HIGH COURT OF JUSTICE (QUEEN'S BENCH DIVISION)—19, 20 AND 21 OCTOBER 1993

COURT OF APPEAL—25 AND 26 OCTOBER 1993 AND 1 NOVEMBER 1993

HOUSE OF LORDS—15, 16 AND 17 NOVEMBER 1993 AND 17 FEBRUARY 1994

Regina *v.* Commissioners of Inland Revenue *ex parte* Matrix-Securities Ltd(1)

Judicial review—Capital allowances—Assurance given by local Inspector that capital allowances would be available under arrangements proposed by Enterprise Zone Property Unit Trust—Earlier letter from Revenue Head Office indicating that local level assurances would not be binding—Inspector's assurance revoked by Head Office—Whether full and accurate disclosure by applicant for assurance—Whether Revenue bound by assurance—Whether withdrawal of assurance unfair as abuse of power—Capital Allowances Act 1990, *s* 10*A*.

M proposed to sponsor an Enterprise Zone Property Unit Trust. SQL, in administrative receivership, owned a partially developed site, £10m being required to complete the development. M proposed to buy the site and eventually the net price payable to SQL's receiver was agreed at £8m. M's proposal involved raising £95m, made up of £30.875m direct from investors and £64.125m by bank loan.

Complex financial arrangements were involved. These included "exit arrangements" which included a put option whereby the trustee could require the lessee of the site to surrender its lease and take a very long lease at a nominal rent for a premium of £64.125m. The exit arrangements were designed to ensure that the investors would not be called on to repay the borrowed £64.125m.

By a five page letter dated 15 July 1993 M's solicitors gave a description of the proposed arrangements to its local level Inspector of Taxes and asked for three assurances, of which one was that the arrangements would give rise to capital allowances under s 10A Capital Allowances Act 1990 in respect of almost all of the £95m. The letter made mention of a previous letter having been seen which " ... raises a question about allowances where a put option (which raises somewhat different issues) is granted". A copy of that earlier letter was not enclosed, but a spare copy of the letter of 15 July was sent " ... in case you wish to refer any matter of this letter to your specialists".

(1) Reported (QBD)(CA)[1993] STC 774; (HL)[1994] 1 WLR 334; [1994] 1 All ER 769; [1994] STC 272.

The earlier letter was in fact a letter of 6 May 1993 from the Financial Institutions Division of the Inland Revenue's Head Office to the Enterprise Zone Property Unit Trust Association expressing doubts about the taxation consequences of transactions in which unit trust schemes acquired property on terms which included put options and stating that, although recent assurances given locally would remain binding in the particular case, the Revenue would continue to apply the law, as it was understood, in other cases. A B

By 19 August the net price of £8m payable to SQL's receiver had been agreed.

By letter of 9 September to the local Inspector M described seven changes to the proposed arrangements but did not mention the net sale price of £8m, and enclosed a thirty-six page "advanced draft" of an information memorandum to be sent to potential investors. The letter asked for confirmation on the same day that the clearance given in July was still valid in the light of the further information in the letter and its enclosure. The Inspector gave that confirmation by telephone on the same day, and confirmed it by letter by the next day. C D

The Financial Institutions Division noticed Press reports of the matter and wrote to M's solicitors on 8 October 1993, saying that the local Inspector should not have given the assurances and stating that an undertaking could not be given not to challenge certain aspects of the scheme if it proceeded. E

M applied by way of judicial review for an order to quash the revocation of the assurances.

The High Court held, dismissing M's application, that the revocation of the local Inspector's assurances did not amount to an abuse of power because:— F

(1) M's explanation that it had understood the Revenue's letter of 6 May 1993 to deal with a case in which a trust acquired, as a separate item of property, a completely separate put option, could not be accepted, because that letter said nothing about "a completely separate put option": M had not, therefore, told the Inspector, fair and square, that there might be a question whether the scheme involved a put option element so as to attract the concerns of the Financial Institutions Division, and had, therefore, markedly failed to put all its cards face up on the table; G

(2) The Revenue were entitled to know about the agreement of the net sale price at £8m to enable an informed judgment to be made as to the impact of s 10A Capital Allowances Act 1990 on the scheme; H

(3) The inadequate disclosure in the letter of 15 July was not cured by the letter of 9 September, which asked for a reply on the same day, because none of the changes to which the Inspector's attention was drawn in the later letter was directly material to the points which ultimately concerned the Revenue, and the Inspector's attention was not drawn to any specific part of the information memorandum which was enclosed with the later letter; I

(4) The applicant was really relying on the Inspector's assurances to curtail the Financial Institutions Division's freedom of action, rather

A than on those assurances as representing an authoritative clearance of the scheme.

Per Laws J.: treating the decision in *Regina* v. *Commissioners of Inland Revenue* ex parte *MFK Underwriting Agencies Ltd. and Others* as if it established something akin to a rule of estoppel against the Crown was a fundaB mental mistake which betrayed a misunderstanding of the public law principles underlying that decision; that decision was no more, nor less, than an application of the developing public law doctrine of legitimate expectation; that doctrine was quite unrelated to estoppel, which on authority was not available to prevent the Crown from carrying out duties imposed on it by statute, including the duty to collect tax; although there was a limited C exception in the planning field, the concept of estoppel as such has no part to play in the Court's imposition, by judicial review, of high standards of decision-making upon public authorities; in particular, it is of no relevance as such to the requirement of fairness, upon which the public law court will insist in determining the legality of public decisions.

D M appealed.

The Court of Appeal held (Dillon and Nolan L.JJ., Roch L.J. dissenting), dismissing M's appeal, that in a case such as the present putting cards on the table required not merely setting out the facts and the movements of money, including disclosing the actual sum which SQL's E receiver was to get (£8m) but also drawing the attention of the Revenue specifically to the crucial question whether, despite the much lower sum which the receiver would actually get, M's advisers were right in their contention that the whole £95m constituted the net price paid for the relevant interest: the letter of 15 July was not enough, because it did not indicate that the correctness of the figure of £95m was at the heart of the F problem, and it was, therefore, not unfair for the assurances to have been revoked as the Inspector had not received the disclosure which he should have had to direct his attention to the real question; also (*per* Nolan L.J.) the letter of 15 July should have referred to the decision in *Ensign Tankers (Leasing) Ltd.* v. *Stokes*, if only for the purpose of seeking the Inspector's agreement that that case was distinguishable on the ground that the loan in G the present case might, in some circumstances at least, be recoverable directly from the individual investors, that being a crucial aspect of the proposals.

M appealed.

Held, in the House of Lords, dismissing M's appeal, that the revocation of the assurances was not an abuse of power because:—

H

(*per* Lord Templeman) the proposed trust was a tax-avoidance scheme because it aimed to produce fiscal expenditure of £95m and real expenditure of only £18m (the net price of £8m payable to SQL's receiver and the £10m required to complete the development of the site), the difference, apart from incidental expenses, being involved in circular, self-cancelling payments; the I letter of 15 July was, therefore, inaccurate and misleading;

(*per* Lord Jauncey of Tullichettle) in determining what was the net price by reference to which any capital allowances would be available, the Revenue would have required not only to have regard to the figure of £95m but also to consider whether, and if so to what extent, that sum was properly

attributable to the relevant interest; the fact that M was prepared to purchase the receiver's interest in the property for £8m would have been a vital piece of information to the Revenue in performing that exercise, and a piece of information essential to the deliberations required of the Revenue by the taxpayer had, therefore, not been furnished;

(*per* Lord Browne-Wilkinson, Lord Griffiths agreeing) the letter of 6 May 1993, which was known to all parties, had made it clear that, for the future, advance clearances given at local level relating to schemes which contained a put option (as this one did) would not bind the Revenue but that the Revenue would, notwithstanding any such clearance, continue to apply the law as the Revenue saw it to be;

(*per* Lord Mustill) the problem was to be approached on a broad front, taking into account all aspects of the exchanges between M and the Revenue: in view of the timing, the level of communication, the complexity of the scheme and its documentation, and the guarded terms of the letter, all of which spoke for themselves, not only was there no injustice in permitting the Revenue to depart from its Inspector's assurance, but any other course would be positively unjust.

Regina v. *Inland Revenue Commissioners* ex parte *Preston* [1985] AC 835: 59 TC 1 and *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd. and Others* [1990] 1 WLR 1545: 62 TC 607 considered.

The application for judicial review was heard in the Queen's Bench Division before Laws J. on 19 and 20 October 1993 when judgment was reserved. On 21 October 1993 judgment was given in favour of the Crown, with costs.

The facts are set out in the judgment.

David Goldberg Q.C. and *John Walters* for the Company.

Lord Lester of Herne Hill Q.C. and *Charles Flint* for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment: *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680; *Council of Civil Service Unions and Others* v. *Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935; *Regina* v. *Secretary of State for the Home Department* ex parte *Khan* [1984] 1 WLR 1337; [1985] 1 All ER 40; *Regina* v. *Knowsley Metropolitan Borough Council* ex parte *Maguire* The Times 26 June 1992.

Laws J.:—This case concerns a scheme called the "Matrix South Quay Trust". It is said to be a unit trust, formed in mid-September 1993. The applicant company sponsored it. On the face of it, it involved the purchase for £95m of certain land and buildings at South Quay in the London

Docklands. In his affidavit supporting this application, Mr. Porter of Messrs. Theodore Goddard says this:

> "It was apparent at an early stage that a number of technical tax issues arose from the proposal. It was equally apparent that investors would not invest in the scheme unless these technical issues were resolved by a confirmation from the Inland Revenue that they accepted that the proposal worked from the tax standpoint."

So on 15 July 1993, Messrs. Theodore Goddard wrote to Mr. Fairley, an Inspector of Taxes, giving a description of what was involved in the proposed trust, and asking for his confirmation of three propositions. I need only mention the first proposition which is the important one. It was that:

> "100 % initial capital allowances will indeed be available to each investor in respect of his share of the purchase price of £95 million ... less his share of the disallowable land element."

The letter of 15 July is very important, and I must return to it.

Mr. Fairley replied on 27 July 1993. He said that the three propositions were agreed. On 9 September 1993, the solicitors wrote again enclosing what was described as,

> " ... an advanced draft of the Information Memorandum which our client Matrix-Securities Ltd., as sponsors of the Matrix South Quay Trust, will be sending to potential investors."

The letter said that certain changes had been made to the scheme by comparison with its description in their earlier letter. The changes were described. They are not themselves, I think, material to anything I have to decide. In the last page of the letter it was said:

> "We should be grateful if you would confirm that the clearance given in your letter is still valid in the light of the information contained in this letter and the Information Memorandum.
>
> As mentioned to you, our clients intend to launch the trust on Monday 13 September. You have however kindly agreed to provide us with a response by Thursday 9 September."

9 September was, of course, the date on which the solicitors' letter was written. So the Inspector of Taxes was being asked to reply on the same day. In fact he replied on 10 September, and said:

> "The various alterations now made to the draft exhibited to me in July do not affect the substance of my letter of 27 July so that the confirmations given therein remain valid."

But on 8 October 1993, the Financial Institutions Division of the Inland Revenue wrote to the solicitors and said that the Inspector was wrong to give the assurances he had done. They gave what they described as three main reasons.

The applicant now seeks judicial review of the Revenue's withdrawal of the confirmation given by the Tax Inspector. The question I have to decide is

whether that withdrawal was unfair, so as to amount to an abuse of power by the Revenue. A

I should briefly refer to the relevant legislation. Section 1(1) of the Capital Allowances Act 1990 provides that a person who incurs capital expenditure on the construction of a building which is to be an industrial building or structure occupied for the purposes of a trade is entitled, subject to other provisions which I need not detail, to an allowance of 100 per cent. of the amount of that expenditure. B

Section 10A contains a deeming provision which conditions the allowance available in a case where the expenditure is incurred in relation to a building or structure in an enterprise zone; and this is an enterprise zone case. Since significance was attached to this provision in the argument before me, I should set out part of it: C

> "**10A**(2)(b) ... The person who buys the relevant interest shall be deemed ... to have incurred, on the date when the purchase price becomes payable, expenditure on the construction of the building or structure (deemed expenditure) equal to the actual expenditure or to the net price paid by him for that interest, whichever is the less." D

Subsection (9) states:

> "(9) Where the actual expenditure was incurred by a person carrying on a trade which consists, in whole or in part, in the construction of buildings or structures with a view to their sale and, before the building or structure is used, he sells the relevant interest in it in the course of that trade ... then— E
>
> > (*a*) if that sale is the only sale of the relevant interest before the building or structure is used, paragraph (*b*) of subsection (2) above shall have effect as if the words 'the actual expenditure or to' and 'whichever is the less' were omitted ... " F

Since expenditure on industrial buildings may be very large, so that investments in it by taxpayers may more realistically arise when a number (perhaps a large number) join together than where one alone puts up funds, the legislature has made arrangements in effect to contemplate collective investment schemes so as to allow taxpayers to band together to invest in buildings in enterprise zones. Section 469 of the Income and Corporation Taxes Act 1988 provides for the tax treatment of unit trusts in such circumstances. A difference is made, to take it shortly, between cases where the trustee is onshore and cases where he is offshore. G H

In the present case, the proposal was that the trustee should be an offshore company. In such a case, all other things being equal, the investor in the trust may be entitled to capital allowances under s 1 of the Act of 1990. Mr. Goldberg for the applicant makes the point that in the case of an onshore trust, the Tax Inspector would have to be satisfied of certain matters under Regulation 4(d) of the Income Tax (Definition of Unit Trust Scheme) Regulations 1988. He says that this is important as showing the reasonableness of his client's approach to the Tax Inspector, rather than the Financial Institutions Division of the Revenue. For reasons which I shall shortly explain, however, I do not consider that the identity of the official in the I

A Revenue whom the applicant approached is in the end critical to the issues which I have to decide.

It is clear on the authorities that there may be circumstances in which the Revenue will be prevented by the Court from proceeding to collect tax according to statute because on the facts it would be unfair to do so. Such a B proposition may at first sight seem startling. It is the duty of the Revenue to collect tax. But it is also their duty to administer and manage the tax régime. There are cases in which, if the Revenue give an unequivocal assurance that, in circumstances which have been fully described to it in advance, tax will not on its view of the law be exacted (or an allowance against tax will be permitted), and expenditure has been incurred on the faith of the assurance, the C Court may prevent the Revenue from later collecting the tax (or refusing the allowance). This position is vouchsafed by leading authorities such as *Regina* v. *Inland Revenue Commissioners* ex parte *Preston*(1) [1985] AC 835 in the House of Lords and *Regina* v. *Inland Revenue Commissioners* ex parte *MFK Underwriting Agencies Ltd. & Others*(2) [1989] STC 873 in the Divisional Court. I should cite the following passage from the judgment of Bingham D L.J. in the latter case, at page 892c—893b(3):

> "I am, however, of the opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. Every ordinarily sophisticated taxpayer knows that the Revenue is a tax-E collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law (see *R* v. *A-G. ex p Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord Oliver). Such taxpayers would appreciate, if they could not so pithily express, the truth of Walton J's aphorism 'One should be taxed by law, and not be F untaxed by concession' (see *Vestey* [1977] STC 414 at 439, [1979] 1 Ch 177 at 197). No doubt a statement formally published by the Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach of the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary. If it is to be successfully said that as a result of such an approach G the Revenue has agreed to forego, or has represented that it will forego, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary H that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the Revenue the ruling sought. It is one thing to ask an official of the Revenue whether he shares the taxpayer's view of a legisla-I tive provision, quite another to ask whether the Revenue will forego any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the Revenue would wish to favour one class of tax-

(1) 59 TC 1. (2) 62 TC 607. (3) *Ibid*, at pages 643D/644E.

payers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied on should be clear, unambiguous and devoid of relevant qualification.

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

And from Judge J. at page 897c–d([1]):

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

I believe it to be consistent with this reasoning to say that the doctrine now invoked by the applicant is an extremely narrow one. For such an assurance to be relied on, the person seeking it must have placed before the Revenue all the facts relevant to the decision which the Revenue is being asked to make. He must be completely frank. And, in my judgment, there can in general be no duty of inquiry upon the shoulders of the Revenue to elicit further information. In a situation of this kind, the Court will not encourage or endorse the propriety of a debate between the Revenue and the taxpayer (or those representing the taxpayer). If a taxpayer chooses to seek an advance assurance from the Revenue, the burden is entirely upon him to explain in full all the considerations material to the Revenue's decision.

Nor do I think that these considerations are necessarily to be limited to matters of fact. The Revenue must be apprised of the legal position for which the taxpayer is contending. No doubt that will often be clear enough, and I do not mean to suggest that in every case the taxpayer must solemnly give chapter and verse from the Taxes Acts. But where there may arguably be a legal question, perhaps of no little nicety, arising on the facts which the tax-

([1]) 62 TC 607, at page 649H/I.

payer presents, and which may not on the face of those facts be self-evidently in play, the taxpayer must spell it out. This is no less so where through his advisers he takes the view that, if the law were fully gone into, the question would not after all arise. If he chooses to elaborate only those issues of law on which he believes a construction favourable to his case may be arrived at, although potentially there might be other issues giving rise to a different position, those other issues too must be put to the Revenue. I reject altogether Mr. Goldberg's first submission for the applicant that only matters of fact need be canvassed with the Revenue.

It is to be remembered that the consequence of a successful judicial review in cases of this kind is that the Revenue are to be prohibited by the Court from seeking to collect tax which at least arguably may be due on the correct construction of the tax legislation; and where there is an arguable question about it, Parliament has provided a statutory appeal route for its resolution. I do not believe that the requirement of fairness impels the Court to take any such course where the issues of fact and, as necessary, law that might potentially arise, are not properly canvassed, fair and square and with a very high degree of candour, by the taxpayer. Further, the Revenue is not to be discouraged by the Courts from being as helpful as it can in responding to enquiries from taxpayers about their tax position. If they are asked to respond promptly (as was certainly the case here), it is desirable that they should not be inhibited from complying. They are not, to use an expression of Lord Denning's from another context, to turn the pages of their books with trembling fingers in case they commit themselves to a false position which is afterwards enforced against them. So, if an assurance is hurriedly sought and, as a result, hurriedly given, it will take a very strong case to fix the Revenue with its consequences. I would go further. If, on the objective facts, it was reasonable for the Revenue (despite the earlier assurance) to take a second look at the case, it will not generally be unfair if, on doing so, they arrive at a different view from that first taken, and give it effect by departing from the assurance first given.

I should say that, in arriving at my conclusions as to the effect of the present jurisprudence, in establishing principles for the Court's approach to a case of this kind, I derived no assistance from the decision of Vaisey J. in *Re 56 Denton Road, Twickenham*(1) [1953] 1 Ch 51, which was concerned with a question not relevant to the present case, namely whether a particular document constituted a "determination" under the War Damage Act 1943.

I should further say that I consider, at any rate, where the person seeking the assurance is a sophisticated concern such as the applicant here, that the applicant must communicate with officials representing the appropriate level of authority within the Revenue. In this case, at first blush, I thought it surprising that the "clearances" (as they have been described) should have been sought from the Inspector of Taxes rather than from the Financial Institutions Division. In the letter of 15 July 1993, at para 2.4, the solicitors themselves referred to a letter which they had seen raising a question about allowances which had been written on 6 May 1993 from the Financial Institutions Division raising substantial issues as to whether expenditure in certain circumstances, concerned with "put options", might qualify for capital allowances. In his second affidavit, Mr. Smith says in para 22 that this letter was not "directly relevant"; but the solicitors chose to mention it. I assume they appre-

(1) [1952] TLR 676.

ciated, at least, that it might be indirectly relevant. I shall have more to say about this aspect of the case later. However, at this stage I merely indicate that, given Mr. Smith's account of his previous dealings with Mr. Fairley (the Tax Inspector), the force of this point in the end is not so much that the solicitors should have contacted the Financial Institutions Division, but that the letter was not even copied to Mr. Fairley. In the circumstances, I do not propose to hold against the applicant on the ground only that it should have approached the former rather than the latter.

I must, therefore, consider whether, in seeking the assurances which were given, the applicant's solicitors explained as fully as was required what was involved in the proposed scheme.

The letter of 15 July 1993 indicated that the trustee of the proposed trust (of which the applicant was the sponsor) was to be the Royal Trust Company of Canada (CI) Ltd., a company incorporated in Jersey. The trust would enable the trustee to acquire the buildings and land, which the trustee would then hold on trust for the benefit of investors in the trust. It was contemplated that a company called South Quay Ltd. ("SQL") would in September 1993 sell the freehold interest which it had acquired in the property, together with a 200-year lease (which by the date of the 15 July 1993 letter had not been merged in the freehold) to the trustee for £95m SQL had in fact been in receivership since May 1992. £10m worth of construction work was outstanding on the buildings at the property. It was contemplated that SQL, through its receiver, would borrow this sum, pay it to Wimpey to complete the construction works, and grant a 99-year lease in respect of the property to another company called Newco (this is, I understand, the same company that is referred to in the applicant's information memorandum as SPQL, to which I must come). That lease would be carved out of the 200-year lease, and the receiver of SQL, in consideration for Newco entering into this lease, would pay a reverse premium of about £70m. Newco was to be a company incorporated in Jersey, its shares owned by the applicant.

The payment of £70m, and the £10m which SQL's receiver was to borrow, would be funded by the receipt of the purchase consideration on the sale contemplated to the trustee. Rent would be paid under the Newco lease. The bankers, Hill Samuel, would make 10-year loans to investors in the scheme of 67.5 per cent. of the purchase price of the units in the trust at a fixed interest rate expected to be about 9 per cent. The rental receipts, which each investor would be entitled to be paid, would be taken by Hill Samuel in payment of this interest. And if the investors decided to sell the property, the trustee would have the power to require Newco to surrender its lease in return for the grant to Newco of another very long lease at a nominal rent and at a premium which would amount to £64.125m (there are other details I need not describe). That is paras 1.15 and 1.16 of the letter. If the investors did not so decide to sell the property, the trustee would, on or after year 10, also be entitled to require Newco to surrender its lease and take a very long lease for a premium of £64.125m (see para 10.1.3), which would be secured by a bank guarantee given by Hill Samuel.

These two possible events are said to constitute what are described in other documentation before me as the "exit arrangements", and they are a very important part of the scheme. In either such event, the investors' share of the premium would be applied by Hill Samuel against each investor's indebtedness under the loans.

Paragraph 2 of the letter is headed "Technical Issue". It discusses the tax treatment of the scheme and asserts that s 10A(9) of the 1990 Act applies so that capital allowances should be available on the £95m less what is called the disallowable land element (which it is unnecessary to describe). Paragraph 2.4, which is important and to which I must return, claims that what are elsewhere described as the "exit arrangements" should not affect the investors' right to recover capital allowances.

In the last paragraph of the letter it is said:

> " ... a copy of the final draft [that is the Prospectus or Information Memorandum] will be sent to you as soon as possible, though we believe there will be nothing relevant in the Prospectus which is not raised in this letter ... we should be most grateful if you would give this letter your most immediate attention ... We enclose a spare copy of this letter in case you wish to refer any matter of this letter to your specialists."

Did the letter of 15 July 1993 give a full and open account of all the details of the scheme which were relevant to its tax treatment? I may immediately identify the following considerations which seem to me to be important:

(a) Each investor would claim capital allowances at his marginal rate of tax (assumed to be 40 per cent.) on something like 98 per cent. of each thousand pounds nominally invested. But in fact he was only required to provide £325; the balance was lent in circumstances where, in the ordinary way at least, there was no likelihood that he would have to repay any of it out of his own resources. So he would pay £325 and get £392 back from the Revenue. The Revenue took the view, in their letter of 8 October 1993, that this circumstance might mean that the Hill Samuel loans were to be treated as falling within the scope of the House of Lords decision in *Ensign Tankers (Leasing) Ltd.* v. *Stokes*[1] [1992] STC 226, a case on tax avoidance.

(b) The capital allowances to be claimed were based on the figure of £95m. This seemed to the Revenue to be a figure substantially in excess of the current market value of the building (the Revenue take it to be about £20m), and in excess, also, of the construction cost of the building to date; stated in the documents to be £72m. This at any rate might raise a question as to the legal availability of the capital allowances to be claimed, or to their extent.

(c) On 8 October 1993, the Revenue indicated its view that the exit arrangements constituted a valuable right so that expenditure by an investor attributable to them would not qualify for allowances.

In describing these aspects I have not forgotten the evidence of Mr. Hofman for the applicant, given in his affidavit of 19 October 1993, that in fact the loans to the investors were full recourse loans, and there might be circumstances in which they would constitute a genuine liability borne by the investor. An investor might become insolvent, and consequences would attach to that; Hill Samuel might "accelerate" the investor loans; there might be a change in the law. Mr. Hofman also refers to the possibility that Hill Samuel might go into administration, or cease to be a recognised bank, for the purposes of s 349 of the Income and Corporation Taxes Act 1988. But it is clear from a letter of 23 September 1993, from S. J. Berwin to Mr. Lywood

(1) 64 TC 617.

of the applicant, that if Hill Samuel were to become insolvent (and so default on their obligations under the guarantee entered into by them) then it was provided that Hill Samuel would have no further recourse against the investors for repayment of the loans.

No doubt there are certain contingencies in which an investor might have to repay the loan, or pay interest for a period. They seem to me to be remote. In my judgment, disclosure of the fact that the investor would most probably have to pay no more than £325 per £1,000, to recover £392 per £1,000, was as much required as if that were the certain position.

In short, the loan arrangements and the circularity of the payments in the scheme meant that the overwhelming likelihood was that the only net contributor of funds would actually be the Revenue itself, to the tune of about £37m. The investors would contribute nothing after tax relief, take a profit, and assume no significant risk.

These considerations objectively give rise to more than one question of law in relation to the scheme; or at least, would do so if the question for the Court were what the tax treatment of the scheme should be. These issues at any rate might, as it seems to me, call for scrutiny (I do not suggest they are exhaustive). First of all, should the £1,000 per unit (whether regarded as actual or notional) paid by each investor attract capital allowances under the Act of 1990, given the possible imbalance between the £95m purchase price and the actual value of the building or its construction cost to date? Secondly, should the payments paid by the investors be regarded as in part attributable to the exit arrangements as a separate valuable right? If so, that would call in question the availability of 100 per cent. capital allowances. Thirdly, there may be an issue (though Mr. Goldberg would say that in the end there is nothing in the point from the Revenue's point of view) whether, having regard to the substantial unlikelihood that any investor would have to repay his Hill Samuel loan from his own resources, the scheme should be regarded as involving artificial transactions? This might call into question the line of authority of which *Ensign Tankers* is an example.

I emphasise that this Court is not concerned to decide what are in fact the tax implications of the scheme. The question is whether the features which I have identified, and the possible questions which might arise in light of them, were made sufficiently clear to the Revenue, first on 15 July.

The letter of 15 July was in stark contrast to the information memorandum circulated to investors. I accept of course that, in the form in which it was so circulated, it was not in existence at the date of the letter. The memorandum contained this paragraph:

> "First there is the 'initial cash profit'. Investors can subscribe for Units in the Trust by providing a cheque for just £325 per £1,000 invested. The balance of £675 will be made available to all investors in the form of a loan from Hill Samuel. A 40 per cent. taxpaying investor should receive a tax rebate of £392 resulting in an 'initial cash profit' of £67 in respect of each £325 of cash subscribed. The interest payable by investors on their loans from Hill Samuel will be fully covered by the guaranteed rental income deriving from the lease."

The next paragraph says:

A "A secure exit is provided whereby the Trust can recover £64.125 million after ten years. This amount is guaranteed by Hill Samuel and will be sufficient to pay off in full all the investor loans."

The exit arrangements were further described as follows:

B "The Exit Arrangements ensure that sufficient funds will be available to enable investors to repay their loans within 10 years. It is the Trustee's intention to implement the Exit Arrangements on the Tenth Anniversary. The Trust Property will be acquired with the benefit of the Lease to SQPL (that is Newco). The Trustee, with the consent of the investors, can require SQPL, at any time within 10 years, to surrender C the lease and accept a new long lease at a nominal rent for a premium of £64.125 million. The premium is guaranteed by Hill Samuel and is equivalent to the maximum amount of investor loans. The amount will be charged to Hill Samuel by the Trust. Further details of the Exit Arrangements can be found on page 24."

D Mr. Goldberg says that the loan arrangements were sufficiently described in the letter of 15 July at para 1.12. That paragraph reads:

"1.12. A facility will be made available to investors whereby Hill Samuel Bank will make 10 year loans to investors of 67.5 per cent. of the purchase price of the units in the Trust at a fixed interest rate which is anticipated to be approximately 9 per cent. These loans will be full E recourse, but Hill Samuel Bank will have a charge over the units. Therefore, where units are charged, the proportion of basic rent received by each investor will be applied by Hill Samuel Bank in satisfaction of the investors' obligation to pay interest. Similarly, following the sale of a lesser interest in the Property (see paragraphs 1.10.3 and 1.15) the investors' share of the premium of £64.125 million will be applied by F Hill Samuel Bank in the repayment of each investors' indebtedness."

The Revenue are thus being told that the interest due to Hill Samuel would be met by the rent received by each investor, and that if a lesser interest in the property was sold, the investor's share of the premium which G would be payable (£64.125m) would be applied by Hill Samuel in repayment of the loans.

Mr. Goldberg submits, also, that the "exit arrangements" were properly described in the 15 July letter. He relies on para 1.10.3 and 1.15 of the letter. The first of these paragraphs indicates that the trustee (unless there has been the grant of a very long lease under para 1.15) may, on or after year 10, H require Newco to surrender its lease and take a very long lease at a nominal rent for a premium of £64.125m. The second paragraph (1.15) indicates that if the investors decide to sell the property, the trustee may, under the Newco lease, require Newco to surrender that lease in return for the grant to Newco of a very long lease at a nominal rent and at a premium. Paragraph 1.16 says that the premium thus to be paid would be £64.125m with certain additions. I

Subject to certain important qualifications which I will set out, I incline to accept that the primary factual aspects of the scheme which now concern the Revenue can in large measure be traced in the letter of 15 July; but it would require an extremely vigilant eye to do so. There is no use of language such as "exit arrangements", "initial cash profit", or "£67 tax free initial cash

profit on receipt of tax relief for every £325 invested in cash by a 40 per cent. taxpayer a return of 20.6 per cent ... ", or " ... on the assumption that the benefit of the tax relief is received within 6 months the return, on an annual basis, would amount to 45.5 per cent."—these latter expressions are all in the information memorandum.

I think it is worth noticing that the information memorandum, in the form of its eighth draft which was what was sent to the Tax Inspector on 9 September 1993, runs to some 36 pages. The letter of 15 July was 5 pages long. The information memorandum trumpets the benefits of the scheme very effectively. Anyone perusing the letter of 15 July would have to work quite hard to perceive and understand the implications of the scheme which, loud and clear, were put to investors in the memorandum. The slant of the memorandum was to tell investors that they could make a quick and safe profit out of the Revenue. The slant of the letter was to tell the Revenue that this was an enterprise zone unit trust scheme like any other. Yet by the last paragraph of the letter the solicitor said:

> " ... a copy of the final draft [that is, of the Memorandum] will be sent to you as soon as possible, though we believe there will be nothing relevant in the Prospectus which is not raised in this letter."

Their view clearly was (and it has been the thrust of Mr. Goldberg's submissions) that so long as the primary facts are described, it is for the Revenue to define the legal implications, and if they get it wrong and give an assurance in consequence, they will be stuck with it. I question whether that is what the legal principle of fairness is about. It smacks of setting snares; though I emphasise, as I did in argument and as Lord Lester acknowledged, there is no question whatever here of any bad faith by the applicant or its advisers. But I entertain the gravest doubt whether, even if the matter stopped where I have so far described it, sufficient disclosure was made by the letter of 15 July.

The matter does not, however, end there. So far, I have referred only in passing to para 2.4 of the 15 July letter. It was concerned with the question whether the exit arrangements (though they were not so described in the letter) might affect the investors' claim to capital allowances. It is in these terms:

> "2.4 It is not considered that the existence of the trustee's rights to require a surrender of the Newco Lease and to grant a new lease to Newco will, in any way, restrict the ability of investors to obtain capital allowances. This is for two reasons: (a) those rights being incorporated in the Newco Lease form part of the relevant interest purchased by the investors so that, even if any price were properly attributable to those rights that price would qualify for capital allowances; and (b) in any event, those rights have no significant value given the rental obligations under the Newco Lease which mean that the monies which the trustee can realise on exercise of those rights represent only the market value of the relevant interest. We have, however, mentioned the point because we have seen a letter which raises a question about allowances where a put option (which raises somewhat different issues) is granted."

The letter in question was written on 6 May 1993 from the Financial Institutions Division to the Enterprise Zone Property Unit Trust Association. The letter was in these terms:

A "When I wrote to you in March last year I mentioned I had doubts that unit trust schemes purchasing put options would meet the regulatory definition of an Enterprise Zone Property Trust. We have had further enquiries from some of your members about this and so I thought it would be as well to restate our position. Our view remains that a unit trust scheme acquiring property which includes a put option may not B satisfy the test in regulation 4(2) of the 1988 Regulations. Furthermore, we also have doubts that expenditure on a put option qualifies for relief under section 1 Capital Allowances Act 1990.

This is the view we seek to apply consistently in this area. We are aware, however, of a recent instance where assurances were given locally C which conflict with that view. We felt bound by those assurances in the circumstances of that particular case, but will continue to apply the law as we see it in other cases."

If there were any reasonable question whether the present scheme involved a put option element so as to engage the Revenue's concerns set out D in that letter, it was, in my judgment, quite clearly incumbent on the applicant, at the very least, to copy the letter to the Inspector since it chose not to write to the Financial Institutions Division. It did not do so. It said that the letter raised "a question about allowances where a put option (which raises somewhat different issues) is granted". In para 22 of his second affidavit, Mr. Smith for the applicant said:

E "We did not consider it was necessary to send a copy of the letter, as we considered that the circumstances in our case were different to those dealt with in that letter and therefore the Put Option letter was not directly relevant."

F He says why the applicant described in para 2.4 considered that the circumstances of its case were—

" ... very different to those in the Put Option letter. We understood the Put Option letter dealt with the situation where a trust acquired, as a separate item of property, a completely separate put option. This is not the situation in our case where the exit rights merely form part of the G terms of the lease and in any case it was also not possible to attribute a separate value to those rights."

If that was the length of the evidence, I would hold that since the applicant at the very least considered the letter worth mentioning, it should have sent it to the Inspector if it was not going to write to the Financial H Institutions Division. But the material I have so far described is very far from being the whole story.

In the course of argument, I had raised a query whether an early draft of the information memorandum was in existence at the time the 15 July letter was written. Mr. Goldberg's instructions, taken while he was on his feet, I were (if I understood him correctly) that there were no such drafts. However, Mr. Lywood has since sworn an affidavit exhibiting a draft prospectus which was in existence at the time. He describes it as being "more in the nature of a skeleton prospectus". It was a working draft. He explains that the applicant's practice in a case of this kind is to set out the details of the proposed scheme in the letter to the Inspector, so as to obtain a tax clearance, and thereafter

to send a final draft prospectus to the Inspector to obtain confirmation of the clearance. He says in effect that a proper prospectus is not prepared until clearance has been obtained, so as not to incur wasted expense.

I make no comment on the applicant's practice save to say that if there is a working draft prospectus, or memorandum, which contains significant material not reproduced in the letter to the Inspector, the applicant must send the early draft (or set out its relevant contents) if it is to have any proper expectation, recognised by the law, of relying on any later assurance given by the Revenue. The costs of providing later, or final, drafts seem to me to be quite irrelevant. But what is more important is the draft prospectus itself.

It contains a page of definitions (page 8 in Mr. Lywood's exhibits); one of them is:

> "Put Option: The put option arrangements referred to in the section marked Purchase Terms."

Then on page 10 under the heading "Put Option":

> "The Trust will have the right to require SPC (that is the lessee, which became Newco) on 30th September 2003, and annually thereafter, to surrender its lease and to take a 999 year lease at a rent of £10,000 per annum for a premium of £64.125 million. The Trust may exercise this option early if Hill Samuel can require early repayment of its loan."

On page 16:

> "As security for the loans to the investors, Hill Samuel will require the following security:
>
> (iv) an assignment of the investors' and the trustees' respective rights under the Put Option."

On page 24:

> "EXIT ARRANGEMENTS:
>
> Insert Put and Call Option Arrangements in proposed form.
>
> GUARANTEE:
>
> Hill Samuel will provide a conditional guarantee of the following:
>
> (ii) payment of the Put Option purchase price, or, if the lease is forfeited, the agreed compensation on forfeiture."

In a letter of 19 August 1993 from Mr. Lywood of the applicant to Messrs. Coopers and Lybrand, which has been disclosed to the Revenue since these proceedings commenced, this was said:

> "The Inland Revenue have confirmed that capital allowances will be available to investors on the basis of full disclosure to the Revenue of the trust details including the loan back agreements and the put options implicit in the structure. This will ensure that investors can participate without any tax risk."

A It is entirely clear that both before and after the letter of 15 July the applicant itself was expressing that aspect of the scheme constituted by the exit arrangements in the language of "Put Options". All the time it had in its hands the letter of 6 May 1993 from the Financial Institutions Division. All that Mr. Smith (second affidavit) is able to say about it is that he understood the put option letter to deal with a case where a "trust acquired, as a separate item of property, a completely separate put option. This is not the situation in our case ... ".

B

There is nothing in the 6 May 1993 letter about "a completely separate put option". The applicant itself thought that put options were implicit in the structure of the scheme. Yet it did not send the May 1993 letter to the Inspector. It did not tell him, fair and square, that there might be a question whether the scheme involved a put option element so as to attract the concerns of the Financial Institutions Division. On this ground alone, in my judgment, it markedly failed to put all its cards face up on the table. The letter did not fulfil what Bingham L.J. described as(1):

C

D

> " ... the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen."

To suggest, in those circumstances, that the Revenue's revocation of Mr. Fairley's assurances amounted to abuse of power such that this Court should prevent the Revenue from now collecting tax in the light of its view as to the impact of put options, subject of course to statutory rights of appeal, is to invoke a course of action which would be as potentially unfair to the general body of taxpayers as it would fly in the face of the principles enshrined in *Preston* and *MFK*, to say nothing of the general law of legitimate expectations.

E

F But that is not the only point. In the same letter of 19 August 1993, the applicant said:

> "Matrix is in a position to proceed to a rapid completion of the purchase of the property for a net price payable to you of £8m (subject to contract) on the basis of this offer which will involve the series of transactions as described by us to your firm's Tax Department and Paul Meitner in recent meetings ... . These transactions are necessary to preserve the tax allowances available on the buildings and would be required for any capital allowance based scheme and will include the novation of the Wimpey Construction Ltd. construction contract."

G

H On the next page:

> "They [the applicants] are confident that this timetable can be adhered to and that the net price will be in your hands by 12th November 1993."

I The Revenue were surely entitled to know the facts described in this letter of August 1993 if they were to arrive at an informed judgment as to the impact of s 10A (including subs (9)) on the scheme. It will be noticed that the expression "net price" used in the letter appears at s 10A(2)(b). But they were not told anything about it.

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(1) 62 TC 607, at page 644C/D.

If there was inadequate disclosure in the letter of 15 July, as in my judgment there was, it was not cured by the second letter of 9 September. It is quite true that that letter enclosed "an advanced draft" of the information memorandum. But it asked for a reply on the same day. None of the changes to which the Inspector's attention was drawn in that letter was directly material to the points which now concern the Revenue. The Inspector's attention was not drawn to any specific part of the memorandum. The description of the changes in the letter would not in fact call for him to refer to it, though I accept of course (because it is on the face of the letter) that the Inspector was asked to confirm his earlier clearance " ... in the light of the information contained in this letter and the Information Memorandum".

There was still no disclosure of the letter of May 1993, nor of the earlier draft prospectus using the expression "put option" nor of the treatment of £8m as the net price for the property. In my judgment, the want of disclosure in the earlier letter was not so cured by the later one as to make it unfair for the Revenue now to resile from the Inspector's assurances.

There are, however, these further considerations. No assurance was given by the Inspector that the scheme had been cleared through Financial Institutions Division. I quite accept that there will be circumstances in which an assurance given by a tax inspector may be relied on. But in this case it is plain from the documents that, before 8 October 1993, the applicant knew that the scheme had not been approved by Head Office, appreciated at least that Head Office might take a different view from the Inspector, and was preparing itself to mount an argument, based on *MFK*, to the effect that the Inspector's assurance was—and I use its words—"legally binding". On 23 September 1993, Mr. Shirley, an accountant, wrote to Mr. Lywood thus:

> "[Referring to what had been said by a Mr. Spiers, who I understand belongs to an institution called BEST Investment] I think he is wrong to say ... that the clearance is not legally binding. David Goldberg Q.C. has said that on the basis of the case of *MFK* ... you would be able to sue the Revenue for judicial review if they went back on their clearance."

On 24 September 1993, the applicant wrote to Mr. Spiers and said:

> "You indicate that the local tax inspector 'appears to have' given an unequivocal indication that 100 per cent. allowances will be granted on all but the land value. I don't think you need the words 'appears to have'; you have seen the correspondence.
>
> You state that the local tax inspector's judgment is not legally binding on the Revenue. This is not correct (ex parte *MFK* ...) as we explained it is a local inspector, not Policy Division that gives capital allowances.
>
> Since the local inspector is the person responsible for giving capital allowance use, I can see no reason why a conclusion shouldn't be reached very quickly."

And in a fax to a journalist on the Independent on 27 September 1993, the applicant said, after referring to *MFK*:

> "This means that we would be able to sue the Revenue for judicial review if they went back on their clearance. As a result of this we con-

A sider it highly unlikely for the local inspector to be overruled by Policy Division after such full disclosure of information and moreover we would sue the Revenue should it happen."

Given this material, I accept Lord Lester's submission in para 27 of his skeleton argument:

B

"The sponsors were really relying on the Inspector's assurances to curtail Financial Institutions Division's freedom of action, rather than on such assurances as representing an authoritative clearance of the scheme."

C That being so, this is plainly not a case in which fairness requires the Court to compel the Revenue to stand by the Inspector's assurances. The applicant anticipated the possibility that Head Office might demur; and that means that it appreciated that there were points or arguments which might concern the Financial Institutions Division. In those circumstances, it should at that stage have put the matter to the Financial Institutions Division to D ascertain whether there would indeed be an authoritative clearance of the scheme. Instead, it chose to rely on what I can only infer it thought to be the letter of the law in *MFK*.

These considerations are, in my judgment, reinforced by the fact that by 24 September 1993 the solicitors had themselves been in touch with the E Revenue, and the Tax Inspector's attendance note of that date, recording a telephone conversation with Mr.Smith of Theodore Goddard, says that he:

" ... asked if there were any problems with Trust. I said that I'd been trying to find papers and that there may be some questions about the scheme and that I would be sending my papers to Kevin Meehan of F FID ... "

I should add, though it is not the basis of my decision, that these materials weaken the applicant's factual case as to the extent to which it relied on the Inspector's assurances. Since it itself considers it necessary to go back to the Inspector on 9 September, I do not think that it could demonstrate any G reliance by reference to events occurring before the Inspector's reply of 10 September; and at least by 24 September, (that is of course a fortnight later) it knew that the Financial Institutions Division might wish to bring its own mind to bear on the scheme.

It seems to me that the applicant has treated the *MFK* decision as if it H established something akin to a rule of estoppel against the Crown. If so, that is, in my judgment, a fundamental mistake which betrays a misunderstanding of the public law principles underlying the *MFK* decision. In my judgment, that decision is no more, nor of course less, than an application of the developing public law doctrine of legitimate expectation. It is a doctrine quite unrelated to estoppel, which on authority is not available to prevent the I Crown from carrying out duties imposed on it by statute, including the duty to collect tax. Although there is a limited exception in the planning field (which was not canvassed in argument before me and into which accordingly it would not be right to delve further), the concept of estoppel as such has no part to play in the Court's imposition, by judicial review, of high standards of decision-making upon public authorities. In particular, it is of no rele-

vance as such to the requirement of fairness, upon which the public law court will insist in determining the legality of public decisions. A

In this case, the applicant, armed with the Inspector's assurances, has in the materials which I have described said in effect: Never mind that the Revenue may want to think again; they are stuck with the Inspector's clearance because of *MFK*. This betrays a subjective knowledge that the Revenue might indeed want to think again, and, what is more important for a proper understanding of the law, treats the Divisional Court's decision in that case as if it were a trump in a game of bridge. On its facts this application is, in my judgment, misconceived, because it can only be mounted by reliance on a distorted and erroneous view of the principle of fairness which informs the Court's approach to cases of this kind. B C

A question was canvassed before me whether even if I held that the Revenue's revocation of the Inspector's assurances amounted to an abuse of power, yet I should exercise my discretion so as to refuse relief to the applicant. In the event, Lord Lester did not press this submission. Though for that reason I heard no full argument on the question, I am sure that he was right not to do so. It would take an extraordinary case for the Court distinctly to hold that a public authority had abused its power, and yet no relief should be granted to the abused applicant. D

However, this is very far from being a case of abuse of power for the reasons which I have sought to give. For those reasons, the application must be dismissed. E

Application dismissed, with costs. Leave to appeal granted.

F

The Company's appeal was heard in the Court of Appeal (Dillon, Nolan and Roch L.JJ.) on 25 and 26 October 1993. On 1 November 1993 judgment was given in favour of the Crown (Roch L.J. dissenting), with costs.

G

David Goldberg Q.C., *David Pannick Q.C.*, *John Walters* and *Hugh McKay* for the Company.

Charles Flint for the Crown.

H

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680; *Council of Civil Service Unions and Others* v. *Minister for the Civil Service* [1985] AC 374; [1984] 3 All ER 935; *Regina* v. *Secretary of State for the Home Department*, ex parte *Khan* [1984] 1 WLR 1337; [1985] 1 All ER 40; *Regina* v. *Knowsley Metropolitan Borough Council* ex parte *Maguire* The Times 26 June 1992. I

Dillon L.J.:—This is an appeal by a company called Matrix-Securities Ltd. ("the Appellant") against a decision of Laws J. given on 21 October

A 1993, whereby he dismissed the Appellant's substantive application for judicial review.

What the Appellant sought by that application, and seeks in this Court, was to quash a decision of the Commissioners of Inland Revenue, the Respondents to this appeal, communicated to the Appellant by a letter of 8
B October 1993, signed by a Mr. Michael Templeman, the director of the Financial Institutions Division of the Inland Revenue, to revoke certain assurances or tax clearances which had been given to the Appellant by the Revenue by a letter of 27 July 1993, and had been confirmed by a further letter of 10 September 1993. Both those letters had been written to the Appellant's solicitors by a Mr. Fairley, H.M. Inspector of Taxes for the
C Piccadilly District in London.

The field of tax law which is the background to the appeal is concerned with capital allowances in respect of buildings or structures in enterprise zones under the Capital Allowances Act 1990 as amended. Section 1(1)
D provides:

"**1.** Buildings and structures in enterprise zones.

(1) Subject to the provisions of this Act, in any case where—

(*a*) a person incurs capital expenditure on the construction of a building or structure which is to be an industrial building or struc-
E ture occupied for the purposes of a trade carried on either by that person or by such a lessee as is mentioned in subsection (3) below, and

(*b*) the expenditure is incurred, or is incurred under a contract entered into, at a time when the site of the industrial building or
F structure is in an enterprise zone, being a time not more than 10 years after the site was first included in the zone,

there shall be made to the person who incurred the expenditure, for the chargeable period which is that related to the incurring of the expenditure, an allowance ('an initial allowance') equal to 100 per cent. of the
G amount of that expenditure."

Subsection (2) extends that to commercial buildings or structures.

Section 10A provides insofar as relevant to the present case:

"10A. Purchases of buildings and structures: special provision for
H enterprise zones.

(1) This section shall apply where—

(*a*) expenditure is incurred on the construction of a building or structure (actual expenditure);

I (*b*) some or all of that expenditure is incurred, or is incurred under a contract entered into, at a time when the site of the building or structure is in an enterprise zone, being a time not more than 10 years after the site was first included in the zone; and

(*c*) before the building or structure is used, the relevant interest in it is sold.

(2) Where this section applies—

(*a*) the actual expenditure shall be left out of account for the purposes of sections 1 to 8, but

(*b*) ... the person who buys the relevant interest shall be deemed for those purposes to have incurred, on the date when the purchase price becomes payable, expenditure on the construction of the building or structure (deemed expenditure) equal ... to the net price paid by him for that interest ... ."

The difference between the two is that under s 1 the allowance is made to the person who has incurred the relevant capital expenditure. Under s 10A it is made to the person who buys the relevant interest in the building or structure on which actual capital expenditure has been incurred. He is deemed to have incurred construction expenditure equal to " ... the net price paid by him for the relevant interest".

It is s 10A which is in point in the present case.

The Appellant is the sponsor of a unit trust called the "Matrix South Quay Trust", formed in mid-September 1993 to acquire the relevant interest—in fact the freehold and a 200-year headlease which had not merged in the freehold, but the details do not matter—in certain land and buildings in the course of construction at South Quay in the London Docklands enterprise zone. A unit trust of some form is an obviously convenient machinery for raising, by moderate sums from a substantial number of investors who are higher-rate taxpayers, the very large sums that may be required for constructing an industrial or commercial building or structure in an enterprise zone.

However, experience had shown that there were two dangers for investors where such a unit trust was formed. The first ("the tax risk") was that investors would invest in the trust on advice and, in the expectation that capital allowances under s 1 or s 10A would be available, but in the event the Revenue might refuse to accept the claim for the allowances. The second ("the investment risk") was that a collapse of the property market would have the result that the investment held by the trustee of the unit trust, that is the building, fell in value and so the investors lost the substantial part of the value of their investments, or had to repay from other sources loans raised in order to pay up their investments.

It is said in the skeleton argument of the Appellant's counsel, which is also the notice of appeal, that the Appellant sought to deal with the tax risk by obtaining a confirmation from the Revenue that they were satisfied that capital allowances would be available in respect of an investment in the trust. It is because the confirmation sought was given by the Inspector of Taxes, but was then withdrawn, that these proceedings have come about.

It is also said in the skeleton argument that the Appellant intended to reduce the investment risk by building into the trust and the property it purchased "exit arrangements", i.e., arrangements which would ensure that investors, who borrowed £64.125m worth of the nominal aggregate amount of their investments above the £30.875m actually required, would not be called on to repay the borrowing.

A As I see it, on a true appreciation there was no investment risk if the Revenue gave and adhered to the tax confirmation sought, because, in that event, the capital allowances granted would more than cover all the actual money needed for the unit trust to acquire the property and complete the building, and would yield a substantial short-term profit to the investors besides paying the expenses of the Appellant.

B

The history of the development is that in March 1989 a property development company, which has been referred to as "WWL", acquired the 200-year lease of the site already mentioned and commenced the development. But WWL ran into financial difficulties and could not continue, so it sold the C lease and the partially completed development for £28.1m to another property development company South Quay Ltd. ("SQL"), which was formed by the creditors of WWL in the hope of completing the development.

SQL incurred a further £44m expenditure in relation to the property, including the acquisition of the freehold. But then SQL also ran into finan-D cial difficulties and, in May 1992, a receiver of SQL was appointed.

At that stage some £10m of construction work remained to be done by the contractors, Wimpeys, to complete the construction of the buildings. That remains the position.

E On 15 July 1993, the Appellant's solicitors (Messrs. Theodore Goddard) sent a letter, which had been settled by leading counsel, to Mr. Fairley, H.M. Inspector of Taxes for the Piccadilly District, seeking confirmations or tax clearances on behalf of the Appellant, the proposed trustee of the proposed unit trust and the future investors in that trust. I shall have to refer to certain F provisions of that letter in more detail later. For the present it is sufficient to say that the letter set out, in para 1.7, that it was intended that during September 1993 SQL, acting by its receiver, would contract to sell the property, subject to, and with the benefit of, a lease to a new company referred to in the letter, to the trustee for £95m.

G The confirmations sought from the Inspector were the following, set out in para 3 of the letter:

> "3.1. 100% initial capital allowances will indeed be available to each investor in respect of his share of the purchase price of £95 million to be paid by the trustee to SQL, less his share of the disallowable land ele-H ment.
>
> 3.2. Sums paid in respect of rents under the Newco lease will constitute rental receipts (i.e. Schedule A receipts from the letting of land as detailed in sections 15 and 355(4), of the Income and Corporation Taxes Act 1988); and
>
> I 3.3. Investors will be entitled to claim interest relief, pursuant to section 354 of the Income and Corporation Taxes Act 1988, in respect of the interest payable by them on loans used to acquire their units."

Mr. Fairley gave these three assurances without any qualification in a letter of 27 July to Theodore Goddard.

At that time there was no contract between the Appellant or the trustee and the receiver. The receiver was seeking tenders for the property from anyone interested. It was envisaged that, after the tender date, the receiver would negotiate a contract with whatever tenderer he preferred, not necessarily the Appellant or the trustee.

By early September 1993, there had been various changes in the scheme, which Theodore Goddard had put to Mr. Fairley in their letter of 15 July. They and their clients naturally wanted confirmation that the assurances which Mr. Fairley had given in his letter of 27 July remained valid despite these changes. They, therefore, sent Mr. Fairley a further letter of 9 September. In that letter they set out details of the changes, which are not relevant to this judgment.

With their letter they enclosed what they called an "advanced draft" of an information memorandum which the Appellant, as sponsor of the unit trust, would be sending to potential investors. At the end of the letter they said:

> "We should be grateful if you would confirm that the clearance given in your letter is still valid in the light of the information contained in this letter and the Information Memorandum.
>
> As mentioned to you, our clients intend to launch the trust on Monday 13 September. You have however kindly agreed to provide us with a response by Thursday 9 September. I look forward to hearing from you. Should you wish to discuss the matter further please do not hesitate to contact me."

Mr. Fairley replied, by letter of 10 September, that the various alterations made to the draft exhibited to him in July did not alter the substance of his letter of 27 July, so that the confirmation given therein remained valid.

Two points are to be noted at this stage. First of all, the draft information memorandum is prominently marked on its cover "Arranged Exit Trust. A new concept" On the first page, after a page of definitions, it is stated:

> "We have pleasure in providing you with details of Matrix South Quay, our first Arranged Exit Trust. This product is an enterprise zone property unit trust (EZPUT), and its structure contains several important innovations designed to be of great benefit to investors.
>
> This £95 million Trust gives investors the opportunity to invest in South Quay, a major property in London Docklands, in a manner which gives an initial cash profit on your net investment and an exit arrangement after ten years, plus the prospect of further substantial gains.
>
> First there is the 'initial cash profit'. Investors can subscribe for Units in the Trust by providing a cheque for just £325 per £1,000 invested. The balance of £675 will be made available to all investors in the form of a loan from Hill Samuel. A 40 per cent. taxpaying investor should receive a tax rebate of £392 resulting in an 'initial cash profit' of £67 in respect of each £325 of cash subscribed. The interest payable by investors on their loans from Hill Samuel will be fully covered by the guaranteed rental income deriving from the lease.

A A secure exit is provided whereby the Trust can recover £64.125 million after ten years. This amount is guaranteed by Hill Samuel and will be sufficient to pay off in full all the investor loans."

Secondly, between 15 July and 9 September the Receiver's tender process had been concluded and negotiations had taken place between the Appellant B and the Receiver. Subject to the further Revenue confirmation asked for in the letter of 9 September being forthcoming, the Appellant was ready for contracts to be exchanged for the purchase of the relevant interest in the property.

Most significantly, in a letter of 19 August 1993 from the Appellant to the Receiver, it was recorded that the Appellant was in a position to proceed C to a rapid completion of the purchase of the property for a net price payable to the Receiver of £8m. In truth the much higher "price" of £95m stated in the letter of 15 July was needed to justify the tax rebates or capital allowances being in aggregate high enough to cover the £8m payable to the receiver, the £10m payable to complete the buildings, and the fees outgoings and expenses of the Appellant and Hill Samuel relating to the scheme and to D provide, also, for the investors the initial cash profit of £67 in respect of each £325 of cash subscribed, referred to in the information memorandum as I have just mentioned.

Although the letter of 15 July had set out the acquisition by SQL of the 200-year lease and the partly-built building for £28.1m and the expenditure E by SQL of a further £44m in respect of the property, as I have mentioned above, it was no part of the Appellant's scheme that that expenditure should be recouped to SQL or the receiver. The receiver's price was only £8m.

Immediately on receipt of the further confirmation of 10 September, the F Appellant acted quickly and,

1. The unit trust was established.

2. There was an exchange of binding contracts with the receiver for the sale of the property, and a non-refundable deposit of £250,000 was paid to the receiver.

G 3. Prospectuses were prepared and sent out at a cost for printing and postage of between £50,000 and £70,000, and subscription lists opened on 22 September; and,

4. Time and money were spent in marketing the scheme.

I have no doubt that those steps were taken at this stage in reliance on H the clearances given and confirmed in the Inspector's letters of 27 July and 10 September.

One effect of the marketing of the scheme was press comment, which came to the attention of Mr. Templeman of the Financial Institutions Division. He considered the correspondence between the Inspector at I Piccadilly District and Theodore Goddard, and wrote to Theodore Goddard on 8 October. In his letter he stated, first of all, that, on the facts available, the Inspector should not have given assurances in the terms he did and, secondly, that the Revenue could not undertake not to challenge certain aspects of the scheme if it proceeded. He gave, at that stage, three reasons why he considered the Inspector was wrong to give the assurances. The first two are:

"First, it appears to us that investors will not incur expenditure for capital allowances purposes to the extent that their investments are funded by the Hill Samuel loan facility. In substance these loans may fall within the scope of the decision of the House of Lords in *Ensign Tankers (Leasing) Ltd.* v. *Stokes*(1).

Second, we believe that the guaranteed exit right amounts to a valuable separate right and expenditure attributable to this right will not qualify for allowances."

The general law on this topic of withdrawing assurances given by an inspector of taxes, or other officer of the Revenue, is not in doubt. The question which Laws J. had to decide, as he correctly stated, was(2):

"Whether that withdrawal was unfair, so as to amount to an abuse of power by the Revenue."

Authority is to be found in *Regina* v. *Inland Revenue Commissioners* (ex parte *Preston*)(3) [1985] AC 835. See the observations of Lord Scarman, at 852E to H(4):

"The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot, *in the absence of special circumstances*, decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the Act of 1970. For instance, as my noble and learned friend points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide."

and of Lord Templeman, at 864G(5):

"The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties, or from exercising their statutory powers, if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

and at 866G to 867A(6):

"However the *H.T.V.* case and the authorities there cited suggest that the commissioners are guilty of 'unfairness' amounting to an abuse of power if by taking action under section 460 their conduct would, in the case of an authority other than Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation. In principle I see no reason why the appellant

(1) 64 TC 617. (2) Page 592A *ante*. (3) 59 TC 1.
(4) *Ibid*, at page 43B/D. (5) *Ibid*, at pages 35H/36A. (6) *Ibid*, at pages 37/38A.

should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy."

It is not in doubt that the primary duty of the Revenue is to collect taxes which are, by statute, due, and not to grant allowances which statute does not warrant. But the managerial function of the Revenue allows a measure of latitude, and beyond that there may be some circumstances in which allowances are made available in order to induce certain types of expenditure in the more general interests of the nation and it is desirable that people should not be deterred from making the relevant expenditure by uncertainty as to whether the allowances will indeed be granted.

But if the taxpayer seeks assurances as to the taxation consequences of a course of action he proposes, there must be candid disclosure on his part.

Both parties accept the statement of the law by Bingham L.J. in *Regina* v. *Inland Revenue Commissioners* (ex parte *M.F.K. Underwriting Agents Ltd. and Others*) [1990] 1 WLR 1545, at 1569D to G[1]:

> "If it is to be successfully said that as a result of such an approach the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the revenue the ruling sought. It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought."

Mr. Goldberg accepted that as equivalent to the statutory provision, not here directly applicable, in s 707(2) of the Income and Corporation Taxes Act 1988, that a person seeking a clearance under that section must:

> " ... make full and accurate disclosure of all facts ... relating thereto which are material to be known to the Board."

The question on this appeal is, therefore, whether, according to those principles which are agreed to have been applicable, there was sufficient disclosure of material facts by Theodore Goddard to the Inspector, Mr. Fairley.

Before I examine that I should mention certain other points which were discussed in argument. It was argued, for the Revenue, that Theodore

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[1] 62 TC 607, at page 643G/H.

Goddard should have submitted their applications for clearance to the Financial Institutions Division and not merely to the local Inspector of the Piccadilly District. It is accepted, however, by the Revenue, that the letters of 15 July and 9 September were written honestly and that the Appellant and Theodore Goddard, and leading counsel who drafted the letter of 15 July, were not seeking to set a trap for the Revenue. It must be accepted, therefore, in my judgment, that the reason why the letters were written to the Inspector for the Piccadilly District, rather than to the Financial Institutions Division, was that that seemed appropriate as that Inspector had general charge of the Appellant's tax affairs, and earlier applications by the Appellant in respect of capital allowances on the construction of buildings in enterprise zones (which did not involve the special features of the South Quay scheme) had been dealt with by him. There was no cross-examination on this. It should be added, in justice to the Appellant and its advisers, that Theodore Goddard included with the letter of 15 July a spare copy of the letter:

> " ... in case you wish to refer any matter of this letter to your specialists."

I find nothing, therefore, in the fact that the approach was to the Inspector, to make it justifiable for the Revenue to revoke the assurances which the Inspector gave if there had been adequate disclosure to the Inspector.

It seems that what actually happened, when Mr. Fairley received the letter of 15 July, is that he was way out of his depth. He realised he was being asked to give the three assurances set out in para 3, and that he was being told that the property was being bought by a trust at a price of £95m, but he does not seem to have made any attempt to understand the letter beyond that and, despite the reference in the letter to a copy being sent in case he wished to refer any matter to his specialists, it does not seem to have occurred to him that he might consult the Financial Institutions Division.

In his affidavit he has said:

> "9. I did not pay much attention to the details in paragraphs 1 and 2 of the Theodore Goddard letter of 15th July, since I regarded this as the province of the Head Office specialists and not mine. I did not discuss those paragraphs with Theodore Goddard. So far as I was concerned, I was being asked for confirmation only on the items listed under paragraph 3. Had I realised that the scheme involved tax planning I would not have given any confirmations.
>
> ...
>
> 12. First, I did not appreciate at the time that the effect of the scheme would be that an investor would receive a tax repayment of an amount which exceeded the amount that he had invested in the scheme. Details of the way in which this was to be achieved are set out in the affidavit of Mr. Templeman sworn today. Briefly the result would be achieved because the investor would be seeking 100% allowances in respect of the amount of the purchase price he had contributed out of his own resources, together with the amount of a loan that was made to him, and that loan in substance never fell to be repaid out of the investor's resources. I did not appreciate this aspect of the scheme when I gave the confirmation requested at paragraph 3.1.

A ...

14. The letters did not explain that the payment of £70million to Newco was to be used as to £5.7million to pay the first year's rent and as to £64.125 million to be circulated back to Hill Samuel Bank from whom the investors were to borrow the sum of £64.125 million as
B explained in the affidavit of Mr. Templeman. I did not appreciate the funds were to move in this circular fashion. I treated the proposal on the basis that a sum of £95million was indeed being expended to purchase the property.

15. Another feature of the scheme that was not apparent from the documentation concerned the value of the property concerned. The
C object of the scheme was to raise some £95 million in respect of the properties referred to in the prospectus. Nevertheless I understand the properties concerned may have a market value of only around £20 million. I was not made aware of this considerable discrepancy."

D At the end of para 2.4 of the 15 July letter Theodore Goddard had said:

"We have, however, mentioned the point because we have seen a letter which raises a question about allowances where a put option (which raises somewhat different issues) is granted."

No copy of this letter, which was in fact from the Financial Institutions
E Division, was sent and it does not seem to have occurred to Mr. Fairley to ask for a copy.

In relation to the letter of 9 September he says he was under a tight deadline and that he did not consider the draft information memorandum at all. It does not seem to have occurred to him to say to Theodore Goddard
F that they would have to wait while he gave what they had sent him proper consideration.

It is one of the major difficulties of the Revenue, in this case, that their Inspector was so incompetent and wet behind the ears.

G Key provisions in the 15 July letter are paras 1.5 and 1.8 which read as follows:

"1.5 Approximately £10 million of construction work remains to be done before the buildings are complete. We understand the 200 year lease was originally transferred from WWL to SQL for approximately
H £28.1 million. SQL has incurred a further £44 million in relation to the development of the property. The trial balance of SQL, as at 15th May 1992 shows the total cost of the development of the property to date to be £72 million. This excludes substantial funding costs. The further £10 million of work required to be done to complete the buildings will be carried out by Wimpey Construction Limited ('Wimpey') under the
I terms of a construction contract dated 1st January 1989, made between Wimpey and WWL, which was assigned in favour of SQL on 1st October 1990, (the 'construction contract'). The buildings have not yet been completed or occupied."

"1.8 Prior to the sale, SQL, acting by the receiver, will borrow £10 million and will pay the proceeds to Wimpey to complete the work

under the construction contract and it will also grant Newco a 99 year lease in respect of the property (The 'Newco Lease'). The Newco lease will be granted out of the 200 year lease. In consideration for Newco entering into the Newco lease the receiver will pay Newco a reverse premium of approximately £70 million. This payment, together with payment of the loan of £10 million will be funded by the receipt of the purchase consideration on the sale. Newco will be a company incorporated and managed and controlled in Jersey. The shares in Newco will be owned by Matrix."

There are also artificial provisions in relation to the lease to the new company ("Newco") in para 1.10.1:

> "For the first ten years of the Newco lease, Newco will be required to pay rent of £5.7 million per annum plus 50% of any rent which it may receive from any sub-tenants."

The £5.7m was to come out of the money actually paid on completion to the receiver and not from borrowing. The reference to the receiver paying Newco a reverse premium of approximately £70m and the artificial £5.7m rent payment, plus the elaborate options in relation to Hill Samuel, make it abundantly clear to anyone with commercial experience that the supposed £95m sale of the relevant interest is not the simple transaction Mr. Fairley thought it was. Whoever heard of a receiver paying a reverse premium of approximately £70m on the sale of an asset of the company of which he is receiver?

The question Mr. Fairley ought to have been considering was whether the so-called price of £95m really was " ... the net price paid by" the buyer of the relevant interest within the meaning of s 10A. Mr. Fairley assumed that it was, because the letter of 15 July told him it was. Theodore Goddard told him it was because they and Mr. Goldberg, who settled the letter, believe that there is a distinction to be drawn under s 10A between the price paid by the purchaser and the price received by the vendor. The section is concerned only with the price paid by the purchaser. In Mr. Goldberg's submission that means whatever the purchaser paid; i.e. the whole £95m, whatever its purpose or destination. But, as I see it, the price paid by the purchaser cannot include sums routed by the purchaser through the vendor for other purposes of the purchaser which are no concern of the vendor; i.e. the £64.125m, which went round in a circle through Hill Samuel, and the £10m to be paid to Wimpey to complete the building, and the various fees of the Appellant and Hill Samuel.

The 15 July letter should have explained in clear terms what the receiver was getting for the property. If I am right that the actual figure was not known at 15 July, the expected approximate figure at that time should have been shown and the actual figure, as finally negotiated, should have been clearly stated in the body of the letter of 9 September. That was a very important card in the Appellant's hand which it failed to disclose.

As for the sending of the information memorandum on 9 September that, of course, was an important document which should have been sent but, if the Appellant wants to rely on it as curing the deficiencies in the earlier disclosure, attention should have been drawn in the letter to the particularly important passages in it. It is not good enough, in my judgment, merely

A to enclose it with a letter drawing specific attention to other matters and to put Mr. Fairley under insistent pressure to issue the desired confirmation that very day.

On the concession made by the Revenue, and in the absence of cross-examination, I assume that the pressure put on Mr. Fairley by Theodore B Goddard to give a quick reply was due to pressure to get a quick reply put on Theodore Goddard by their own client for commercial reasons, and it was not intended to steam roller Mr. Fairley into giving a reply without adequate consideration.

Mr. Goldberg submits—and this is the crux of this case—that the duty C of candid disclosure imposed on an applicant for tax clearance under *ex parte MFK* is merely a duty to put before the Revenue the material facts. The Revenue has access to the law and so, Mr. Goldberg submits, it is no part of the obligation of the applicant for a clearance to refer the Revenue to matters of law and, in particular, no part of his duty to draw the Revenue's attention to arguments in law which militate against the granting of the D clearance sought; e.g. in the present case, to draw the Revenue's attention to the question of whether the £95m really was "the net price of the relevant interest" or, indeed, whether the £95m was a genuine "price" at all.

I do not accept Mr. Goldberg's submission as universally correct. What E has to be disclosed in each case, including what has to be disclosed in relation to matters of law or possible arguments either way, must depend on the particular circumstances of each case.

In a case such as the present an applicant such as the Appellant is seeking an indulgence from the Revenue. It is asking the Revenue to forgo tax by F committing itself to granting tax allowances which, on a further and deeper analysis, might be found not to be payable. It is a case in which, though the scheme has in part the commercial objective of acquiring for the unit trust and completing the buildings at South Quay, there is also the major, if not predominant, objective of achieving for the investors a profit at the expense of the Revenue by tax planning. The Appellant's chairman was right to say:

G "This is not primarily an investment in a building. What investors are buying is a financial package."

In such a case, putting cards on the table requires not merely setting out the facts and the movements of money, including disclosing the actual sum which the receiver was to get (the £8m) but also drawing the attention of the H Revenue specifically to the crucial question whether, despite the much lower sum the receiver would actually get, the Appellant's advisers were right in their contention that the whole £95m constituted the net price paid by the purchaser for the relevant interest.

Clause 3.1 of the letter of 15 July is not enough, because it does not indi- I cate that the correctness of the figure of £95m is at the heart of the problem.

The question is then whether, in the situation at 8 October brought about in part by the incompetence of the Inspector and in part by the serious breach of duty on the part of the Appellant in making full disclosure to the Inspector, it was unfair for the Financial Institutions Division to revoke the

assurances which the Inspector had given. In my judgment, it was not. The Inspector had not received the disclosure he should have had to direct his attention to the real question. Indeed, if my view is correct that the Appellant, and its advisers, owed a duty to the Revenue, if they wanted a clearance, to draw the attention of the Revenue to the crucial question, it would be unreal for the Appellant to urge that it was not fair for the Revenue to revoke the assurances because the Inspector had failed to spot off his own bat what he should have been told by the Appellant.

I would, therefore, dismiss this appeal.

Nolan L.J.:—In my judgment, the critical issue in the present case is a very narrow one, though it may have wide implications for other cases. It is whether the Appellant when seeking the advance clearance upon which they wish to rely, satisfied the first of the conditions which were described as being "ordinarily necessary" in cases of this sort by Bingham L.J. in *Regina* v. *Inland Revenue Commissioners* (ex parte *M.F.K. Underwriting Agents Ltd. and Others*) [1990] 1 WLR 1545, at page 1569.

I think it will be helpful if I quote the passage in full(1).

> "First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given. It means that he must indicate to the revenue the ruling sought. It is one thing to ask an official of the revenue whether he shares the taxpayer's view of a legislative provision, quite another to ask whether the revenue will forgo any claim to tax on any other basis. It means that the taxpayer must make plain that a fully considered ruling is sought. It means, I think, that the taxpayer should indicate the use he intends to make of any ruling given. This is not because the revenue would wish to favour one class of taxpayers at the expense of another but because knowledge that a ruling is to be publicised in a large and important market could affect the person by whom and the level at which a problem is considered and, indeed, whether it is appropriate to give a ruling at all. Secondly, it is necessary that the ruling or statement relied upon should be clear, unambiguous and devoid of relevant qualification."

There is no doubt that the second condition was satisfied in the present case. The ruling given by Mr. Fairley, H.M. Inspector of Taxes, on 27 July 1993, and confirmed on 10 September 1993, was clear, unambiguous and devoid of qualification. The question is whether it was based upon sufficient disclosure by the Appellant of the relevant facts.

In the *MFK* case, as in the *Regina* v. *Inland Revenue Commissioners* ex parte *Preston*)(2) [1985] AC 835, it was held that no binding assurance had been given by the Revenue, but the implication of the decisions in both cases was that, if the necessary conditions had been satisfied then, in the ordinary way at least, it would be unfair and an abuse of power for the Revenue to go back on what they had said.

This means that the informal advance clearance, if fairly sought and squarely given, has a status higher than that of a decision of the High Court

(1) 62 TC 607, at pages 643H/644B. (2) 59 TC 1.

A or the Court of Appeal. It represents an irreversible decision that the taxpayer concerned will be taxed on the basis for which he has successfully applied.

Since the *Preston* and *MFK* doctrine rests on fairness, it is essential, in fairness to the Revenue, that those seeking a clearance should provide the B Revenue official concerned with all the material which he needs in order to arrive at a correct decision.

Mr. Goldberg Q.C., representing the Appellant, submitted that it is unnecessary for the taxpayer to do more than set out the facts in full and C then pose the question for which an answer is sought. In some cases this may be so, but in others, of which I regard the present as one, it is impossible to separate the factual from the legal considerations. This is indeed recognised by the letter of 15 July 1993 itself, where para 2, headed "Technical Issue", correctly grapples with some of the legal problems presented by the Appellant's proposals.

D

The critical part of para 2, for present purposes, to my mind, is para 2.1 which reads:

> "At the time of the sale, the buildings, although let, will not have been occupied and section 10A will apply in respect of the trustee's pur- E chase of the buildings. Furthermore, as the sale will be made by SQL (acting by the receiver) in the course of its trade which consists of the construction of buildings with a view to their sale, section 10A(9) will apply. As the trustee will have purchased the buildings directly from the developers, SQL, we would expect the transaction to fall within section 10A(9)(a) so that capital allowances would be available by reference to F the net price paid by the trustee to SQL, i.e. £95 million less the disallowable land element."

The result of that, and of the other propositions, put forward in para 2, as accepted by Mr. Fairley, was that *prima facie* at least capital allowances were due on the net price paid for the relevant interest, "i.e.", says para 2.1, G " ... £95 million less the disallowable land element".

There is no doubt that £95m was the price payable under the contract for the purchase of the relevant interest, but the proposal put forward by the Appellant was a tax-planning exercise in which the purchase contract was H only one of a number of complex and interdependent arrangements.

Although the letter of 15 July did not say so, the proposals were aimed at high-rate taxpayers for whom the principal selling point was that for an outlay of £325 they could expect to receive a tax rebate of £392.

I It is well settled law that in such a case regard must be had to the arrangements as a whole in order to determine whether they constitute acceptable tax mitigation or unacceptable tax avoidance. Thus in *Ensign Tankers (Leasing) Ltd.* v. *Stokes* [1992] 1 AC 655, at page 681 Lord Goff said(1):

(1) 64 TC 617, at page 746E–F.

"Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds at the expense of the general body of taxpayers, and as such are unacceptable."

It was plainly necessary for Mr. Fairley to consider whether the arrangements put forward by the Appellant fell into this category. In the *Ensign Tankers* case itself, the taxpayer company and its partners claimed capital allowances in respect of a sum of $14m which had been expended on the making of a film. Of this sum $3.25m had been provided by the taxpayer company and its partners from their own resources. The remainder was raised by non-recourse loans repayable out of the profits of the film.

It was held that the taxpayer company could only claim in respect of its share of the $3.25m. Lord Goff's speech continued(1):

"Now, if one takes certain individual features of the transaction, and considers them in isolation, it is possible to give some colour to VP's argument. For example, it is no doubt correct that the mere fact that the taxpayer borrows money in order to incur capital expenditure does not prevent him from qualifying for a capital allowance under the section; likewise, the mere fact that such a loan is a non-recourse loan in the sense that the taxpayer is not personally liable for its repayment, the loan being repayable out of property or proceeds in the hands of the taxpayer, will not of itself prevent the transaction from constituting what is in truth a loan, or the expenditure so financed qualifying for a capital allowance. But it is well established in the cases that we should not, for present purposes, have regard to such features in isolation. Indeed the authorities require us to look at related transactions such as those which were entered into on 14 July 1980 as one composite transaction. It is that composite transaction which we have to analyse, as a whole, in order to ascertain its true nature and effect, and to decide whether the transaction so analysed results, on a true construction of the relevant statutory provision, in the taxation consequences for which the taxpayer contends."

In the present case the letter of 15 July 1993 should, in my judgment, have referred to the *Ensign Tankers* decision, if only for the purpose of seeking Mr. Fairley's agreement that the case was distinguishable on the ground the loan in the present case might, in some circumstances at least, be recoverable directly from the individual investors. This was, after all, a crucial aspect of the proposals.

Further, it was, I think, certainly necessary for Mr. Fairley to be provided with the materials upon which he could judge whether the sum of £95m was in truth the net price paid for the relevant interest or whether it was, at least arguably, an expense which had been largely conjured out of the air; for if it was reasonably arguable that £95m should not, in all the circumstances, be regarded as the true cost of the relevant interest for capital allowances purposes, then Mr. Fairley had no right to grant the clearance. It

(1) 64 TC 617, at pages 746–747.

goes without saying that we are not at this stage concerned to decide whether such an argument would succeed. We are concerned with the question whether Mr. Fairley was provided with adequate materials to form a view upon the matter. The issue was not, of course, expressly raised. The question is whether nonetheless the relevant facts were put before Mr. Fairley with sufficient clarity for him to see whether the issue arose and, if so, to resolve it in favour of the Appellant.

The financial and fiscal results expected from the proposed transaction are clearly shown by the cash flow chart which appears as exhibit 4 to the affidavit of Mr. Templeman(1). This reflects, amongst other things, the fact that out of the £95m the net sum to be received by the vendor for the sale of the relevant interest was £8m. That was the sum described as the " ... net price payable to you" in a letter dated 19 August 1993 from the Appellant to the receiver of SQL.

Mr. Goldberg points out that this sum had not been agreed when the letter of 15 July 1993 was written, but some such sum must surely then have been in mind. It was certainly agreed by the time of the second letter written to Mr. Fairley on 9 September 1993.

Out of the remaining £87m a further sum of approximately £10m was to be applied by SQL in paying for the completion of the building works. These are the only sums directly attributable to the property, the development of which the enterprise zone legislation had been designed to encourage.

Of the remaining £77m, £64.2m was to be paid to Newco, £5.7m being used for the payment of the first year's rent and £64.25m going to Hill Samuel Bank Ltd., this reimbursing the bank in cash terms for the £64.125m which they had lent to the investors.

In the Daily Telegraph on 18 September 1993, the chairman of the Appellant was quoted as saying that: " ... this is not primarily an investment in a building. What investors are buying is a financial package", and that only "a small portion" of the £95m would be used to buy the Docklands buildings.

In his affidavit sworn on 20 October 1993, Mr. Fairley says that, from his reading of the letter of 15 July 1993 and the follow-up letter of 9 September 1993, he did not appreciate that the payment of £70m to Newco was to be used as to £5.7m to pay the first year's rent and as to £64.125m to be circulated back to the Hill Samuel Bank. He treated the proposal on the basis that the sum of £95m was indeed being expended to purchase the property. In para 15 he says that he was not made aware of the considerable discrepancy which appears to exist between the sum of £95m and the value of the property. This may be said to be scarcely surprising because, in para 9 of his affidavit, Mr. Fairley makes the astonishing statement that he did not pay much attention to the details in paras 1 and 2 of the letter of 15 July, since he regarded this as a province of Head Office specialists, (though he did not consult his Head Office about the letter, even though he was supplied by Messrs. Theodore Goddard with a spare copy to be used, if he so wished, for that purpose).

(1) Not included in the present print.

But if Mr. Fairley had read the letter with the attention which it required, would he have been adequately put on notice of the points of which he remained unaware? I am bound to say that, in my judgment, the answer is: no.

Mr. Goldberg submits that the relevant facts were all there and that Mr. Templeman's cash flow chart could have been built up on the basis of the letter alone.

I accept for the sake of argument, though with some hesitation, that this could have been done at least with the benefit of the further enquiries which it was open for Mr. Fairley to make, but it would have been a laborious and time-consuming exercise for one coming fresh to the proposals. I do not think a busy inspector of taxes could reasonably be asked to carry out such an exercise while, at the same time, being pressed for a speedy answer. Nor should it have been necessary for him to do so. The onus was on the Appellant to provide him with the full picture frankly and in detail. It may be that to have done so would have considerably reduced, if not eliminated, its chances of obtaining clearance. So be it. That simply reflects the importance of the cash flow illustration.

I might have taken a different view on this matter if Mr. Fairley had been supplied with a draft of the information memorandum when the letter of 15 July was sent to him, because, at least that would have informed him of the fiscal and financial basis upon which the proposals were being put to the public, and thus caused him to look more closely at the internal arrangements. The letter of 15 July had promised that he would be sent a copy of the final draft prospectus as soon as possible, " ... though we believe there will be nothing relevant in the draft which is not raised in this letter". In the event he received no such draft until 9 September, when he was being pressed for a final answer on the same day. The taxation attractions of the scheme for investors were made clear, but there was still no reference to the discrepancy between the £95m and the value of the property. I think that the further information supplied was too little and too late.

For these reasons I agree with Laws J. that it would be wrong to hold that the Revenue have acted unfairly in withdrawing the clearance given.

Although this conclusion seems to me inescapable, I have not found the case an easy one. The Appellant has incurred enormous expense as a result of acting on a firm and clear Revenue assurance. In para 7 of his affidavit, Mr. Fairley says that he knew he had no authority to approve "the scheme", but the unqualified answers which he gave to the questions put to him were, on the face of this, all that the Appellant needed in order to go ahead with its proposals.

The Revenue are to be applauded for the practice described in their statement of 18 October 1990; whereby inspectors of taxes(1):—

> " ... will of course continue where practicable to inform practitioners of the Revenue's interpretation of tax law as it applies to any case which falls within the responsibility of that office."

(1) ICAEW Memorandum TR 818, Simon's Tax Intelligence 1990 page 894.

A But the very greatest care must be taken to ensure that Inspectors of Taxes do not, as a result, shoulder burdens which are too heavy for them to bear. That is the danger which has materialised in the present case, and it must tend to have a damaging effect upon the relationship of trust between the Department and tax practitioners on which the tax system largely depends.

B

Having regard to the quality of the advice and representation enjoyed by the Appellant there was not, nor could there be, any question of a deliberate attempt to mislead the Revenue.

With these considerations in mind I was nearly persuaded by Mr.
C Goldberg's powerful and eloquent submissions that the Revenue should be held to their word. But it seems to me that we are bound to uphold the principle that taxpayers can only rely upon an informal advance clearing if the critical issues are stated clearly in the clearance application, or are so obvious that no express statement is needed. The clearance application in the present case did not, in my judgment, satisfy this high standard.

D

Therefore, I, too, would dismiss the appeal.

Roch L.J.:—On 15 July 1993, the Appellant applicant, who is the sponsor of the proposed enterprise zone unit trust known as "Matrix South Quay Trust" wrote to the Piccadilly District Inspector of Taxes, Mr. Fairley, seek-
E ing three confirmations in relation to its proposed scheme.

On 27 July the Inspector replied:

> "I confirm that the items number 3.1, 3.2 and 3.3 on page 5 of the above letter are agreed. The precise figures for capital allowances to be
F agreed when the land element figures are to hand from the relevant valuer."

On 9 September 1993, the solicitors for the Appellant applicant wrote again to Mr. Fairley setting out certain alterations in the scheme from those contained in the letter of 15 July, enclosing a copy of the 8th draft of the
G information memorandum the Appellant intended to send to those who were to be invited to subscribe for units in Matrix South Quay Trust. The Inspector replied on the following day, 10 September:

> "The various alterations now made to the draft exhibited to me in July do not affect the substance of my letter of 27 July so that the con-
H firmations given therein remain valid."

Undisputed evidence indicates that the Appellant, following the Inspector's letter of 27 July, incurred substantial expenditure in preparing the scheme, in particular producing the prospectus for the scheme's launch, and that, after the Inspector's letter of 10 September, yet further money was
I expended in finalising the prospectus and preparing the necessary legal documents, executing the lease, which was a necessary part of the scheme, and paying an irrevocable deposit of £250,000 to the receiver of South Quay Ltd.

On 8 October 1993, the director of the Financial Institutions Division of the Inland Revenue wrote to the Appellant's solicitors that the Financial Institutions Division had concluded that the Inspector had been wrong to

give the assurances he did, and stating that the Board could not undertake not to challenge certain aspects of the scheme if it proceeded.

In *Regina* v. *Inland Revenue Commissioners* (ex parte *Preston*) [1985] 1 AC 835, at 866H to 867B, Lord Templeman said(1):

> "In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of contract or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation."

It is not suggested that Mr. Fairley, the Inspector, did not have authority to give the confirmations that he did.

Mr. Flint, for the Commissioners, accepted that the Inspector is the normal point of contact between the tax practitioner and the Inland Revenue. However, the Commissioners assert that the confirmation should not have been given in this case and, further, that had the letter of 15 July been brought to the attention of the Financial Institutions Division at the Inland Revenue, those confirmations would not have been given. The confirmations were thus in the nature of a representation made by a person having the authority to make such a representation, and the Appellant has acted on that representation to their detriment.

If the Revenue is to be bound by such confirmations then it must be shown by those to whom the representations have been made, first that they put all their cards face upwards on the table; second, that they made clear to the Inland Revenue the confirmation or guidance which they sought; third, that they made it plain to the Inland Revenue that it was fully considered guidance that was being asked for; fourth, that they indicated to the Inland Revenue the use which they intended to make of the confirmation . See Bingham L.J. (as he then was) in *Regina* v. *Inland Revenue Commissioners* (ex parte *M.F.K. Underwriting Agents Ltd. and Others*) [1990] 1 WLR 1545, at page 1569.

Bingham L.J. in expanding on the first requirement said, at page 1569E(2):

> "This means that he [the taxpayer] must give full details of the specific transaction on which he seeks the revenue's ruling; unless it is the same as an earlier transaction on which a ruling has already been given."

Bingham L.J. added a further requirement before a ruling or statement could be relied upon, namely that the ruling or statement should be: " ... clear, unambiguous and devoid of relevant qualification". The letters of 27 July and 10 September satisfy this further requirement.

(1) 59 TC 1, at pages 37H/38A. (2) 62 TC 607, at page 643H.

A It is important that clearances given by the Inland Revenue can be relied on in cases such as the present. If that were not so, enterprise zone schemes and similar schemes would not work, because people would not invest in the scheme if no reliance could be placed on clearances from the Inland Revenue with regard to such schemes. It is, of course, always open to the Revenue to take such time as is necessary before giving the guidance sought.

B

Further, the Revenue has the power, when giving guidance, to give it on a non-binding basis, or subject to a qualification, if that is thought desirable or necessary. However, in my judgment, once the Revenue gives unqualified guidance then it will normally be bound by such guidance or confirmation if the conditions of candour have been met by the parties seeking the guidance C or confirmation.

There is, in my judgment, a public interest in investors being able to rely on clearances or guidance given by the Inland Revenue with regard to schemes designed to revitalise derelict or depressed areas. It will only be in the most exceptional case that the Revenue will be allowed to withdraw con- D firmations, once given, when the four requirements have been fulfilled by the person seeking guidance.

In my opinion, this case turns on the question whether the Appellant put all its cards face upwards on the table in its letters of 15 July and 9 September this year; there being no point raised by the Respondents with E regard to the second, third and fourth matters.

In their letter of 8 October 1993, in which the Inland Revenue told the Appellant's solicitors they could not undertake not to challenge certain aspects of the scheme if it proceeded, the Revenue made these statements: first, the Inspector should not have given the assurances he did in his letter of F 27 July 1993 on the facts available, which I take to mean on the facts then available to the Inspector; second, they list the three main reasons why they think the Inspector was wrong to give those assurances. Those reasons are the same reasons on which the Revenue still rely. The one statement that is not made in that letter is that the Appellant had not given full details of the G specific scheme on which it was seeking the Revenue's ruling. It was only on 11 October, following a letter from the Appellant's solicitors referring to the *MFK* case, that the Revenue wrote:

> "There were in our view important considerations not fully brought to his attention, namely the large discrepancy between the price being paid for the buildings under the scheme and their apparent market H value. The details of the letter dealing with the Revenue's views about the effect of put options referred to in paragraph 2.4 of your letter of 15th July and the impact of the *Ensign Tankers* decision in relation to the loan facility. In these circumstances we do not consider that all the cards were on the table face up."

I Why then were these confirmations given by the Inspector when they should not have been given if, indeed, that is the true situation? Mr. Goldberg has submitted, in my view correctly, that in this application the Court is not concerned with the true position in relation to the capital allowances to which an investor is strictly entitled under this scheme, but solely with whether the Revenue on 8 October, and subsequently, has been

acting in abuse of their power by saying they will not honour the confirmations given by the Inspector. A

There is a danger of reasoning in this way. The price paid to the receiver is so obviously not the net price, and the money invested for each unit is so clearly £325 and not £1,000, that the Appellant's submission must have been misleading and have obscured the true issues. B

The reasons why the confirmations were given consequently need examining with some care, in my opinion. The answers which emerge from Mr. Fairley's affidavits do not reveal a happy situation. First, Mr. Fairley discloses: C

> "I did not pay much attention to the details in paragraphs 1 and 2 of the Theodore Goddard letter of 15th July, since I regarded this as the province of the Head Office specialists and not mine. I did not discuss those paragraphs with Theodore Goddard."

In the next paragraph Mr. Fairley says: D

> "During that period [the two weeks following 15th July] I lost sight of the need to send the papers to Head Office and then I went on leave from August 16th to September 5th."

This despite para 4 of Theodore Goddard's letter, which is not one of the paragraphs to which Mr. Fairley did not pay much attention, which ended: E

> "We enclose a spare copy of this letter in case you wish to refer any matter of this letter to your specialists."

Mr. Fairley then complains that the letter of 15 July did not enclose a draft of the information memorandum, nor any diagram or other explanation of the intended or expected fiscal effects of the scheme. F

As I understand the evidence, such documents were not sent either because they did not exist, or because the letter of 15 July itself set out more information than any draft of the information memorandum which then existed. The intended fiscal effects of the scheme were precisely those matters which the Revenue were being asked to confirm. G

Paragraph 2 of the letter set out the technical issues which arose on the route towards the three intended fiscal effects. Mr. Fairley says that he did not appreciate " ... at the time", which I take to refer to July 1993, H

> " ... that the effect of the scheme would be that an investor would receive a tax repayment of an amount which exceeded the amount he had invested in the scheme."

Whether this statement is or is not true depends on whether, in the eyes of the law, the investors' investment for each unit is £1,000 or £325. I

On 9 September 1993, Mr. Fairley was sent the 8th draft of the information memorandum. The matters which Mr. Fairley did not appreciate in July 1993 were made absolutely clear in that document at several places. First, on the opening page under the heading: "Message from Sponsor", on the third

page under the heading: "Returns to Investors", and in three investment examples for the private investor.

The cover of that document had these words upon it: "Matrix South Quay. Arranged exit trust . A new concept".

In his affidavit Mr. Fairley says that he did not consider the memorandum at all because Theodore Goddards' letter of 9 September 1993, which accompanied it, did not ask him to consider any specific part of the memorandum and, for the changes to the scheme as outlined in the letter of 15 July contained in the letter of 9 September, there was no need for him to refer to the memorandum. Mr. Fairley states in para 18 of his first affidavit:

> "Again, I overlooked the need to send the papers to Head Office and they remained on my desk until requested by the Financial Institutions Division on about 23rd September."

Finally, para 14 of Mr. Fairley's affidavit ends with these words:

> "I treated the proposal on the basis that a sum of £95 million was indeed being expended to purchase the property."

In para 15 of his affidavit Mr. Fairley says he was not made aware by the letter of 15 July of the considerable discrepancy between the £95m and the market value of the properties which he understands may have been only about £20m.

The relevance of the market value may be disputed. What, in my view, must strike any reader of para 1.8 of the letter of 15 July 1993 is that the receiver is to retain only £15m of the £95m being paid to him by the trust.

The conclusion that I have reached is that by 9 September 1993, before the final confirmations were given, the Inland Revenue was in possession of the full details of the transaction on which the Appellant sought the Revenue's rulings. Whether one uses the phrase "full details" or a phrase based on the wording of s 707 of the Income and Corporation Taxes Act 1988:

> "Full and accurate disclosure of all facts and considerations relating [to the transaction or transactions] which are material to be known to the [Revenue] ... ."

my conclusion is that the Appellant had satisfied those requirements and the proof of that was that by 8 October the Financial Institutions Division of the Inland Revenue were able to formulate the three grounds upon which they say this scheme would fail to achieve the tax advantages for investors which the Appellant claimed for it.

I have no doubt that, had Mr. Fairley sent the letter of 15 July to the Financial Institutions Division, they would have raised the three points contained in their letter of 8 October with the Appellant's solicitors and the scheme would not have advanced further in the form in which it presently is had the Appellant been unable to persuade the Inland Revenue to change its views on those issues.

It must be certain, in my opinion, that had Mr. Fairley not overlooked the need to send the letter of 9 September and a copy of the 8th draft of the memorandum to, what he calls, "Head Office" then these matters would have been raised in September 1993, prior to the Appellant entering into a contract for the sale of the property and incurring the expenditure it did in paying the irrevocable deposit and funding and distributing the memorandum of information to potential investors, and promoting the scheme in other ways.

In reaching this conclusion, I take account of the fact that it is not alleged by the Revenue that there was any bad faith on the part of the Appellant or its advisers, or that the letter of 15 July, which was drafted by the Appellant's solicitors in consultation with leading counsel, Mr. Goldberg, was in any way a tricky letter, or a letter which laid traps for an unwary Tax Inspector.

It was not submitted by Mr. Flint that the sending of these documents to the Inspector, rather than to the Financial Institutions Division, was sharp practice on the part of the Appellant. Indeed, it was accepted that the Tax Inspector is the normal point of contact between the tax practitioner and the Revenue. In my judgment, he was clearly the officer to whom the Appellant should have sent its submission, for those reasons that have been given by my Lord, Dillon L.J.

Was the Appellant entitled to assume that the responsible members of the Inland Revenue, expert in the field, would be consulted and would, if necessary, study the information provided before the confirmations were given? The last sentence of the letter of 15 July 1993 shows that the Appellant contemplated that this would occur. The unqualified confirmations were given not because of any failure of the Appellant to provide necessary details to the Revenue, but because the Tax Inspector failed to read the first two paragraphs of the letter of 15 July 1993 with sufficient care and failed to read the 8th draft of the memorandum at all. More importantly, on his evidence, he failed to follow the internal procedure which he should have followed, namely sending the papers to his Head Office. If the matter is to be judged not by asking whether the Inland Revenue has been given full details of the proposed scheme, but whether the details given to the particular Revenue official were sufficient, then the latter test, in my opinion, introduces a great element of uncertainty into an area where a high degree of certainty is desirable and necessary.

Can the answer to the question: Did the applicant place all its cards on the table face up, vary with the abilities and application of the Revenue official to whom the request for clearance was addressed? I do not believe that the Inland Revenue can be heard to say that, although the issues would have been obvious to some of their officers, they were not made sufficiently obvious for this particular officer to appreciate what they were.

Finally, I would observe that what has to be set out in the submission to the Inland Revenue seeking their guidance, approval or confirmation are all details of the scheme and fiscal consequences which the taxpayer or his advisers assert flow from the scheme. The applicant and his advisers do not have to raise possible arguments against the fiscal consequences of the scheme being those for which they contend, or to say to the Revenue, "You may

wish to consider whether this scheme falls foul of the principles in the *Ensign Tankers* case because of these reasons ... ".

In my view, the taxpayers, and those who act as their advisers, or advisers to promoters of schemes such as the present scheme, are entitled to assume that the Inland Revenue know the principles set out in their Lordships' opinions in that case, and will be astute to see that the proposals they are being asked to consider do not run counter to those principles.

I would allow this appeal. I would grant the two declarations sought.

Appeal dismissed, with costs. Leave to appeal to the House of Lords granted.

The Company's appeal was heard in the House of Lords (Lords Templeman, Griffiths, Jauncey of Tullichettle, Browne-Wilkinson and Mustill) on 15, 16 and 17 November 1993. On 17 February 1994 judgment was given unanimously in favour of the Crown, with costs.

David Goldberg Q.C., *David Pannick Q.C.* and *John Walters* for the Company.

Lord Lester of Herne Hill Q.C. and *Charles Flint* for the Crown.

The cases cited in argument were those referred to in the judgment.

Lord Templeman:—My Lords, the Appellants, Matrix-Securities Ltd. ("Matrix") seek a declaration that the Respondent Commissioners of Inland Revenue are not entitled to revoke tax clearances given by a letter dated 27 July 1993 and confirmed by a letter dated 10 September 1993 from the Inspector of Taxes. Laws J. and the Court of Appeal (Dillon and Nolan L.JJ., Roch L.J. dissenting) refused to make the declaration and Matrix appeal.

On 1 January 1989 Wiggins Waterside Ltd. ("WWL") entered into a contract for Wimpey Construction Ltd. to carry out the South Quay Development by constructing three buildings at South Quay, Marsh Wall Development in the Isle of Dogs (Docklands) Enterprise Zone. On 23 March 1989 South Docklands Ltd. granted to WWL a lease of the site of the three buildings for a term of 200 years. Construction of the buildings began. On 6 August 1989 the freehold reversion expectant on the determination of the term created by the 200-year lease was conveyed to WWL but the lease was not merged in the freehold. On 1 October 1990 the 200-year lease and the freehold reversion were assigned and conveyed by WWL to South Quay Ltd. ("SQL") for the sum of £28.1m. On the same day the benefit of the building contract with Wimpey was also assigned to SQL. Sums amounting to £44m were paid by SQL to Wimpey for the continued construction of the buildings. SQL incurred debts of about £60m owed to a consortium of six banks which included Hill Samuel Bank Ltd. ("Hill Samuel"). That bank was

entitled to 10 per cent. or about £6m of the debts owed by SQL to the consortium. In May 1992 Cork Gulley was appointed administrative receiver to SQL and the buildings now require a further £10m to be expended in order to complete them and make them ready for letting.

Matrix carried on business as organisers of Enterprise Zone Property Unit Trusts whereby investors in trust units finance construction in enterprise zones and a trustee on their behalf purchases an interest in the buildings constructed. Such investors may become entitled to capital allowances under the Capital Allowances Act 1990 as amended [Finance (No. 2) Act, 1992, s 70, Sch 13, paras 1, 2, 14]. By the Act of 1990 where:

> "**1.**—(1) ...
>
> (*a*) a person incurs capital expenditure on the construction of a building ...
>
> there shall be made to the person who incurred the expenditure, for the chargeable period which is that related to the incurring of the expenditure, an allowance ('an initial allowance') equal to 100 per cent. of the amount of that expenditure."

Section 10A of the Act of 1990 as amended applies:

> "(1) ... where ...
>
> (*a*) expenditure is incurred on the construction of a building ... (actual expenditure);
>
> (*b*) ... that expenditure is incurred ... at a time when the site of the building ... is in an enterprise zone ...; and
>
> (*c*) before the building ... is used, the relevant interest in it is sold."

By s 20 of the Act of 1990 the relevant interest in the present case was the freehold and the 200-year lease held by the receiver of SQL. Where s 10A applies:

> "(2) ...
>
> (*a*) the actual expenditure shall be left out of account for the purposes of sections 1 to 8, but
>
> (*b*) Subject to subsection (8) below, the person who buys the relevant interest shall be deemed for those purposes to have incurred, on the date when the purchase price becomes payable, expenditure on the construction of the building ... (deemed expenditure) equal to the actual expenditure or to the net price paid by him for that interest, whichever is the less ...
>
> (8) Where the relevant interest in the building ... is sold more than once before the building ... is used, subsection (2)(b) above shall have effect only in relation to the last of those sales.
>
> (9) Where the actual expenditure was incurred by a person carrying on a trade which consists, ... in the construction of buildings ... with a view to their sale and, before the building ... is used, he sells the relevant interest in it in the course of that trade ... , then—

A (a) if that sale is the only sale of the relevant interest before the building ... is used, paragraph (b) of subsection (2) shall have effect as if the words 'the actual expenditure or to' and 'whichever is the less' were omitted; and

(b) in any other case, that paragraph shall have effect as if the B reference to the actual expenditure were a reference to the price paid on that sale."

Both WWL and SQL were traders for the purposes of s 10A(9). Neither of them could claim initial allowances under s 1 because their expenditure on the three buildings was not capital expenditure but an expense which they C could bring into account in calculating their income liable to corporation tax.

The receiver of SQL sought a purchaser of the interests of SQL in South Quay. That purchaser would be obliged to expend £10m to complete the building and would be entitled under s 1 of the Act of 1990 to recover from the Revenue the sum of £4m being tax at 40 per cent. on the initial allowance D of 100 per cent. of the actual expenditure. The purchaser would also be entitled under s 10A of the Act of 1990 to recover 40 per cent. of deemed expenditure equal to his purchase price. There might be some discount from the purchase price for the value of the land which formed the site of the buildings; this complication can be ignored for present purposes.

E By a letter dated 15 July 1993, Theodore Goddard, business and finance lawyers, wrote to Mr. Fairley, an Inspector of Taxes at Piccadilly District of the Inland Revenue in London in the following terms:

"Dear Sirs

F *New Enterprise Zone Property Unit Trust—Matrix South Quay Trust*

We act for Matrix-Securities Ltd. ('Matrix') of Gossard House, 7–8 Savile Row, London, W1X 1AF. Matrix are the sponsors to a proposed Enterprise Zone Unit Trust which is to be known as the 'Matrix South Quay Trust' (the 'trust'). It is proposed that the trustee of the trust will be the Royal Trust Company of Canada (CI) Ltd. (the 'trustee'), a G company incorporated and resident in Jersey. The trust will be established to enable the trustee to acquire three partially completed buildings (the 'Buildings') totalling some 350,000 sq. ft. at the South Quay, Marsh Wall Development which is situated in the Isle of Dogs (Docklands) Enterprise Zone (the Buildings together with their site are referred to as the 'Property'). The Trustee will hold the Property on H Trust for the benefit of investors in the Trust ('the Investors').

We are writing to seek your views on aspects of the trust. In this letter, references to sections are to sections of the Capital Allowances Act 1990, unless otherwise stated."

I Paragraphs 1.1 to 1.6 of that letter contained a confused and non-sequential history of the South Quay development from 1 January 1989 until May 1992 and then continued:

"1.7 It is intended that during September 1993 SQL, acting by the receiver, will contract to sell the property, subject to and with the benefit of the Newco lease, which is described further below, to the

trustee for £95 million (the completion of that contract being referred to as the 'sale').

1.8 Prior to the sale, SQL, acting by the receiver, will borrow £10 million and will pay the proceeds to Wimpey to complete the work under the construction contract and it will also grant Newco a 99 year lease in respect of the property (the 'Newco lease'). The Newco lease will be granted out of the 200 year lease. In consideration for Newco entering into the Newco lease, the receiver will pay Newco a reverse premium of approximately £70 million. This payment together with repayment of the loan of £10 million will be funded by the receipt of the purchase consideration on the sale. Newco will be a company incorporated and managed and controlled in Jersey. The shares in Newco will be owned by Matrix."

Paragraph 1.10 set out some of the terms of the Newco lease including payment of an annual rent of £5.7m for the first ten years and an option to the trustee on or after the expiration of the tenth year of the Newco lease to require Newco to surrender the Newco lease and take a long lease at a nominal rent for a premium of £64.125m. By para 1.16 when the investors decide to sell the property, Newco must surrender the Newco lease and pay a premium of £64.125m for the grant of a long lease for 500 years at a nominal rent. That long lease and the freehold must then be sold to a purchaser and the price paid by the purchaser is divisible as to 90 per cent. up to £34m and as to 50 per cent. of the proceeds in excess of that figure to the trustee and as to the balance to Newco.

Paragraph 1.11 explained that Newco's obligations under the Newco lease would be guaranteed by Hill Samuel Bank. Paragraph 1.12 said that a facility would be made available to investors whereby Hill Samuel would make ten-year loans of 67.5 per cent. of the purchase price of the units in the trust at a fixed interest rate anticipated to be nine per cent. The loan would be secured by a charge on the investors' units and thus on the rent payable by Newco under the Newco lease and on the £64.125m premium payable by Newco on the surrender of that lease and the grant of a long lease. Paragraph 1.13 explained that Hill Samuel would "sub-participate" its loans to investors to Hill Samuel Bank (Jersey) Ltd., a wholly-owned subsidiary of Hill Samuel. The Jersey bank would in turn "sub-participate" them to Newco.

Paragraph 2 of the letter was entitled "Technical Issue". Paragraph 2.1 said that:

"... we would expect the transaction to fall within section 10A(9)(a) so that capital allowances would be available by reference to the net price paid by the trustee to SQL, i.e. £95 million less the disallowable land element."

Paragraph 2.2 said that:

"It has been suggested that section 10A(9)(b) could apply to the trustee's purchase of the buildings. ..."

in which case:

"... allowances would only be available in respect of the price paid by SQL to WWL, i.e. £28 million."

A Paragraph 2.2 gave reasons why Matrix considered that s 10A(9)(b) did not apply.

Paragraph 2.4 stated that:

"It is not considered that the existence of the trustee's rights to require a surrender of the Newco lease and to grant a new lease to
B Newco will, in any way, restrict the ability of investors to obtain capital allowances. This is for two reasons: (a) those rights being incorporated in the Newco lease form part of the relevant interest purchased by the investors so that, even if any price were properly attributable to those rights that price would qualify for capital allowances; and (b) in any event, those rights have no significant value given the rental obligations
C under the Newco lease which mean that the monies which the trustee can realise on exercise of those rights represent only the market value of the relevant interest. We have, however, mentioned the point because we have seen a letter which raises a question about allowances where a put option (which raises somewhat different issues) is granted."

D Paragraph 3 was entitled "Confirmations" and was in these terms:

"3. We would be most grateful if, on behalf of Matrix, the trustee and the investors, you would confirm that:

3.1 100% initial capital allowances will indeed be available to each investor in respect of his share of the purchase price of £95 million to be
E paid by the trustee to SQL, less his share of the disallowable land element;

3.2 Sums paid in respect of rents under the Newco lease will constitute rental receipts (i.e. Schedule A receipts from the letting of land as detailed in sections 15 and 355(4) of the Income and Corporation Taxes
F Act 1988); and

3.3 Investors will be entitled to claim interest relief, pursuant to section 354 of the Income and Corporation Taxes Act 1988, in respect of the interest payable by them on loans used to acquire their units."

By a letter dated 27 July 1993, the Inspector wrote to Theodore Goddard
G saying:

"Your letter of 15 July refers.

I confirm that the items numbered 3.1, 3.2 and 3.3 on page 5 of the above letter are agreed. The precise figures for capital allowances to be agreed when the land element figures are to hand from the relevant val-
H uer."

On 19 August 1993 Matrix wrote to the receiver as follows:

"Re South Quay

I Further to your letter of 18th August 1993 inviting us to participate in a re-run of the 'best and final offers' for the above, I write to set out our improved offer.

Matrix is in a position to proceed to a rapid completion of the purchase of the property for a net price payable to you of £8,000,000 (subject to contract) on the basis of this offer which will involve the series of

transactions as described by us to your firm's Tax Department ... in recent meetings. ... These transactions are necessary to preserve the tax allowances available on the buildings and would be required for any capital allowance based tax scheme and will include the novation of the Wimpey Construction Ltd. construction contract. These transactions will not expose the receivers to any additional liabilities. We do not believe that this price could be bettered.

... Matrix have evolved an enterprise zone trust structure which ... guarantees investors an immediate profit, and the prospect of further profits dependent on the long term performance of the property ...

The Inland Revenue have confirmed that capital allowances will be available to investors on the basis of full disclosure to the Revenue of the trust details including the loan back agreements and the put options implicit in the structure. This will ensure that investors can participate without any tax risk. A leading bank has agreed to provide investors with non status loans and funding for investors will therefore be in place ...

Matrix believe that there is an excellent opportunity to launch a trust of this nature in the Autumn of this year. You should be aware that Matrix are in discussion to apply this structure to a number of other buildings. If South Quay is not the first trust launched in this nature, it is unlikely that they will be able to repeat this offer. Matrix have 100 per cent. success record in launching Enterprise Zone Trusts."

On 9 September 1993 Theodore Goddard wrote to the Inspector enclosing an advance draft of an information memorandum which described and advertised the Matrix South Quay Trust. The letter informed the Inspector that the information memorandum " ... sets out the details of the proposed structure, which you will see is in principle substantially the same as that envisaged in our earlier letter".

The letter described seven changes which do not require comment, save that in para 7 the Inspector was asked to:

" ... note that the trust will now be entitled to 80 per cent. of the occupational rents throughout the lease which will be net of expenses and that the share of proceeds as described in paragraph 1.15 in our letter will be 80 per cent. of all proceeds."

The remaining 20 per cent. of the occupational rents and proceeds of sale will be enjoyed by Matrix.

The letter dated 9 September 1993 asked the Inspector to confirm that the clearances given in his letter of 27 July were still valid in the light of the information contained in the letter dated 9 September 1993 and the information memorandum and continued:

"As mentioned to you, our clients intend to launch the trust on Monday 13 September. You have however kindly agreed to provide us with a response by Thursday 9 September."

The letter dated 9 September 1993 and the information memorandum were delivered to the Inspector on the morning of 9 September 1993 and the following day he replied in writing as follows:

A "The various alterations now made to the draft exhibited to me in July do not affect the substance of my letter of 27 July so that the confirmations given therein remain valid."

My Lords, Theodore Goddard should never have asked the Inspector for a clearance. The letter dated 15 July 1993 was not finalised by a legal B executive or a senior partner but by leading counsel. The letter should have been directed to the only authority qualified to deal with it, namely the Financial Institutions Division of the Inland Revenue.

A clearance should not have been given either by the Inspector or by the Financial Institutions Division. The Act of 1990 provides that an initial C allowance shall be paid for actual expenditure and deemed expenditure. If leading counsel was unable to give an assurance, satisfactory to Matrix, that the scheme described in the information memorandum involved relevant expenditure by the investors of £95m attracting an initial capital allowance of £38m, the Revenue were neither bound nor entitled to express an opinion.

D Nevertheless, a clearance was sought, a clearance was given in unequivocal terms by a representative of the Inland Revenue who had been furnished with the information memorandum and that clearance was acted and relied upon by Matrix which incurred considerable expenditure in launching the scheme.

Soon after this appeal was opened and again during the course of the E appeal, I asked Mr. Goldberg, who had approved the terms of the letter from Theodore Goddard to the Inspector of Taxes dated 15 July 1993, and who appeared for Matrix, whether paras 1.7, 2.1 and 3.1 of that letter were correct and not misleading when they referred to the "purchase price of £95 million to be paid by the trustee to SQL". Mr. Goldberg replied and submitted that those statements were accurate and were not misleading. If F they appeared accurate to Mr. Goldberg, they must have appeared accurate to the Inspector. If the statements are in fact accurate and are not misleading then the Inland Revenue should not be allowed to revoke the clearance contained in the Tax Inspector's letter dated 27 July 1993 and confirmed on 10 September 1993. If, on the other hand, the statements are materially inaccurate or misleading, then the clearance may be revoked.

G

Under s 10A of the Act of 1990, initial allowances are payable on the net price paid by a purchaser for the relevant interest. The letter dated 15 July from Theodore Goddard to the Inspector asserted that the price to be paid by the trustee for the relevant interest was £95m. On this basis the initial allowance was £38m. The letter dated 19 August 1993 from Matrix to the H receiver offered £8m for the relevant interest. On this basis the initial allowance was £3.2m and if a further £10m were expended in completing the buildings there would be a further initial allowance of £2.5m making a total of £5.7m recoverable from the Revenue. The result of this appeal depends on the resolution of the contradictions between the letter dated 15 July 1993 from Theodore Goddard to the Inspector and the letter dated 19 August I 1993 from Matrix to the receiver.

By the information memorandum, investors liable to pay income tax at the highest rate of 40 per cent. were invited to apply for units in the South Quay Trust. The minimum application must be £25,000. The application must be accompanied by a cash payment of £325 for every £1,000

applied for. When the trustee has received £30.875m in cash from investors in respect of applications for £95m of units, the trustee will purchase the South Quay development.

The information memorandum offers 95m South Quay Trust Units to investors. The investors are required to pay to the trustee £30.875m in cash. That sum of £30.875m will be distributed as follows:

(1) To the receiver £8m, he having conditionally accepted the offer made on 19 August 1993 to sell the interests of SQL in the South Quay development for that sum.

(2) To Wimpey £10m to complete the construction of the buildings.

(3) To Hill Samuel £2.5m guarantee fee.

(4) To Matrix £4.875m for stamp duty, commission and their own fees, and expenses.

(5) The remaining £5.5m will be paid to South Quay Properties Ltd. ('SQPL') that being the company to which the Newco lease will be granted. SQPL will in turn deposit that sum of £5.5m with Hill Samuel (Jersey). This deposit is intended to discharge the rates and other outgoings of the development for the first ten years of the Newco lease.

When the trustee has received £30.875m in cash from the investors, the trustee will be in a position to complete the purchase of the relevant interest from the receiver. First, Hill Samuel will provide title to £64.125m, for example by banker's draft and will hand that draft by way of loan to the trustee on behalf of the investors. The trustee will pass the draft to the receiver with an additional sum out of the moneys actually paid by the investors. The receiver will pass the draft for £64.125m to SQPL as a reverse premium on the grant of the Newco lease. SQPL will hand the draft by way of loan to Hill Samuel Bank (Jersey) Ltd. Hill Samuel Bank (Jersey) Ltd. will in turn pass the draft by way of loan to Hill Samuel, whence it came. The initial circle of self-cancelling payments of £64.125m will have been completed. The conveyancing documents will be worded so that the receiver conveys the relevant interest to the trustee for the sum of £95m subject to and with the benefit of the Newco lease which will be dated immediately before the conveyance.

Under the Newco lease, SQPL are due to pay a basic annual rent of £5.7m. The investors are due to pay interest of £5.7m on their loan. There will be an annual ceremony at which Hill Samuel provide a draft for £5.7m. That draft will be handed by Hill Samuel to Hill Samuel (Jersey) in payment of the interest due from Hill Samuel to Hill Samuel (Jersey) on its loan of £64.125m. Hill Samuel (Jersey) will hand the draft to SQPL in payment of the interest due from Hill Samuel (Jersey) to SQPL on its loan of £64.125m. SQPL will hand the draft to the trustee in payment of the basic rent. The trustee will return the draft to Hill Samuel, whence it came, in payment of the interest due from the investors to Hill Samuel on their loans of £64.125m. These transactions will constitute an annual circle of self-cancelling payments of £5.7m so long as the Newco lease is allowed to continue by the trustee.

When the investors decide that the South Quay development shall be sold, the trustee will call for the surrender of the Newco lease and for the payment by SQPL of a premium of £64.125m for the long lease. Hill Samuel

will provide a draft for £64.125m and hand that draft to Hill Samuel (Jersey) in repayment of the loan of that amount from Hill Samuel (Jersey) to Hill Samuel. The draft will be handed on by Hill Samuel (Jersey) to SQPL in repayment of the loan from SQPL to Hill Samuel (Jersey) of £64.125m. SQPL will hand the draft to the trustee in payment of the premium of £64.125m for the long lease. The trustee will return the banker's draft to Hill Samuel, whence it came, in repayment of the investors' loans of £64.125m. These transactions constitute the final circle of self-cancelling payments.

The initial circle of payments must be played out in order that the investors may be able to claim initial allowances of £38m without spending £95m on the purchase of the relevant interest. The annual circles of payments must be played out until the trustee considers that the time is ripe to sell the South Quay development. This will take place after the development has been completed and after the offices in the buildings have been let on occupational tenancies so that the development becomes saleable. Until the trustee is ready to sell the development, the circular annual payments must be played out in order to expunge the liabilities for rent and interest. The final circle of payments must be played out in order to expunge the loans and the premium for the long lease.

The circular payments can be effected by a banker's draft or without involving any title to any money. All that is required is that the appropriate entries should be made in the accounts of the participants and it would not then be necessary for the participants to meet and hold hands. The playing out of the circular payments is placed under the control of Hill Samuel by a guarantee. No one can break any circle and it is not in the interests of any participant to try to break any circle. Under the express terms of the guarantee, Hill Samuel will guarantee payment of the basic rent payable under the Newco lease by SQPL and will guarantee payment by SQPL of the premium of £64.125m payable on the grant of the long lease. Under the terms of the guarantee, the basic rent and the £64.125m premium are assigned by the trustee to Hill Samuel so that Hill Samuel may be indemnified. Hill Samuel is not liable to pay the basic rent under its guarantee unless it receives interest of the same amount from the investors. The investors' units are charged to Hill Samuel by way of security. Hill Samuel is appointed the attorney of the trustee and the investors to require the Newco lease to be surrendered and the premium of £64.125m to be paid and received. In addition Hill Samuel is entitled to set off rent against interest.

After the final circle has been completed the trustee and SQPL will convey and assign the South Quay development to a purchaser in fee simple freed from the long lease. The purchase price will be divided as to 80 per cent. to the trustee for the investors and as to 20 per cent. to Matrix.

It is now possible to resolve the contradiction between the letter dated 15 July 1993 to the Inspector which refers to a price of £95m for the relevant interest and the letter dated 19 August 1993 to the receiver which refers to a price of £8m.

The price of £8m in the letter dated 19 August 1993 from Matrix to the receiver is the real price, being the consideration for the sale by the receiver and the purchase by the trustee of the relevant interest, namely the freehold and the 200-year lease of the South Quay development and will be

expenditure on the relevant interest which entitles the investors to an initial allowance of £3.2m. The price of £95m in the letter dated 15 July 1993 from Theodore Goddard on behalf of Matrix to the Inspector is the fiscal price, being a figure fixed by Matrix to enable the investors to claim a tax advantage of £38m without expending £95m on the relevant interest. If the fiscal price had been fixed at less than £95m the claimed tax advantage would have been less than £38m and the attraction of the scheme to investors on the look out for something for nothing would have been reduced. If the fiscal price had been fixed at more than £95m, the attractions to the investors would have been increased but the chances of obtaining a clearance from the Inspector would have been reduced.

The fiscal price of £95m was fixed so that potential investors could be told by the information memorandum that if an investor invests £100,000 in the trust he need only pay £32,500 and will receive within six months £39,200 by way of an initial allowance so that he will make an immediate capital profit of £6,700 and in addition will be entitled to share with all the other investors in 80 per cent. of the occupation rents of the buildings when they are completed and in 80 per cent. of the proceeds of sale of the South Quay development when the buildings are eventually sold. The sum of £64.125m required to make up the fiscal price will never be paid but will be revolved by Hill Samuel and its subsidiary, by the trustee, the receiver and SQPL in such a manner that each receipt is matched by an equal and preordained immediate payment. The circular payments are self-cancelling.

The South Quay trust is a sophisticated tax-avoidance scheme designed to plunder the Treasury of £38m initial allowances instead of allowances of £3.2m for the purchase price and £4m for the Wimpey expenditure making a total of £7.2m. The scheme is based on circular self-cancelling transactions whereby the sum of £64.125m is bound to go round in a circle at the inception of the scheme, finishing where it starts. The sum of £5.7m is bound to go round in a circle annually until the Newco lease is brought to an end by the trustee and that sum will finish where it starts. When the scheme is finally wound up, £64.125m is bound to go round in a reverse circle finishing where it starts.

The South Quay trust is a tax-avoidance scheme because it aims to produce fiscal expenditure of £95m and a real expenditure of only £18m; see *Commissioner of Inland Revenue* v. *Challenge Corporation Ltd.*(1) [1987] AC 155, 168. The courts have long since insisted that fiscal consequences correspond to real consequences.

Every tax-avoidance scheme involves a trick and a pretence. It is the task of the Revenue to unravel the trick and the duty of the Court to ignore the pretence. In the present case the principal trick employed consisted of circular self-cancelling payments of £64.125m. The pretence was that the investors were expending £64.125m. The trick of circular, self-cancelling payments with matching receipts and payments was rejected in each of the following cases:

Black Nominees Ltd. v. *Nicol*(2) 50 TC 229; *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*(3) [1982] AC 300; see also [1979] 1 WLR 974, 979 (CA); *Eilbeck* v. *Rawling*(3) [1982] AC 300; see also [1980] 2 All

(1) [1986] STC 548. (2) [1975] STC 372. (3) 54 TC 101.

ER 12, 21 (CA); *Commissioners of Inland Revenue* v. *Burmah Oil Co. Ltd.*(1) 54 TC 200; *Moodie* v. *Inland Revenue Commissioners*(2) [1993] 1 WLR 266 and *Ensign Tankers (Leasing) Ltd.* v. *Stokes*(3) [1992] 1 AC 655.

In *Inland Revenue Commissioners* v. *Fitzwilliam*(4) [1993] 1 WLR 1189 the majority failed to take into account the nature and effect of the transaction regarded as a whole.

The authorities disclose that unacceptable tax-avoidance schemes exhibit several similar or identical characteristics. A scheme may of course include embellishments designed to avoid the mistakes of earlier schemes. It is a common characteristic of a scheme that, considered as a whole, the results claimed are too good to be true. Matrix claim that if top rate taxpayers invest £30.875m they will immediately receive a return of £38m from the Revenue and an 80 per cent. interest in the South Quay development which may ultimately be very valuable indeed. It is a common characteristic that some steps in the scheme are preordained though not necessarily contractual. According to Mr. Goldberg the Matrix scheme avoids the mistake made in the *Ensign Tankers* case where there was no recourse by a lender to a borrower; Hill Samuel are expressly accorded a right of recourse against the investors and, therefore, he argues, the steps are not preordained. But in reality recourse to the investors will never be made. Title to the money circulated will be produced by Hill Samuel only for the purpose of steps which ensure that in practice the money will come back to Hill Samuel immediately. A scheme may include the achievement of a commercial purpose; the South Quay development will be vested in the trustee and the investors will pay £30.875m. But some steps in the scheme have no commercial purpose; they are only included in order to obtain a tax advantage. In the real world Hill Samuel would not lend and borrow £64.125m on the terms and in the manner provided by the scheme. These transactions only have the purpose of manufacturing a tax advantage. The Matrix scheme also contains the familiar feature that out of the real money engendered by the scheme, in this case £30.875m, large sums of costs, charges and fees are siphoned off to the organisers of the scheme, their associates and their legal advisers. Hill Samuel will receive £2.25m without running a risk or incurring expenditure. Matrix will receive £4.875m to meet their own costs and charges and the professional fees charged by their solicitors and counsel. In addition, Matrix will receive 20 per cent. of the South Quay development which may ultimately be worth £100m or more.

Once a tax-avoidance scheme has been identified, the scheme must be construed as a whole and the taxing statute must be applied to the results in fact achieved by the scheme. Applying the Act of 1990, the Matrix scheme as a whole will result in relevant actual expenditure of £10m and relevant deemed expenditure of £8m. The claim to initial tax allowance of £38m based on a pretended expenditure of £95m must fail. The letter dated 15 July 1993 was inaccurate and misleading. The Revenue are, therefore, entitled to withdraw the clearance obtained as a result of that letter and the appeal must be dismissed. Matrix must pay the costs of the Revenue of these proceedings and before the House.

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(1) [1982] STC 30. (2) 65 TC 610. (3) 64 TC 617. (4) [1993] STC 502.

Lord Griffiths:—In this case a local tax inspector made a bad mistake. He gave clearance to a scheme proposed by Matrix-Securities which Lord Templeman has exposed as a manifestly impermissible tax-avoidance scheme. Although the letter of 15 July 1993 in which Matrix put the scheme to the Inspector was not expressed as clearly as it might have been, I have no doubt that if the Inspector had read it carefully he would have realised either that it was a tax-avoidance scheme or at the very least it should be considered by the specialist division of the Inland Revenue before clearance was given. In either case he should not have given his clearance.

The scheme involved a valuable put option. Matrix knew that the specialist division was not prepared to approve such schemes and I agree with Lord Browne-Wilkinson that, in these circumstances, Matrix should have put the scheme to the specialist division and were not entitled to rely on the clearance of the local Tax Inspector. I would, therefore, dismiss this appeal for the reasons given more fully in the speech of Lord Browne-Wilkinson with which I agree.

I wish, however, to add a few words of a more general nature to the issue that has arisen in the appeal. It is part of the human condition that people will make mistakes, but they must not be held to mistaken decisions if the mistake is discovered in time to take effective remedial action. In the present case, the specialist unit discovered the mistake made by their Tax Inspector and gave immediate notice to Matrix that they could not approve the scheme before any money had been invested by the public in the scheme. In these circumstances even if the Inspector had been the right person to submit the scheme to in the first instance, and even if the scheme had been clearly set out it would be wholly wrong to hold the Revenue to the mistaken clearance and allow the scheme to go ahead at a cost of some £38m of lost revenue to the national exchequer. It is one thing to hold the Revenue to a clearance that has been acted upon in good faith, but quite another to permit the correction of an error before it has been acted upon.

If, however, Matrix had been entitled to rely on the clearance given by the Inspector and had spent money in promoting the scheme before the clearance was withdrawn, then it seems to me that fairness demands that Matrix should be reimbursed for this out-of-pocket expense and it could be regarded as an abuse of power for the Revenue to refuse to do so. This point does not have to be decided in this appeal but I mention it because this aspect of the argument only surfaced towards the end of the hearing and the Revenue strenuously resisted any liability to compensate Matrix in such circumstances.

Lord Jauncey of Tullichettle:—My Lords, the issue in this appeal is whether the Revenue are entitled to revoke tax clearances given to Matrix by a local Tax Inspector in respect of a proposed Enterprise Zone Property Unit Trust of which Matrix were the sponsors. The clearances related to the eligibility of unit holders to receive a 100 per cent. initial allowance under the Capital Allowances Act 1990 (the Act of 1990) in respect of expenditure on buildings forming the proposed trust property.

The relevant history of the proposed trust property which consisted of land at South Quay, Marsh Wall Development, in the Isle of Dogs (Docklands) Enterprise Zone is summarised in the speech of my noble and learned friend, Lord Templeman which summary I gratefully adopt. Matrix

had sponsored other Enterprise Zone Property Unit Trusts (EZPTs) in Swansea and Dudley in the early part of 1993 and in the early summer of 1993 they became interested in the purchase of SQL's interest in the trust property. To this end they approached the receiver of SQL and by letter of 19 August 1993 offered it the net sum of £8m for the purchase of South Quay stating that the offer would involve a series of transactions which were " ... necessary to preserve tax allowances available on the buildings and would be required for any capital allowance based tax scheme ...". The word "preserve", as will become apparent, was somewhat of a euphemism. In the meantime, Matrix and their legal advisers had been devising a scheme which it was hoped would be attractive to investors and would also satisfy the Revenue as to its eligibility for 100 per cent. capital allowances on the price paid for the property, a price which in the scheme far exceeded the £8m referred to in the letter of 19 August 1993. Without eligibility for such capital allowances the scheme would have little or no attraction for the investing public.

The scheme which was produced may be summarised as follows:

1. The trustee "Sun Alliance Trust Company (Jersey) Ltd," were to purchase a leasehold interest in South Quay for 198 years from the receiver of SQL for the sum of £95m.

2. This sum was to be subscribed by higher rate tax-paying investors who, with a minimum individual investment of £25,000, would themselves pay over £30.875m and would borrow the remaining £64.125m from Hill Samuel Bank. The loans would be non-status with full recourse for 10 years at a fixed interest rate of 9 per cent. and the bank would have a charge over the investor's units. The annual interest would amount to approximately £5.7m.

3. The receiver would grant to South Quay Properties Ltd. (SQPL alias "Newco") a sublease for 99 years with an annual rent of £5.7m for the first ten years plus a percentage of any occupational rent received from sub-tenants and at a reverse premium of £72.125m. The receiver would also borrow £10m and would pay that sum to Wimpey to complete the building contract. On receipt of the £95m from the trustee, the receiver would repay the loan of £10m, and would pay the reverse premium of £72.125m. They would also pay £4.875m to Matrix as a fee to include stamp duty and expenses, retaining in their own hands only £8m. SQPL (hereinafter referred to as "Newco") is a Jersey company wholly owned by Matrix.

4. The loans by Hill Samuel to the investors would be sub-participated to Hill Samuel Bank (Jersey) Ltd. which would in turn sub-participate them to Newco. Therefore, on receipt of the £72.125m reverse premium Newco would lend £64.125m to Hill Samuel (Jersey) Ltd. who would in turn lend it back to Hill Samuel. Newco would deal with the remaining £8m by placing £5.5m on deposit with Hill Samuel (Jersey) and by paying £2.5m to Hill Samuel in respect of a guarantee of Newco's obligations under the 99-year lease.

5. Rent of £5.7m was to be paid under the 99-year lease by Newco to the trustee, which rent was payable to the investors. However, as the investors' units were charged to Hill Samuel, the bank would use the rents to meet the interest payments of £5.7m which were due to the bank in respect of the loans to the investors.

6. Intended as one of the attractions of the scheme were the "exit arrangements" which were embodied in the 99-year lease. It was provided that after a period of ten years, or earlier, in certain circumstances the trustee could require Newco to take a long sub-lease carved out of the 198-year lease for a premium of £64.125m payable by Newco to the trustee, together with a nominal rent. This premium would then be used to repay to Hill Samuel the loans to the investor. Hill Samuel would repay to Hill Samuel (Jersey) Ltd. their loan of £64.125m and Hill Samuel (Jersey) Ltd. would, in turn, repay to Newco the loan of that sum which Newco had made out of the reverse premium received in respect of the lease. In the event of a sale by Newco of its interest under either the 99-year lease or any longer lease which it had been required to take under the exit arrangements, 80 per cent. of the net proceeds of any such sale should be paid to the trustees for behoof of the investors. Hill Samuel's guarantee of Newco's obligations under the 99-year lease referred to in 4 (*supra*) extended both to payment of rent and to the payment of the premium of £64.125m if and when required.

The practical effect of the matters hereinbefore summarised would be:

1. for every £1,000 nominally invested by him in the scheme, an investor would have put up £325 and received back within a matter of months a tax-free sum of £392 being 40 per cent. of £1,000 less a land element thereof amounting to 2 per cent.;

2. he would almost certainly have no call made upon him or his estate in respect of his loan from Hill Samuel; and

3. he would have the prospect of participating in any occupational rents payable to Newco as sub-lessors and in any profitable sale of the trust property.

To suggest, therefore, that the maximisation of tax allowances for the benefit of individual investors was not a primary object of the scheme would be naive, but that is not the primary question in this appeal. In obtaining Revenue clearances for the Swansea EZPT, whose characteristics differed in some respect from those in the South Quay Trust, Matrix, through their solicitors Messrs. Theodore Goddard, wrote to Mr. George Fairley, their local Inspector of Taxes for the Piccadilly District of London, on 23 February 1993, setting out the details of the scheme and enclosing a brochure. They asked for confirmation that:

> "3.1 The proposed trust will be a qualifying Enterprise Zone Property Scheme in accordance with Statutory Instrument 1988, No. 267.
>
> 3.2 Claims for 100 per cent. initial allowances may be made in respect of the full sum of £4.4 million paid in consideration for the grant of the 125 year lease other than the part of the consideration which relates to the land element.
>
> 3.3 The sums paid in respect of rents under the proposed leases (and if necessary, bank guarantees) will constitute Schedule A receipts from the letting of the land, as detailed in sections 15 and 355(4) Taxes Act 1988; ... "

By letter of 26 February 1993 Mr. Fairley replied as follows:

> "I refer to your faxed letter of 23 February and to our subsequent telephone conversation. You have asked for three confirmations:

A 3.1 This matter is being handled centrally by my Head Office. I have submitted the papers and await a response.

3.2 &

3.3 On both of these I can confirm the position provided of course that the final arrangements do not differ from those contained in the B draft proposals."

Mr. Fairley reconfirmed the matter by a faxed letter of 5 March 1993.

In the case of the Dudley EZPT, Messrs. Theodore Goddard, by letter of 15 March, similar to that of 23 February (*supra*) sought confirmation C that 100 per cent. initial allowances might be made in respect of the purchase price of the property less the land element. This confirmation was forthcoming on the same day.

On 6 May 1993 an officer of the Financial Institutions Division of the Revenue wrote to the Chairman of the Enterprise Zone Property Unit Trust D Association in the following, *inter alia*, terms:

"We have had further enquiries from some of your members about this and so I thought it would be as well to restate our position. Our view remains that a unit trust scheme acquiring property which includes a put option may not satisfy the test in regulation 4(2) of the 1988 Regulations. E Furthermore, we also have doubts that expenditure on a put option qualifies for relief under section 1 Capital Allowances Act 1990.

This is the view we seek to apply consistently in this area. We are aware, however, of a recent instance where assurances were given locally which conflict with that view. We felt bound by those assurances in the circumstances of that particular case, but will continue to apply the law F as we see it in other cases."

The contents of this letter were known to Matrix and their advisers prior to their approach to the Revenue in relation to the South Quay Trust scheme.

G On 15 July 1993 Messrs. Theodore Goddard sent to Mr. Fairley, the local Inspector of Taxes, a letter extending to some five pages, which had been settled by senior counsel seeking his view on an aspect of the proposed scheme. The relevant passages in that letter are set out in the speech of my noble and learned friend, Lord Templeman and it is, therefore, neither necessary for me to repeat them nor to set out the terms of Mr. Fairley's H manuscript reply of 27 July 1993, which is also set out in the speech of my noble and learned friend. I would only add that a concluding sentence of the letter of 15 July was in the following terms: "We enclose a spare copy of this letter in case you wish to refer any matter of this letter to your specialist". On 9 September 1993 Messrs. Theodore Goddard again wrote to Mr. Fairley enclosing an advance draft of the information memorandum which Matrix intended to send to potential investors. The letter which was delivered I by hand early on the morning of 9 September sought confirmation on the same day that the clearance given to Mr. Fairley's letter of 27 July 1993 was still valid. At about 3 p.m. on that date Mr. Fairley telephoned to say that the confirmation remained valid, which message was confirmed by letter of 10 September. Once again, the relevant parts of the letter of 9 September and the information memorandum are set out in the speech of my noble

and learned friend, and I gratefully adopt his account thereof. It will, however, be noted that neither in that letter nor in the memorandum was there any reference to the offer by Matrix of 19 August 1993 to purchase the property at South Quay for £8m. Thereafter, in the light of the two confirmations given by Mr. Fairley, Matrix proceeded to implement the scheme and incurred expense of approximately £1m.

On 8 October 1993 Mr. M. Templeman, the director of the Revenue's Financial Institutions Division, wrote to Messrs. Theodore Goddard in the following terms:

"Dear Sirs,

Matrix South Quay Trust

1. We have recently noticed press reports about the Matrix South Quay Trust and we have considered the letter of 15 July 1993 which you wrote to the inspector at Piccadilly District. We have also considered carefully the reply he sent you on 27 July 1993 and we have concluded that, on the facts available, he should not have given you assurances in the terms he did. We think that we should take the first opportunity of letting you know that the Board cannot undertake not to challenge certain aspects of the scheme if it proceeds.

2. There are three main reasons why we think the inspector was wrong to give those assurances.

3. First, it appears to us that investors will not incur expenditure for capital allowances purposes to the extent that their investments are funded by the Hill Samuel loan facility. In substance these loans may fall within the scope of the decision of the House of Lords in *Ensign Tankers (Leasing) Ltd.* v. *Stokes.*

4. Second, we believe that the guaranteed exit right amount to a valuable separate right and expenditure attributable to this right will not qualify for allowances.

5. Third, on section 10A CAA 1990, we think that neither of the alternative views of subsection (9) put forward in your letter are correct. Where there is more than one sale by a developer or builder in the course of his trade we think that section 10A(9) has to be applied twice. Section 10A(9)(a) will apply to the first sale and section 10A(9)(b) will apply to the second. That is, the allowances on the purchase from the second developer will be dealt with as follows:

1. to the extent that the purchase price is attributable to the construction expenditure incurred by the second developer, section 10A(9)(a) will apply because this is the first sale of that part of the building; subject to other considerations, including the points mentioned earlier, capital allowances are available to the purchaser on the full amount of the purchase price attributable to that part of the building;

2. to the extent that the purchase price is attributable to the construction expenditure incurred by the first developer, section 10A(9)(b) will apply because this is the second sale of that part of the building. The allowances available to the purchaser (again, subject to other considerations) are therefore limited to the lower of the price paid on the sale of its relevant interest by the first

A developer and the part of the price paid by the purchaser which is attributable to that part of the building."

On 13 October Matrix sought judicial review of the decision in the letter of 8 October to revoke the clearances in the letters of 15 July and 9 September. On 21 October Laws J. refused the application and on B 1 November Matrix's appeal was dismissed by a majority of the Court of Appeal, Dillon and Nolan L.JJ., Roch L.J. dissenting.

In his affidavit Mr. Fairley stated that he knew that he had no authority to approve the scheme which was a matter for Head Office. He disclosed that he had not paid much attention to the details in paras 1 and 2 of the letter of C 15 July since he regarded this as the province of the Head Office specialist. However, he forgot to send the papers to Head Office. He further stated that he did not consider at all the memorandum sent with the letter of 9 September and, once again, forgot to send the papers to Head Office. Notwithstanding these remarkable revelations, Mr. Fairley proffered no D comprehensible explanation as to why he had given the clearances in his letter of 27 July.

I turn now to the law applicable to this appeal which raises, first, the issue of whether the conduct of the Revenue in seeking to revoke the clearances constituted unfairness amounting to abuse of power and, E secondly, the general applicability of the Act of 1990 to the scheme.

In *Regina* v. *Inland Revenue Commissioners* ex parte *Preston*(1) [1985] AC 835, in which the circumstances were very different from those of the present appeal, my noble and learned friend, Lord Templeman said, at page 864G(2):

F "The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers G an abuse of power by the commissioners."

At pages 866H–867B, he said(3):

"In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the commissioners if that H decision is unfair to the appellant because the conduct of the commissioners is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct or breach of representation does not con- I stitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for 'unfairness' amounting to

(1) 59 TC 1. (2) *Ibid*, at pages 35H/36A. (3) *Ibid*, at pages 37G/38B.

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> abuse of power if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."

and at page 867G, my noble and learned friend continued(1):

> "The inhibitory effect which the inspector's letter of 21 July 1978 would, or might, have had on future Revenue action was lost to the appellant by the fact that [his letter] did not contain the full disclosure which the inspector had the right to expect and on which he plainly relied."

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I take from these passages (i) that the Court may properly review a decision of the Revenue to exercise its statutory powers if the decision is so unfair as to amount to an abuse of power although the Court has a discretion to refuse relief even if such decision does savour of such abuse, and (ii) that a breach of representation by the Revenue will not amount to an abuse of power if full disclosure of all relevant material had not been made by the taxpayer prior to the making of the representation.

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In *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd.*(2) [1990] 1 WLR 1545, Bingham L.J., after referring to the publication by the Revenue to the world of a formal statement, said, at page 1569(3):

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> "But where the approach to the revenue is of a less formal nature a more detailed inquiry is in my view necessary. If it is to be successfully said that as a result of such an approach the revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would in my judgment be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say 'ordinarily' to allow for the exceptional case where different rules might be appropriate, but the necessity in my view exists here. First, it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the revenue's ruling, unless it is the same as an earlier transaction on which a ruling has already been given."

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My Lords, I have no doubt that the learned Lord Justice, as he then was, was absolutely correct in stating that in the circumstances posited the taxpayer must put all his cards face upwards on the table. I have equally no doubt that this is the sort of case which the Lord Justice had in mind. However, before considering whether Matrix had done what was required of them, it is necessary to look at the relevant provisions of the Capital Allowances Act 1990 as amended [Finance (No.2) Act, 1992, s 70, Sch 13, paras 1,2,14].

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Section 1(1) of the Act provides that when a person incurs capital expenditure on the construction of a building in an enterprise zone to be occupied for the purposes of a trade carried on by him or by a lessee he shall receive an initial allowance equal to 100 per cent. of the amount of that expenditure for the relevant chargeable period.

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(1) 59 TC 1, at pages 38F. (2) 62 TC 607. (3) *Ibid*, at page 643F/I.

A Section 10A covers the situation where expenditure has been incurred on the construction of a building but before that building is used the relevant interest in it is sold. Subsection (2) provides:

"(2) Where this section applies—

B (*a*) the actual expenditure shall be left out of account for the purposes of sections 1 to 8, but

(*b*) Subject to subsection (8) below, the person who buys the relevant interest shall be deemed for those purposes to have incurred, on the date when the purchase price becomes payable, expenditure on the construction of the building or structure (deemed expenditure) equal to the actual expenditure or to the net price paid by him for that interest whichever is the less."

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Pausing here, it would appear that the allowances available under subs (2)(b) could not exceed the actual expenditure incurred but might be less if the net price paid for the relevant interest was less than that actual expenditure. Subsection (9) deals with a situation where the seller of the relevant interest had incurred the expenditure in the course of the trade of constructing buildings for sale and sells the building in the course of the trade before it is used. Subsection 9(a) and (b) are in the following terms:

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"... (*a*) if that sale is the only sale of the relevant interest before the building or structure is used, paragraph (*b*) of subsection (2) above shall have effect as if the words 'the actual expenditure or to' and 'whichever is the less' were omitted; and

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(*b*) in any other case, that paragraph shall have effect as if the reference to the actual expenditure were a reference to the price paid on that sale."

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In terms of para (a) of this subsection, it would appear that it might be possible to obtain an allowance which exceeded the actual expenditure on the construction of a building provided that the net price paid for the relevant interest exceeded that sum. However, it is abundantly clear from these provisions that capital allowances are to be made only in respect of real expenditure or real purchase prices paid for the relevant interest.

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"Relevant interest" is defined in s 20(1) as follows:

"(1) Subject to the provisions of this section, in this Part, 'the relevant interest' means, in relation to any expenditure incurred on the construction of a building or structure, the interest in that building or structure to which the person who incurred the expenditure was entitled when he incurred it."

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Laws J. considered that Matrix failed to make full disclosure inasmuch as they neither sent to Mr. Fairley a copy of the letter of 6 May 1993 from the Financial Institutions Division, nor informed him specifically that there might be a question as to whether the scheme involved a put option element. Further, Matrix failed to mention the £8m agreed as the price of SQL's interest and they should have put the matter to the Financial Institutions Division given, in particular, the put option element in the scheme. In the Court of Appeal, Dillon L.J. concluded that the fact that Matrix had

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approached the Inspector rather than the Financial Institutions Division did not of itself justify the Revenue in revoking Mr. Fairley's assurances. However, he concluded that the sum of £8m to be kept by the receiver should have been disclosed to the Revenue at least by 9 September and that clause 3.1 of the letter of 15 July did not indicate that the correctness of the £95m was at the heart of the problem. Nolan L.J. considered that the case of *Ensign Tankers (Leasing) Ltd.* v. *Stokes*(1) [1992] 1 AC 655 should have been referred to in the letter of 15 July and that the sum of £8m to be retained by the receiver should have been disclosed in the letter of 9 September. I should add that the Revenue have all along accepted both in the Courts below and in this House that Matrix have throughout acted in good faith.

Before this House, Mr. Goldberg Q.C., for Matrix, argued that there had been full disclosure. He developed this argument by detailed references to the two letters and memorandum of information sent to Mr. Fairley and relied in particular upon the fact that Mr. Templeman had no difficulty in concluding from this information that the scheme gave rise to problems. The clearances, therefore, resulted not from non-disclosure on the part of Matrix but from the incompetence of Mr. Fairley. There is clearly force in this argument in view of the terms of Mr. Templeman's letter of 8 October 1993. However, I do not consider that it necessarily follows that full disclosure had been made because sufficient information was disclosed to enable inferences to be drawn therefrom.

In para 2.1 of the letter of 15 July 1993, Messrs. Theodore Goddard stated their expectation that the trustee's purchase of the buildings would fall within s 10A(9)(a) so that capital allowances would be available by reference to the net price of £95m less the small disallowable land elements. Paragraphs 1.7 and 1.8 of the above letter stated that the receiver of SQL after borrowing £10m to pay Wimpey to complete the work under the construction contract and granting to Newco a 99-year lease, would sell the property to the trustees for £95m paying out of said sum the £10m loan and the reverse premium of £70m, or thereby. One does not need to be a mathematical genius to infer from these paragraphs that the receiver would ultimately be left with no more than £15m. How then is the figure of £95m payable to the receiver in terms of the scheme to be reconciled with Matrix's offer to them of £8m? Neither the letter of 9 September 1993 nor the accompanying memorandum of information attempts to answer this question.

My Lords, the figure by reference to which a capital allowance is available under s 10A(9)(a) is the net price paid for the relevant interest which, by virtue of s 20, means the interest in the building to which the person who incurs the expenditure was entitled *when* (the emphasis is mine) he incurred it. In this case that would have been the interest of SQL as freeholders and under the 200-year lease before the receiver granted the 99-year Newco lease. It would appear that it was for that interest that Matrix were prepared to pay £8m. In determining what was the net price by reference to which any allowance would be available the Revenue would, in the present case, require not only to have regard to the figure of £95m but also to consider whether, and if so to what extent, that sum was properly attributable to the relevant interest. The fact that Matrix were prepared to purchase the receiver's interest in the property for £8m would have been a vital piece of information to the Revenue in performing the latter exercise.

(1) 64 TC 617.

It is, of course, of arguable force that it should have been apparent from the terms of para 1.8 of the letter of 15 July to anyone who had bothered to read the definition of "relevant interest" in s 20 that the price paid therefor could not possibly include the reverse premium payable for the Newco lease—a transaction which could not affect the nature of SQL's interest in South Quay at the prior time when it incurred the relevant expenditure and indeed a transaction which would have produced precisely the same legal effect as between the trustee and Newco had the trustee granted the lease and paid the reverse premium after they had acquired the leasehold interest in South Quay. However, that, to my mind, did not constitute full disclosure. As Bingham L.J. said in *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd. and Others*(1) [1990] 1 WLR 1545, 1569 "It is necessary that the taxpayer should put all his cards face upwards on the table". The proposed sale by the receiver of the property for £8m was a card of critical importance in the exercise which Matrix asked the Revenue to carry out and was never placed on the table. For this reason alone, I would dismiss this appeal.

There are, however, three further matters which I should like to mention. I agree with Laws J. that a copy of the letter of 6 May 1993 from the Financial Institutions Division should have been sent to Mr. Fairley with the letter of 15 July. Paragraph 2.4 of the letter merely states "... we have seen a letter which raises a question about allowances where a put option (which raises somewhat different issues) is granted". If the writer of para 2.4 thought that it was a matter of sufficient importance to mention the unidentified letter then I consider that he should have gone on to draw the attention of Mr. Fairley to the contents thereof.

There was some argument to the effect that the letter of 15 July should, having regard to the terms of the letter of 6 May, have been sent to the Financial Institutions Division at Head Office and not to the local Tax Inspector. Had there been evidence to suggest that Mr. Fairley was known to Matrix prior to 15 July to be incompetent and suffering apparently from a degree of amnesia, it may well be that disclosure to him might *per se* have failed to constitute full disclosure. However, there was no such evidence. The letter of 15 July enclosed a copy for reference to specialists, if required, and I consider that Matrix at that date were entitled to assume that Mr. Fairley was a reasonably competent Inspector of Taxes who would refer any matter which was beyond his competence or authority to those officers of the Revenue who had the necessary skills and powers.

However, the letter of 6 May 1993 is important inasmuch as it expresses doubts as to whether expenditure on a put option qualifies for relief under s 1 of the Act of 1990 and warns that in the future the Financial Institutions Division will continue to apply the law as they see it. Notwithstanding the foregoing warning Matrix chose to proceed with a scheme which included a put option and on the basis of a clearance which did not bear to have been given with the authority of the Financial Institutions Division. They cannot now complain that revocation of such a clearance would be unfair to them.

It is of great advantage to taxpayers and their advisers that the Revenue should continue to implement the practice described in their statement of

(1) 62 TC 607.

18 October 1990(1), to " ... continue where practical to inform practitioners of the Revenue's interpretation of tax law as it applies to any case which falls within the responsibility of their office". Advance Revenue clearance is no doubt critical for large numbers of financial and insurance schemes which are promoted. It is, however, equally important that when clearance is sought for such schemes the Revenue should not be put under undue pressure to give an answer by return. In the present case, the letter of 9 September with its accompanying memorandum of information required an answer the same day. I have grave doubts whether that requirement was, in the circumstances, reasonable. In my view, the Revenue when asked for clearances or other views should never feel pressurised by importunate taxpayers or their prestigious advisers. Rather should they take such time as is reasonably necessary for them to give full consideration to the problems placed before them. Taxpayers and their advisers should appreciate this when asking the Revenue for their view.

My Lords, I do not find it necessary to consider the various authorities dealing with tax avoidance and circular payments. I am content to dismiss this appeal on the simple ground that a piece of information essential to the deliberations required of the Revenue by the taxpayer was not furnished to them and that, accordingly, there would be no unfairness to Matrix in revoking the clearances of Mr. Fairley.

Lord Browne-Wilkinson:—My Lords, the only issue in this appeal is whether the Inland Revenue are prevented by their conduct from alleging that a scheme promoted by Matrix-Securities Ltd. gives rise to tax consequences less favourable to participants in the scheme than were indicated in two letters from the Inland Revenue. Your Lordships are not concerned to consider the actual consequences for tax purposes which the proposed scheme would have given rise to if implemented.

It is the statutory function of the Revenue to collect the taxes which Parliament has legislated are to be payable. The tax liability which any given transaction attracts can only be determined by the courts after the transaction has been carried through. But the financial viability of many transactions depends upon its tax repercussions. Therefore, taxpayers frequently need to know the tax consequences of a transaction before carrying it through. To meet this need, the Revenue are prepared in certain circumstances to give advance assurances as to the tax repercussions of a transaction so that the parties can proceed with confidence. This practice is of the greatest benefit to taxpayers and it would not be in the public interest to discontinue it.

It is now established that, in certain circumstances, it is an abuse of power for the Revenue to seek to extract tax contrary to an advance clearance given by the Revenue. In such circumstances, the taxpayers can by way of judicial review apply for an order preventing the Revenue from seeking to enforce the tax legislation in a sense contrary to the assurance given: *Regina* v. *Inland Revenue Commissioners* ex parte *Preston*(2) [1985] AC 835. But the courts can only restrain the Revenue from carrying out its duties to enforce taxation obligations imposed by legislation where the assurances given by the Revenue make it unfair to contend for a different tax consequence, as a result of which unfairness the exercise of its statutory

(1) ICAEW Memorandum TR 818, Simon's Tax Intelligence 1990 page 894. (2) 59 TC 1.

A powers by the Revenue would constitute an abuse of power: see *per* Lord Templeman, at page 864G. It is further established that if the taxpayer, in seeking advance clearance, has not made a full disclosure of the relevant circumstances, the Revenue is not acting unfairly, and, therefore, is not abusing its powers, if it goes back on an advance clearance which it has only given in ignorance of all the relevant circumstances: *per* Lord Templeman, at
B page 867G; *Regina* v. *Inland Revenue Commissioners* ex parte *M.F.K. Underwriting Agents Ltd. and Others*(1) [1990] 1 WLR 1545.

In my judgment, a failure by the taxpayer to make full disclosure of the material circumstances is not the only case in which, notwithstanding that the Revenue has given an assurance, it will be no abuse of power for the
C Revenue to go back on the assurance given. Many of the transactions on which advance clearance is sought are extremely complex, both factually and legally. If the Revenue has made it known that in particular categories of transaction advance clearance can only be given effectively at a particular level and clearance is not obtained from that level, there is, in my judgment, no abuse of power if the Revenue seeks to extract tax on a basis different
D from that contained in the assurance. If the taxpayer either knows or (by reason of Revenue circulars) ought to have known that a binding clearance can only be obtained in a particular way and a purported clearance has been obtained in a different way, there is nothing unfair if the Revenue says that the purported clearance (being to the knowledge of the taxpayer given without authority) is of no effect and does not bind it.
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In my view, this consideration, by itself, is sufficient to dispose of this appeal. Enterprise Zone Property Unit Trusts (such as the Matrix scheme in the present case) involve extremely complex documentation, the tax repercussions of which are regulated by intricate fiscal legislation. In the
F present scheme, there was included a "put option" viz. "the exit arrangements" summarised in the speech of my noble and learned friend Lord Jauncey of Tullichettle. In earlier drafts of the scheme the exit arrangements were defined as a put option. Before any clearance was sought by Matrix or their solicitors in relation to the present scheme, they were aware of the letter dated 6 May 1993 from the Financial Institutions Division of the Revenue to
G the chairman of the Enterprise Zone Property Unit Trust Association which reads as follows:

> "We have had further enquiries from some of your members about this and so I thought it would be as well to restate our position. Our view remains that a unit trust scheme acquiring property which includes a put option may not satisfy the test in regulation 4(2) of the 1988
H Regulations. Furthermore, we also have doubts that expenditure on a put option qualifies for relief under section 1 Capital Allowances Act 1990.
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> This is the view we seek to apply consistently in this area. We are aware, however, of a recent instance where assurances were given locally which conflict with that view. We felt bound by those assurances in the
I circumstances of that particular case, but will continue to apply the law as we see it in other cases."

The letter, therefore, makes it clear that, for the future, advance clearances given at local level relating to schemes which contain a put option

(1) 62 TC 607.

would not bind the Revenue but that they would, notwithstanding any such clearance, continue to apply the law as the Revenue saw it to be.

In those circumstances, I find it hard to understand how it came about that on 15 July 1993 Matrix's solicitors (who knew of the contents of the letter of 6 May) addressed their request for clearance of a scheme which, to their knowledge, contained a put option not to the Financial Institutions Division of the Revenue but to the local Inspector. The letter of 6 May made it clear that the local Inspector had no power to deal with the matter. It is even stranger to find in the letter of 15 July, para 2.4, the statement, "We have seen a letter which raises a question about allowances where a put option (which raises somewhat different issues) is granted". I am unable to see how, given the existence of the put option in the Matrix scheme, the letter raised somewhat different issues. However, no allegation of bad faith is made against Matrix or their solicitors and, in any event, the conduct of Matrix is not the relevant factor. What is relevant is that the Revenue had made it clear that a clearance at local level of a scheme containing a put option would not in the future be treated as binding. In those circumstances, I can see no ground on which it can be said that it is unfair or an abuse of power for the Revenue to press a claim for tax in accordance with the fiscal legislation since, to the knowledge of all parties, such clearance at local level was not to be treated as binding on the Revenue.

This point, being by itself sufficient to dispose of any allegation of abuse of power, I prefer to express no opinion on the difficult question whether Matrix made full disclosure of all the relevant circumstances. I would dismiss the appeal.

Lord Mustill:—My Lords, the single issue in this case is one of impression—namely whether it is an abuse of power for the Commissioners of Inland Revenue to maintain that in assessing the tax implications of the scheme described by your Lordships they are free to disregard the opinions expressed in the letters of 27 July and 10 September 1993 from the Inspector of Taxes. There are two questions which are not involved. First, whether the Appellants themselves abused the useful procedure whereby persons contemplating transactions with tax implications can assure themselves in advance that an adverse ruling on tax will not destroy what would otherwise be an unobjectionable mode of dealing. It has not been suggested that the Appellants acted in bad faith when passing their scheme before the eyes of the local Inspector. The second issue not before the House is whether this scheme, designed as it was to exploit legislation whose purpose was to breathe commercial life into the designated areas rather than to enable higher-rate taxpayers to make an immediate and virtually risk-free profit, has achieved the aims of its promoters. The sole question before the House is not how the scheme should be taxed, but whether it is contrary to the spirit of fair dealing, which should inspire the whole of public life, that the Inland Revenue should be enabled to maintain that the tax implications of the scheme are different from those which their Inspector was so ready to concede. Your Lordships being unanimous in giving a negative answer, it will be for another tribunal to decide how the scheme should be taxed, and I offer no opinion upon it.

As to the answer I feel no doubt. Others of your Lordships have concentrated on one aspect or another of the Appellants' dealings with the Revenue. I give these full weight, but prefer to approach the problem on a

broader front, taking into account all aspects of the exchanges between the Appellants and the authorities. Their timing, the level of communication, the complexity of the scheme and its documentation, the guarded terms of the letters all speak for themselves. In my opinion, not only is there no injustice in permitting the Revenue to depart from its Inspector's assurance, any other course would be positively unjust.

Appeal dismissed, with costs.

[Solicitors:—Messrs. Theodore Goddard; Solicitor of Inland Revenue.]