act 1960, the Inspector of Taxes or other officer of the Board has to obtain leave from a Commissioner, but there is no provision entitling the person who is proposed to be assessed to appear or be heard or to make representations: see s. 51 of the Finance Act 1960 and s. 6 of the Income Tax Management Act 1964. (*c*) If the E assessment is to be made for a year which is more than six years before "the normal year", application for leave has to be made to the General or Special Commissioners, and on any such application the person to be assessed is entitled to appear and be heard: see s. 51 (4) and (7) of the Act of 1960.

Fourthly, before the Act of 1964 the late assessments were made by a Commissioner, and now after the Act they are made by an Inspector with the F leave of a Commissioner. The Commissioner decides now, as he did before the Act, whether a late assessment is to be made or not. Before the Act his decision was plainly an administrative decision, and there is not in the Act of 1964 enough to show that a judicial or quasi-judicial decision is being substituted.

Fifthly, if the draftsman of the Act of 1964 or Parliament had intended in s. 6 of that Act to confer on the person to be assessed a right to appear and be G heard or to make representations, it would have been easy and natural to insert an express provision following one of the precedents set by s. 51 (7) and s. 28 of the Act of 1960.

For these reasons I am of opinion that the Appellant was not entitled to be given an opportunity for presenting his case in opposition to the Inspector's application for leave to make the late assessments, and accordingly that H the assessments were not *ultra vires*.

I would dismiss the appeal.

Lord Cross of Chelsea—My Lords, for the reasons given by my noble and learned friends, whose speeches I have had the advantage of reading, I agree that this appeal should be dismissed. I have formed no view as to whether *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 330 was rightly I decided.

Lord Salmon—My Lords, prior to the Income Tax Management Act 1964 assessments to income tax were made by a Commissioner, usually an Additional Commissioner, of Income Tax. Prior to 1960 assessments could not ordinarily be made later than six years after the end of the year to which the assessment related, but assessments to recover tax lost to the Crown by fraud or wilful default could be made at any time: Income Tax Act 1952, s. 47 (1). By the Finance Act 1960 powers were given to the Commissioners for the first time to make assessments to recover tax lost to the Crown by neglect in years prior to the " normal year ". These powers are contained in a complex code set out in s. 51 of the Act. Lord Denning M.R. said that he found that section hard to understand. So do I. No one ever suggested that a Commissioner in making an assessment to recover tax lost by fraud or wilful default under the proviso to s. 47 (1) of the Act of 1952 or by neglect under s. 51 (3) of the Act of 1960 should consult the taxpayer before he did so. It has been rightly conceded in this appeal that neither natural justice nor any other concept of fairness required the Commissioner to give the taxpayer any opportunity of being heard or of making written representations before assessments were made under the statutory provisions to which I have referred.

The Income Tax Management Act 1964 relieved the Commissioners of their administrative duties of making assessments to income tax and transferred these duties to the Board of Inland Revenue and its Inspectors. Section 6 of that Act provided, however, that:

> " (1) An assessment to income tax made by virtue of any of the following enactments (which allow assessments out of time in cases of fraud, wilful default or neglect), that is"—and then the relevant enactments are set out—" may only be made with the leave of a General or Special Commissioner given on being satisfied by an inspector or other officer of the Board that there are reasonable grounds for believing that tax has or may have been lost to the Crown owing to the fraud or wilful default or neglect of any person. (2) The General or Special Commissioner giving leave to make such an assessment shall take no part in the proceedings, and shall not be present, when any appeal against the assessment is heard or determined. "

In my view, s. 6 was intended to protect the taxpayer by leaving the responsibility for making the assessment to which it relates on the shoulders of a Commissioner. In discharging his duties under that section the Commissioner was, in effect, carrying out the same function as he had carried out prior to the 1964 Act coming into force. When he made an assessment prior to that Act he must have asked himself precisely the same questions as he would ask himself when performing his duties under s. 6, namely: Are there reasonable grounds for believing that tax has or may have been lost to the Crown owing to fraud, wilful default or neglect? In other words, he would not raise such an assessment unless he was satisfied that there was a *prima facie* case for doing so.

Since neither natural justice nor any other concept of fairness required that the Commissioner should give the taxpayer an opportunity of being heard or of making written representations when the Commissioner was raising an assessment prior to 1964 in respect of tax lost to the Crown by fraud or wilful default, or by neglect under s. 51(3) of the Act of 1960, I cannot accept that it is contrary to natural justice or unfair for the taxpayer to be afforded no such opportunity when the Commissioner is performing a parallel function under the Act of 1964. It seems clear to me that, both before and after that Act, the function performed by the Commissioner in relation to these assessments was

A purely administrative. No doubt this involved a duty to act fairly, but in my opinion there is nothing unfair in making the assessment or giving leave for it to be made without giving the taxpayer a chance to object. As my noble and learned friend Lord Reid pointed out in *Wiseman* v. *Borneman*(1) [1971] A.C. 297, at page 308:

> " Every public officer who had to decide whether to prosecute . . . ought
B first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused . . on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party. "

In the Court of Appeal Sachs L.J. seems to have been oppressed by the anxiety, trouble and expense to which the taxpayer would be put by having
C an assessment made upon him for tax under the proviso to s. 47(1) of the Act of 1952 or under s. 51(3) of the Act of 1960. He appears to have thought that accordingly it was unfair to make such assessments without first hearing the taxpayer, but considered that the Act precluded such a hearing. I cannot agree. Such assessments do not involve any more, or even as much, anxiety, trouble or expense for the subject, and certainly less unpleasant and damaging publicity,
D than does a prosecution for a criminal offence. No one suggests that it is unfair to launch a criminal prosecution without first hearing the accused. No one suggests that prior to 1964 it was unfair to raise the assessments to which I have referred without first hearing the taxpayer. I cannot understand how it can have become unfair to do so after 1964.

I would dismiss the appeal solely on the grounds which I have stated.
E Since, however, a number of other points have been canvassed I will briefly express my view about them. I attach very little importance to the fact that the Commissioner, who under s. 6 of the 1964 Act gives leave to make an assessment, is naturally debarred from hearing an appeal against that assessment. In my view, this provision was designed to put him in the same position as he used to be when he had performed the parallel task of making assessments under the Acts
F of 1952 and 1960: see s. 6 (4) of the Act of 1952 (repealed by the Act of 1964). I doubt whether the express disqualification of a Commissioner, contained in s. 6 (2) of the Act of 1964, to hear an appeal was intended by the Legislature to be contrasted with the absence of any such express disqualification in s. 51 (4) and (7) of the Act of 1960. These are the provisions enacting that, if an assessment to recover tax lost to the Crown by neglect is to be raised for a year ending earlier
G than six years before the end of the " normal year ", the leave of the General or Special Commissioners shall first be obtained and the person to be assessed shall be entitled to appear and be heard before such leave is given. The fact that the Legislature has not thought it necessary expressly to bar the Commissioners who have given leave under s. 51 (7) to raise an assessment from hearing an appeal against that assessment does not, in my view, mean that the Legislature
H intended them to hear such appeals. After all, the Legislature cannot be expected to specify everything that shall or shall not be done in order to comply with natural justice. When a matter arises for decision under s. 51(4) it relates to alleged neglect occurring at least twelve years previously, and often more. All the relevant evidence on both sides is likely to be available at the hearing under subs. (7). Leave is most unlikely to be given unless the Commissioners are
I satisfied on a balance of probabilities that tax has been lost to the Crown by neglect. If leave is given I can imagine that the taxpayer might appeal to the

(1) 45 T.C. 540, at p. 554.

(Lord Salmon)

Commissioners against the amount of the assessments, but he is hardly likely to appeal to the Commissioners on the ground that no tax has been lost by neglect. If he does so, he would, I think with some justification, feel surprised and indignant to find the same Commissioners sitting to hear his appeal as those who had already decided the point against him on giving leave to raise the assessments. I am not deciding that if the same Commissioners sat it would be contrary to natural justice. That point does not arise on this appeal. I am far from satisfied, however, that the absence of an express bar in the Statute against the same Commissioners hearing such an appeal would necessarily invalidate an objection by the taxpayer to their doing so..

Section 51(7) of the Act of 1960 included words which expressly gave the taxpayer a right to appear and be heard before the Commissioners decided to give leave for an assessment to be made under subs. (4). No such words are included in s. 6 of the 1964 Act. Their omission clearly was not accidental. It was made, in my view, because the Legislature recognised that a Commissioner acting under s. 6 was carrying out, in reality, the same purely administrative function as he had previously carried out under s. 47(1) of the Act of 1952 and s. 51(3) of the Act of 1960. The Legislature was not intending to deprive a judicial process of one of its essential characteristics, i.e., an obligation to give a fair hearing to both sides. If the process were of a judicial nature (which, in my view, it clearly is not) such an intention would have had to be much more plainly expressed; it " is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment ": *Commissioner of Police* v. *Tanos* (1958) 98 C.L.R. 383, *per* Dixon C.J. and Webb J., at page 396—a principle endorsed by my noble and learned friend Lord Wilberforce in *Wiseman* v. *Borneman*[1]. It is not relevant to enquire into the logic which prompted the Legislature to create a quasi-judicial process for giving leave to make assessments under s. 57(4) whilst leaving intact the administrative process for giving leave to make assessments under subs. (3): still less is it necessary to enquire why, if a taxpayer is entitled to appear and be heard before an assessment is raised on him to recover tax lost to the Crown by neglect earlier than six years before the " normal year ", he is not entitled to appear or be heard before an assessment is made upon him to recover tax lost to the Crown by fraud or wilful default in a similar period.

A decision under s. 6 of the Act of 1964 is in the class of purely administrative preliminary decisions, taking away no rights and in respect of which neither reason nor justice requires the persons concerned to be heard before the decision is made. Their turn comes later: *Wiseman* v. *Borneman*[2] *per* Lord Reid, at page 308, and Lord Wilberforce, at page 317. The Appellant places great reliance upon *Wiseman* v. *Borneman*, which was a very different case from the present; in that case the proceedings in question were clearly of a judicial nature. The principles there enunciated in this House do not appear to me in any way to support the Appellant's argument in the present case.

The Appellant also contended that *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 Q.B. 330 was wrongly decided and sought to rely upon my dissenting judgment in that case. That case again was as different from the present case as it was from *Wiseman* v. *Borneman*, and I do not think that anything in my judgment, even if it were right, as it may have been, could be of any help to the Appellant. The decision in *Cozens*'

(1) 45 T.C. 540, at p. 562. (2) *Ibid.* at pp. 553–4 and 561.

A case was criticised in *Wiseman* v. *Borneman* by my noble and learned friends Lord Guest and Lord Wilberforce, but the question whether it was right was left open; and so it must remain for the present.

I would dismiss this appeal with costs.

Questions put:

B That the Order appealed from be reversed.

The Not Contents have it.

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

[Solicitors:—Geo. & Wm. Webb; Solicitor of Inland Revenue.]