Neutral Citation Number: [2015] EWHC 3261 (Admin)

Case No: CO/3457/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2015

Before :

Mrs Justice Whipple

- -

Between :

The Queen on the Application of Ralph Hely-Hutchinson	**Claimant**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Defendant**

- -
- -

Mr Rory Mullan and Ms Harriet Brown (via the **Direct Access Scheme**) for the **Claimant**
Mr Nawbatt (instructed by **HMRC Solicitors Office**) for the **Defendant**

Hearing dates: 15 October 2015

- -

Approved Judgment

Mrs Justice Whipple :

INTRODUCTION

1. This is an application for Judicial Review brought by Ralph Hely-Hutchinson (the "Claimant") against HM Commissioners for Her Majesty's Revenue and Customs (the "Commissioners"). Permission was granted by Patterson J following a renewal hearing on 12 February 2015. Following that hearing, the Claimant lodged a Consolidated Statement of Facts and Grounds dated 19 February 2015. The Commissioners have filed detailed Grounds of Defence dated 21 May 2015 in response. A Protective Costs Order in the Claimant's favour was granted by Mostyn J on 20 April 2015. Before me, Mr Rory Mullan and Ms Harriet Brown represented the Claimant and Mr Akash Nawbatt appeared for the Commissioners. I thank all Counsel for their clear submissions and careful preparation of this case. I thank the Claimant's counsel in particular for acting *pro bono* in this difficult case.

2. The Claimant seeks Judicial Review of four closure notices dated 30 April 2014 (the "Closure Notices"). Each Closure Notice contains a rejection of the Claimant's claim for capital losses, advanced in relation to the four tax years from 1999 to 2002 inclusive. For the years 1999 and 2000, the claims were "free standing" claims to capital losses; for the years 2001 and 2002, the claims were by way of amended self-assessment return, the amendments reflecting the effect of the claimed capital losses.

3. The Claimant asserts a legitimate expectation to claim those capital losses, in reliance on guidance published by the Commissioners in 2003. The Claimant contends that his legitimate expectation cannot and should not be frustrated by the Commissioners' withdrawal of the 2003 guidance by means of a Revenue and Customs Brief issued in 2009 ("RCB 30/09"), and by the Closure Notices which relied on RCB 30/09, because to do so would be so conspicuously unfair as to amount to an abuse of the Commissioners' powers.

4. The Commissioners respond that there is no conspicuous unfairness in this case and that there is an overriding public interest in collecting the correct amount of tax. They resist this challenge.

BACKGROUND

5. From 1989 to 2008 the Claimant was employed by ABN Amro ("ABN"). As part of his remuneration, the Claimant was granted options in a company called Armadale Ltd at a nominal exercise price (the "Armadale option scheme").

6. The Armadale option scheme was an unapproved employee share option scheme. The payment of remuneration via such a scheme reflected widespread practice at the time, particularly in the banking sector. The Commissioners had concerns that such schemes, particularly as they were used in the banking sector, constituted tax avoidance, being designed to avoid employers' liability to National Insurance Contributions (NICs) on the value of the options conferred. The Commissioners commenced investigations. Those investigations led to settlements, in the end, in all cases, and the issues were never litigated. But the period of investigation and

settlement was protracted. I am told that the Commissioners reached settlement with ABN in 2005, but the last settlements with other employer banks were reached years later. I note that in November 2010, the Commissioners reached settlement with Goldman Sachs, which included a settlement of the outstanding NICs issue on that bank's employee share option scheme; that settlement was challenged unsuccessfully by way of judicial review in *R (on the application of UK Uncut Legal Action Ltd) v Revenue and Customs Commissioners* [2013] EWHC 1283 (Admin), [2013] STC 2357.

7. The Claimant exercised options he held in the Armadale scheme in tax years 1999 and 2000, disposing of the shares on the same day. Section 17 of the Taxation of Capital Gains Act 1992 applied to those disposals. That section provides that:

> "Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset-
>
> …
>
> (b) where he acquires or, as the case may be, disposes of the asset wholly or partly … in consideration for or recognition of his … services … in any office of employment ..."

8. This is known as the "market value rule". At the time the Claimant exercised his options, the common understanding of this rule was that the base cost for capital gains tax purposes was the market value at the date of exercise of the option. Because these shares were redeemed on the same day, and on the application of the market value rule as it was then understood. The Claimant completed his tax returns for the relevant years on the basis that no gain or loss arose on disposal.

9. On 12 December 2012, the Court of Appeal handed down judgment in *Mansworth (Inspector of Taxes) v Jelley* [2003] STC 53. That case concerned the proper construction of what is now section 144(2) TCGA 1992 (formerly section 137(3) of the Capital Gains Act 1979), read with what is now section 17(1) of the CGTA 1992 (formerly section 29A(1) CGTA 1979). The Court concluded that the grant (or acquisition) of the option and its exercise were to be treated as a single transaction (see paragraph 32).

10. On 8 January 2003, the Commissioners published a Technical Note headed "Tax treatment of options following *Mansworth v Jelley"* (this is the "2003 Guidance"). In it, the Commissioners stated that they would not appeal the decision in *Mansworth v Jelley*. It recorded that the effect of *Mansworth v Jelley* would be to increase the capital gains acquisition cost which might mean that on a subsequent disposal of the assets, the higher cost may reduce the capital gain or turn a gain into an allowable loss. Specifically, the 2003 Guidance said this:

> "**3. Who is affected by the change in acquisition cost?**
>
> Most of the people affected will be employees who have sold shares that they acquired by exercising unapproved

employee share options or Enterprise Management Incentive share options. The CGT acquisition cost of these shares is:

their market value at the time the option is exercised plus

any amount charged to income tax on the exercise.

The decision does not affect employees who acquired shares through approved Save As You Earn ('SAYE') schemes and approved Company Share Option Plans ('CSOPs'). Their acquisition cost stays what it was before the *Mansworth v Jelley* decision: the exercise price paid for the shares. Others affected would be anyone else exercising options granted otherwise than by way of a bargain at arms length or by reason of employment.

4. What happens next for people affected by the change in acquisition cost?

Self-Assessment time limits

Where taxpayers have already made Returns they can amend those Returns on the basis of the decision in *Mansworth v Jelley* within the time limits. These time limits run to 31 January 2003 for Returns for the tax year to 5 April 2001 and to 31 January 2004 for Returns for the tax year to 5 April 2002. Where taxpayers have not already made Returns they should include gains or losses calculated in accordance with the decision in *Mansworth v Jelley*.

Other open years

Where cases are open for earlier years, taxpayers can amend their Capital Gains for those years in accordance with the decision.

…

6. What happens next for the people affected by the change in disposal proceeds?

Where Return made before 12 December 2002, the date of the Court of Appeal judgement

We will take no action to implement the decision in *Mansworth v Jelley*.

Where Return made on or after 12 December 2002, the date of the Court of Appeal judgment

> The Return for any tax year, should include gains or losses calculated in accordance with the decision in *Mansworth v Jelley*.
>
> CGT1 Capital Gains Tax introduction and other Inland Revenue publications will be amended in due course."

11. The 2003 Guidance did not stand alone. The Commissioners issued a number of related publications at or around the same time which substantially repeated the 2003 Guidance. Specifically, I have been shown a number of extracts from HMRC's Manuals, and a further more detailed notice (the date of which is not clear to me) headed "Further details on tax treatment of options following the decision in the case of *Mansworth v Jelley*", which stated:

> "This notice expands on the one issued on <u>8 January 2003</u> but does not replace it so you may need to read both of them. The earlier notice sets out the general position. This one takes the form of answering some frequently asked questions. …".

It then set out a series of questions and answers. In particular, it stated as follows:

> **"Capital Losses**
>
> Q6. What is the time limit for claiming capital losses which arise as a result of the decision in *Mansworth v Jelley*?
>
> A6. It depends on the year when the loss was made. For self-assessment tax years (1996/97 onwards), you have to claim capital losses within five years after the first 31 January following the tax year in which you made the loss. For example, you have to claim a capital loss for shares sold between 6 April 1997 and 5 April 1998 no later than 31 January 2004.
>
> Capital losses are deducted from capital gains in the following order:
>
> i. Losses in the same year as the gain,
>
> ii. Losses brought forward from 1996/97 or a later tax year (self-assessment years),
>
> iii. Losses brought forward from 1995/96 or earlier tax years.
>
> A deduction for capital losses for pre-self-assessment tax years (1995/96 and earlier) can be given without a claim but see Q9.
>
> Q7. How do I claim a capital loss that arose in a self-assessment tax year?

A7. There is guidance in the notes on the capital gains pages of your self-assessment tax return. You can amend your tax return if the amendment window (12 months from the statutory filing date for that return) has not closed. If the return is under enquiry you can ask the Inland Revenue officer to amend your return at the end of the enquiry to include your claim for a capital loss.

If the time limit for amending your tax return:

- has not yet passed, write to your tax office saying you are amending your tax return and provide figures for your capital loss,

- has passed but you are still in time to make a capital loss claim, write to your tax office and provide figures for your capital loss.

Q8. How do I amend my 2001/02 tax return to set off a capital loss? My return was issued in April 2002 and is not under enquiry.

A8. The time limit for amending your tax return for the tax year to 5 April 2002 is 31 January 2004. Before that date write to your tax office saying you are amending your tax return, provide figures for your capital loss and show how it should be set off.

Q9. How do I deduct my pre-self-assessment losses?

A9. If you have a capital gain for an 'open' tax year you can deduct losses brought forward from 1995/96 or earlier tax years after deducting:

- any losses which arose in the same year as the gain

- unused losses brought forward from 1996/97 or a later tax year (self-assessment years).

An open tax year is one where the amendment window (12 months from the statutory filing date for the tax return of that year) has not closed or where your return is under enquiry.

You have to set off pre-self assessment losses in the earliest open year.

Write to your tax office saying you are amending your tax return and provide figures for your capital loss. If your return is under enquiry you can ask the Inland Revenue

> officer to amend your return at the end of the enquiry to include capital losses.
>
> …"

12. The 2003 Guidance was subject to some adverse comment in the specialist tax press in the weeks following publication. Surprise was expressed that the Commissioners had directed that the acquisition cost of shares should be the aggregate of market value at the time of exercise of the option, plus any amount charged to income tax on the exercise of the option; it was noted that this could lead to the taxpayer incurring a loss on disposal of the shares, because the value actually received (ie market value) would be less than the computed acquisition cost.

13. On 29 January 2003, the Claimant made a claim for capital losses on the 1999 and 2000 share disposals. His claim was based on the 2003 Guidance. The claimed losses arose from aggregating market value and the amount charged to tax on the exercise of the options, as directed in the 2003 Guidance.

14. On 17 March 2003, the Commissioners wrote to the Claimant, acknowledging the claim, and saying that:

> "The interaction between the recent court decision in *Mansworth v Jelley*, losses and self-assessment generally is under consideration. Definitive advice will be published on the Internet and elsewhere as soon as possible. Until then we are noting and acknowledging correspondence but not generally dealing with points that are not covered in the information published on the Inland Revenue Website under Featured Areas: Capital Gains Tax; Recent Developments; Tax Treatment Of Certain Options Following *Mansworth v Jelley* on 8 January 2003."

15. Meanwhile, legislation was put in hand to close the gap opened (in the Commissioners' perception) by *Mansworth v Jelley.* Section 158 of the Finance Act 2003 enacted a new section 144ZA to the TCGA 1992, which applied where the grant of an option and its exercise were treated as a single transaction (ie *Mansworth v Jelley* cases), and in such a case imposed a value based on the actual amount or value received on disposal of the shares. This re-established the position as it had been understood before *Mansworth v Jelley.* The new provision applied to the exercise of an option after 10 April 2003.

16. On 2 June 2003, the Commissioners (Mr Dave Smith, Inspector of Taxes) wrote to the Claimant to tell him that the Commissioners were opening an enquiry into his claims and amendments. The letter said this:

> "The Revenue is enquiring into your participation in the ABN Amro Armadale share option scheme. One area of enquiry involves the claims arising from the *Mansworth v Jelley* case. The Revenue does not accept, for this scheme, that the additional losses claimed under that case are due.

> One consequence is that no repayments will be made. At this stage, I do not intend to ask any questions about this matter as matters are being discussed between the Revenue and your employer and their advisors. However I will advise later if I need any further information from you or if there are any amendments arising because of this enquiry."

The letter attached a schedule of figures, showing how the claims would be given effect if the capital losses claimed were found to be due.

17. During lengthy correspondence from 2003 to 2009, the Claimant repeatedly asserted his right to claim "*Mansworth v Jelley* losses", which was the term commonly used to refer to claims based on the 2003 Guidance. He complained that his own tax affairs should be treated independently of his employer's tax affairs, and noted that similar claims by colleagues had been allowed. The Commissioners repeatedly asserted their obligation to collect the tax due. The enquiries remained open.

18. The Claimant submitted self-assessment tax returns for 2005/6 and 2006/7 setting the claimed *Mansworth v Jelley* losses against capital gains accrued in those years. The Commissioners opened enquiries into those returns.

19. On 20 March 2009, the Commissioners issued RCB 30/09, which set out the Commissioners' changed view of the taxation of gains under unapproved employee share option schemes. It was headed "Shares acquired before 10 April 2003 by exercising employee share options – allowable deductions". It referred to the 2003 Guidance, and said this:

> "We have now received legal advice that HMRC's guidance is incorrect. Where the shares are treated as having been acquired at market value, that value is the full measure of their deemed cost of acquisition. The cost is not augmented by any amount chargeable to income tax on the exercise of the options. Thus in computing any capital gain or loss accruing on a disposal of the shares no deduction falls to be made of, or in respect of, any amount that is chargeable to income tax on exercising the options. Our guidance will be amended accordingly."

20. RCB 30/09 confirmed that the change did not apply to disposals after 10 April 2003, given section 144ZA TCGA. But RCB 30/09 was said to apply in the following circumstances:

> "HMRC will apply our new understanding of the law in cases where there is an open enquiry or appeal."

21. In fact, the only individuals who were affected by RCB 30/09 were those in relation to whom there was an open enquiry or extant appeal. That was because disposals after 10 April 2003 were subject to the new legislation, and earlier disposals would have been the subject of claims which, unless challenged (leading to an enquiry or appeal) would now be out of the Commissioners' reach to assess,

given the statutory protections contained in section 29 of the Taxes Management Act 1970.

22. RCB 30/09 was followed on 11 September 2009 by Revenue and Customs Brief 60/09, headed "Questions arising from Revenue and Customs Brief 30/09" (this is "RCB 60/09"). The guidance set out a series of questions and answers. One relevant question and answer went as follows:

> "**Taxpayers who used HMRC's previous guidance**
>
> Q15. Do taxpayers who before 12 May 2009 computed their chargeable gains or losses in line with the Revenue's guidance that was published on 8 January 2003 have a open 'legitimate expectation' that their tax treatment should be more favourable than it would be under HMRC's current understanding of the law?
>
> A15. HMRC does not accept that its published guidance alone can necessarily create a 'legitimate expectation' for a taxpayer. Whether a taxpayer has a legitimate expectation will depend upon the specific factors and circumstances of the case. Chargeable gains and allowable losses included in returns or claims should be calculated on the correct statutory basis, which HMRC now understand to be as described in Revenue & Customs Brief 30/09. HMRC's primary responsibility is to apply the law correctly and collect underpaid or under-declared tax. However, in some limited circumstances, to apply the statute may be so unfair as to amount to an abuse of power by HMRC and in these circumstances HMRC may be bound by its previous guidance. We will normally be bound by our previous guidance where the taxpayer can demonstrate that he or she:
>
> - Reasonably acted in reliance on the previous guidance and would suffer detriment from the correct application of the statute.
>
> - To have acted in reliance on the advice the taxpayer must have done or refrained from doing something as a direct consequence of the advice. HMRC understand that in this context 'detriment' means real loss, it is not sufficient to have merely suffered disappointment or upset."

23. The Claimant was not aware of RCB 30/09 or RCB 60/09 at the time that they were published. He continued in his correspondence with the Commissioners, and the Commissioners continued in their responses to him in much the same way as before. The Commissioners (by J R Mountford, HM Inspector of Taxes) finally wrote to him on 12 November 2010 ruling that the *Mansworth v Jelley* losses would not be allowed, referring to RCB 30/09 and RCB 60/09. Closure notices

were issued on that date for the years 2005/6 and 2006/7. On 7 December 2010, the Claimant indicated his wish to appeal both of those closure notices. That appeal stands or falls with the outcome of this judicial review.

24. On 10 February 2012, Mrs Carole Sanderson, HM Inspector of Taxes, wrote to the Claimant on behalf of the Commissioners to provide the Claimant with an update. She quoted RCB 30/09 and 60/09, and noted that enquiries opened in cases where *Mansworth v Jelley* losses had been claimed would now be closed. She invited the Claimant to withdraw his claims, or if not prepared to do so, to explain why he considered it was not appropriate to do so and to supply supporting evidence.

25. The Claimant wrote back on 20 March 2012 declining to withdraw the claims and asking that the years under enquiry should be closed with those claims intact, noting that the claims had all been made on the basis of the Commissioners' own detailed guidance. The Claimant attached a lengthy appendix setting out a number of complaints about the Commissioners' conduct, including an assertion that the Claimant had a legitimate expectation, and that the Commissioners had discriminated against the Claimant without justification, because they had agreed many *Mansworth v Jelley* loss claims and repaid the tax in those claims, without opening enquiries. Further complaints were added by the Claimant's letter dated 30 May 2012.

26. There were further exchanges. On 7 February 2014 Mrs J A Bowman, officer, wrote to the Claimant saying that if she did not receive evidence that the Claimant had reasonably acted on the 2003 Guidance and suffered detriment as a result, she would close the four open enquiry years disallowing the capital losses claimed. The Claimant responded, holding his ground. In a letter dated 26 March 2014, he complained that the Commissioners were seeking to apply the change of law in RCB 30/09 retroactively. The Commissioners' response (by Mrs Sanderson) in a letter dated 30 April 2014 was as follows:

> "I would agree that changes in the law do not apply retrospectively. However, with respect, that is not what we are trying to do.
>
> …
>
> We are therefore seeking to apply our present understanding of the law as it stood at the time of the transactions in 1998/99 and 1999/00. There is no retrospection here or an attempt to backdate guidance. It is true that today's understanding of the law in 2003 is different from that which we had in 2004 (say) but the principle that we apply at today's date our current understanding of the law is consistent with [policy]."

27. The Closure Notices were issued on the same date in relation to the four open tax years, and the claimed *Mansworth v Jelley* losses were disallowed. The Claimant now seeks judicial review of the Closure Notices.

GROUNDS FOR SEEKING JUDICIAL REVIEW

28. The Claimant advances four grounds for seeking Judicial Review of the Closure Notices. Those are as follows: (1) that the Claimant had a legitimate expectation that the *Mansworth v Jelley* loss claims would be considered and dealt with consistently with the published 2003 Guidance which set out the Commissioners' view of the law at the time that the claim was made, and the Closure Notices breach that legitimate expectation. (2) The refusal by the Commissioners to recognise the *Mansworth v Jelley* loss claims and the decision to resile from the 2003 Guidance, and the Commissioners' manner of so doing, was so unfair as to amount to an abuse of power. (3) The refusal by the Commissioners to recognise the claims was a breach of the principle that the Commissioners should treat taxpayers fairly and consistently. Other taxpayers who exercised employment related share options had been taxed in accordance with the interpretation of the capital gains tax code, as that is understood by the Commissioners by their 2003 Guidance, whereas the Claimant has been denied that treatment, and (4) that the opening of and/or the maintenance of the enquiry for eleven years until 2014, and the subsequent issue of Closure Notices, was unlawful as it was based on an unlawful use of the statutory power to enquire into a taxpayer's affairs.

29. The Commissioners dispute those grounds. The Commissioners argue that the Claimant has known since June 2003 that the claimed capital losses for the tax years 1998/99-2001/02 were not agreed, that the Claimant cannot point to any detrimental reliance on the 2003 Guidance, given that he has been on notice since June 2003 of the Commissioners' challenge to his claims, that the Closure Notices were not irrational nor were they unfair, and do not amount to an abuse of powers. Specifically, that there is no partial or unfair treatment because the Claimant has been treated in the same way as his comparator cohort of taxpayers whose tax periods remained open at the time of RCB 30/09, and there was no abuse in the opening and maintenance of the enquiries until 2014, given the complexities of the issues underlying that enquiry.

THE COMMISSIONERS' POWERS AND DUTIES

30. The Commissioners' collection and management powers are contained in section 1 of the Taxes Management Act 1970 (as amended). By that provision, the Commissioners are responsible for the *"collection and management of"* capital gains tax, amongst other taxes.

31. The Commissioners have a *"very considerable discretion in the exercise of their powers"* so that:

> "… in the daily discharge of their duties inspectors are constantly required to balance the duty to collect "every part" of tax due against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which will inevitably mean that not all the tax known to be due will be collected."

(*R (Inland Revenue Commissioners) v National Federation of Self-Employed and Small Businesses Ltd* [1981] WLR 722, the "*Fleet Street Casuals"* case, per Lord Scarman at p 746 E and F).

32. Mr Mullan invites me to conclude that the duty to collect the tax due under the statute co-exists with, and on occasion must give way to, other duties owed by the Commissioners. Two other duties in particular were identified as relevant. The first is the requirement that the Commissioners should treat taxpayers fairly and not discriminate between them without good reason. The second is that the Commissioners should stand by their published statements of practice and/or policy and not be permitted to depart from those statements at will.

33. The Commissioners' duty to treat taxpayers fairly and not discriminate between them was recognised by Lord Scarman in *Fleet Street Casuals*. In that case, the Claimant challenged the Revenue's decision to grant an amnesty to the casual printers of Fleet Street, which was said to disadvantage the members of the Federation. He put it thus (p 747 A):

> "I am persuaded that the modern case law recognises a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly; to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims. The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, every part of which it is their duty, if they can, to collect".

34. In *R v IRC, ex p Unilever plc* [1996] STC 681 at 692, Sir Thomas Bingham MR emphasised that what might seem fair treatment to one taxpayer may be unfair if other taxpayers "*similarly placed*" are treated differently. This was considered and applied by Elias J in *R (on the application of British Sky Broadcasting Group plc) v CEC* [2001] STC 437, where he concluded that there were "material differences" between the claimant taxpayer and the competitors who were alleged to have received preferential treatment, such as to justify the different treatment in that case (paras 8 and 18).

35. Mr Nawbatt for the Commissioners draws to my attention three cases where the Court has refused challenges based on lack of parity with competitors. He cites Moses LJ in *R (Weston) v CIR* [2004] EWHC 1069 (Admin) (unreported), where permission to claim judicial review was refused:

> "10. There is no arguable unfairness in [the Commissioners] pursuing that duty [to collect the tax due] merely because, for some reason, they have failed to pursue their obligation in relation to the other taxpayers. Nor could it possibly be contended that there was unfairness to the other taxpayers since they have had the good fortune, if Mr Sherry's client's information is correct, to have escaped the tax. But the mere fact that two taxpayers arguably in the

> same situation have not in fact been charged tax does not raise a case of unfairness without more. If there was some evidence, which it would be incumbent on Mr Sherry's clients to produce, to show that there had been some unfairness; a basis for distinguishing between the taxpayers; some favour shown to the Inspector which caused the Revenue to charge his client tax but not the others; if there were some specific basis to show that the decision made was based upon some caprice or discriminatory reason; why, then the case would be different. But it is not, in my judgment, open to a taxpayer, simply because one taxpayer has been charged and another has not, simply to raise the contention and then expect the revenue to respond requiring them to disclose the private affairs of other taxpayers."

36. That passage was relied upon by Davis J in dismissing a claim for Judicial Review in *R (David Paul Esterson) v Commissioners for HMRC* [2005] EWHC 3037 (Admin), para 40, and Irwin J in refusing permission in another claim for judicial review in *R (Scott) v HM Revenue and Customs* [2015] EWHC 2810 (Admin), para 14.

37. Mr Nawbatt further suggests that these cases reflect the EU law principle that there can be no equality in illegality, citing Cases C259/10 and C-250/10 *Rank Group plc v RCC* [2012] STC 23. I am not persuaded that *Rank*, and other cases where the EU principle of equality in tax matters (manifesting as fiscal neutrality) has been considered, will assist in the resolution of this case, which is brought in reliance on domestic, public law principles of fairness.

38. The domestic cases can be reconciled. It is clear that the Commissioners must treat taxpayers fairly as between each other, and must not discriminate between classes of taxpayers. I accept that the duty identified by Mr Mullan exists, and is an important part of the Commissioners' functions. But that does not mean that every case of inconsistent treatment amounts to an abuse of the Commissioners' powers, far from it. The three domestic cases on which Mr Nawbatt relies are illustrations of inconsistency falling short of abuse. There may be other cases where the nature or scale of the different treatment will be so unfair as to be abusive. The issue for the Commissioners, and for the Court on judicial review of a decision of the Commissioners in a case of this kind, is to establish where that unfairness falls on the scale; specifically, to determine whether it is so conspicuously unfair as to amount to an abuse of the Commissioners' powers. That is an issue to which I will return.

39. Secondly, Mr Mullan argues that there is a general requirement, in the public interest, that the Commissioners should stand by their published statements, in order to safeguard legal certainty and predictability of treatment amongst taxpayers. He points to long-established authority supporting the practice whereby the Revenue gives advice and guidance to taxpayers. In *R v Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, Bingham LJ said this:

> "The Revenue might stick to the letter of its statutory duty, declining to answer any questions when not statutorily obliged to do so…and maintaining a strictly arm's length relationship with the taxpayer. It is, however, understandable if the Revenue has not in practice found this to be the best way of facilitating collection of the public revenue. That this has been the Revenue's experience is, I think, made clear by Mr Beighton, who, having described the machinery for assessment and appeal, continues:
>
> > "6. Notwithstanding this general approach in administering the tax system, the Board see it as a proper part of their function in contributing to the achievement of their primary role of assessing and collecting the proper amounts of tax and to detect and deter evasion, but they should when possible advise the public of their rights as well as their duties, and generally encourage co-operation between the Inland Revenue and the public."

40. In the same case, Judge J said this (p 113e):

> "The practice exists because the Revenue has concluded that it is of assistance to the administration of a complex tax system and ultimately to the benefit of the overall tax yield."

And further at p 115 b:

> "…If however the taxpayer ... receives an unequivocal statement about how [his tax affairs] will be treated for tax purposes if implemented, the Revenue should in my judgment be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer has relied on them. The same principle should apply to Revenue statements of policy".

41. More recently, that practice has been recognised as standing at the heart of the relationship between the Commissioners and taxpayers by the Supreme Court in *R (on the application of Davies and another) v Commissioners for HM Revenue and Customs; R (on the application of Gaines-Cooper v Commissioners for HM Revenue and Customs* [2011] UKSC 47, per Lord Wilson:

> "[25] There can be no better introduction to this section than in the words of Moses LJ in his judgment in the decision under appeal:
>
> > "12. The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives,

> cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public…co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. …"

42. In my judgement, the authorities establish the general principle that the Commissioners should be held to their published statements, because the publication of those statements is itself in the public interest, it provides certainty amongst taxpayers, it is part of the cooperative relationship between the Commissioners and the public, and ultimately it is part of the Commissioners' tax collection function. But there are plainly circumstances when the Commissioners can retreat from their published statements (or rulings). Those circumstances require careful attention and have been considered within the doctrine of legitimate expectation, which I will look at below.

43. Before I turn to that subject, I must deal with the Commissioners' central riposte to the Claimant's arguments, which is that the Commissioners' primary duty is to collect tax which is due. At times, the Commissioners came close to characterising the duty to collect tax as a trump card which prevails over all other considerations (save, possibly, for those cases where extreme personal prejudice in the form of detrimental reliance can be made out). It is necessary to be clear about the nature and scope of this duty: the duty to collect tax is not a narrow duty which requires the Commissioners simply to enforce the statute, come what may. It is a broad duty, exercised by means of a wide managerial discretion, within which is embedded the obligation to treat taxpayers fairly. That means that in the pursuit of that duty, the public authority *can* be required to forgo tax which is due under the statute, if to do otherwise would cause such conspicuous unfairness as to constitute an abuse of the Commissioners' powers. That much was made plain in *MFK* by Judge J (p 114 h):

> "However it was clearly recognised in Ex parte Preston [1985] A.C. 835 that in an appropriate case the court could direct the Inland Revenue:
>
> '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 ….:' per Lord Templeman, at p. 864."

Lord Wilson put it in this way in *Davies and Gaines-Cooper:*

> "26 The primary duty of the revenue is to collect taxes which are properly payable in accordance with current

> legislation but it is also responsible for managing the tax system: section 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (*R (Wilkinson) v Inland Revenue Comrs [2005] 1 WLR 1718* , para 21, per Lord Hoffmann), it is lawful for the revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: *R v Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617* , 636, per Lord Diplock."

In determining what amounts to unfairness so marked that it constitutes an abuse of power, it is important to remember that "*the categories of unfairness are not closed*" (per Bingham MR in *Unilever* at p 690 f) and therefore the circumstances in which the Commissioners may be required to forgo tax can travel beyond cases of detrimental reliance (although the fact that a taxpayer has relied to his or her detriment on the Commissioners' promise is in many cases the source of the complaint of unfairness). Specifically, the Commissioners are incorrect to submit, as they do in their skeleton, that "*A public authority cannot be required to continue to apply the wrong tax treatment just in order to ensure consistency of treatment*" (para 23); the Commissioners *can* be required in an appropriate case to continue to apply the wrong tax treatment to ensure consistency of treatment, where the alternative would be conspicuously unfair, and an abuse of power.

LEGITIMATE EXPECTATION

44. The principles of legitimate expectation in tax matters are well established. The starting point is the judgment of Bingham LJ in *MFK* (at p 110 e-j):

> "No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them."

45. Lord Wilson in *Davies and Gaines-Cooper* clarified that a "*statement formally published … to the world*" must also be clear, unambiguous and devoid of relevant qualification to give rise to a substantive legitimate expectation of particular tax treatment (see para 29).

46. A taxpayer's legitimate expectation to be treated in a particular way can be frustrated if there is an overriding public interest in imposing different treatment. This stage of the analysis is described in different ways in the cases (and was not identified separately in the early cases such as *MFK* and *Unilever*). After reviewing the cases, Lindsay J summarised it thus in *R (on the application of Bamber) v RCC* [2005] EWHC 3221 (Admin), para 59:

> "Where there is a substantial public interest in the public body behaving as it has done or as it intends to do then, absent the marked degree of unfairness or of

> disproportionality illustrated by the cases, relief of the character of judicial review against the public body can properly be and is, indeed, likely to be, withheld."

47. The degree of "unfairness" or "disproportionality" which must be demonstrated is very high, if judicial review is to be granted. Put another way, the proposed departure from earlier assurances must be so unfair as to constitute an abuse of the Commissioners' powers, in order for relief to be warranted. Simon Brown LJ in *Unilever* referred to this as "*conspicuous unfairness"*, and further suggested this distinction at p 697 c:

> "the border [lies] between on the one hand mere unfairness - conduct which may be characterised as "a bit rich" but nevertheless understandable - and on the other hand a decision so outrageously unfair that it should not be allowed to stand."

48. These principles are not in dispute. Both Counsel referred to the need to carry out a "balancing exercise" at the point that a legitimate expectation has been identified, to determine whether there is an overriding public interest. I am content to adopt that label, while noting that the exercise is not so much one of achieving a 'balance', as determining whether the unfairness scales tip so far towards the taxpayer as to make frustration of his or her legitimate expectation an abuse.

ANALYSIS

The exercise of the options

49. At the time the Claimant originally exercised the share options in 1998 and 1999, he had no expectation that their disposal would generate a loss for CGT purposes.

2003 Guidance

50. The 2003 Guidance constituted a lawful exercise of the Commissioners' powers of care and management. The contrary was not argued.

51. The Commissioners submitted that the 2003 Guidance was merely a statement of the Commissioners' understanding of the law, rather than formal guidance to the taxpaying public, and that it had a different, lesser status than guidance on, for example, policy matters. I do not follow that submission. Part of the Commissioners' role as a tax collecting authority is to give guidance on their interpretation of the law, from time to time. This is particularly necessary in light of case law developments which might create uncertainty or suggest a different approach. Statements by the Commissioners as to their interpretation of the law are part and parcel of the Commissioners' conversation with the taxpaying public. Such statements are put into the public domain by the Commissioners with the intention that they are to be read by the taxpaying public and understood as representing the official view. They are as much "guidance" as any other type of statement published by the Commissioners. Further, and in any event, the 2003 Guidance did not simply set out the Commissioners' interpretation of the law after

Mansworth v Jelley. It went much further. By it, the Commissioners told taxpayers how they should calculate the acquisition cost of shares, and directed them to amend self-assessment returns if they were in time to do so, or to calculate gains or losses on the basis set out if they wished to make a free-standing claim. This was indeed guidance issued to the taxpaying public.

52. The 2003 Guidance was a statement formally published by the Revenue to the world. It was clear, unambiguous and devoid of relevant qualification. The Claimant fell clearly within its terms. The Claimant relied on the 2003 Guidance in submitting his claim. (None of this is disputed.) The consequence is that the Claimant had a legitimate expectation arising out of the 2003 Guidance that his claim for capital losses on the disposal of his shares would be taxed in accordance with that Guidance.

53. That legitimate expectation is no lesser or different because, as time progressed, the Commissioners came to view the 2003 Guidance as a mistake which had given those taxpayers who had relied on it a windfall to which they were not entitled as a matter of tax law. That is a feature typical of legitimate expectation in tax cases.

Opening of Enquiries

54. The Commissioners were entitled to open enquiries into the Claimant's claims pursuant to section 9A of the Taxes Management Act 1970. The Commissioners initially indicated that the enquiries were for the particular purpose of giving time to investigate the employers' arrangements. The scope of the investigation appears to have expanded some years later.

55. It is not clear from Mrs Sanderson's statement, or any other evidence before me, precisely who was subject to enquiries, but my understanding is that it was employees of banks operating these unapproved share option schemes. It is not clear which employers, if any, apart from the banks, were operating these schemes, or who, beyond bank employees, was able to benefit from the 2003 Guidance. Mrs Sanderson says that the enquiries were closed only once the relevant papers and records had been brought together some time in 2012 (para 19).

56. I reject the Claimant's submission that the Commissioners deliberately delayed the conclusion of the enquiries in his case because they wished to await the revocation of the 2003 Guidance and disallow his claimed losses. Mrs Sanderson's evidence is to contrary effect: she says there was no deliberate delay, rather the investigations were complex and took a long time. I accept that.

RCB 30/09

57. RCB 30/09 was published on 20 March 2009. It reversed the 2003 Guidance. The Closure Notices were directly based on RCB 30/09. Inevitably, much of the argument in relation to the Closure Notices is equally applicable to RCB 30/09.

58. RCB 30/09 was just as much a valid exercise of the Commissioners' powers as the 2003 Guidance had been. Mr Mullan seeks to argue that RCB 30/09 is wrong (as indeed the 2003 Guidance had been) as a matter of technical tax law. But the

technical tax position is not relevant to this application for judicial review and I express no view on it. I proceed on the basis that the 2003 Guidance reflected the Commissioners' view of the law at the time that it was published; but that view changed and by 2009 the Commissioners had concluded that the 2003 Guidance was wrong in law, and so they replaced it with RCB 30/09 which set out the Commissioners' revised understanding of the law. RCB 30/09 was not prompted by any change of law or decision of a court or tribunal, but resulted from an internal review which led to legal advice being obtained. However it came about, I accept that once the Commissioners realised that the 2003 Guidance was, or might have been, a mistake, they needed to consider whether to remedy the position, and if so, how they should go about doing so.

59. The Commissioners could not simply withdraw the 2003 Guidance, without considering the wider position and determining what was fair in all the circumstances. This follows from a proper understanding of the nature and scope of the Commissioners' powers. It is also reflected in a submission by the Commissioners recorded by Wyn Williams J in *R (on the application of Cameron) v RCC* [2012] EWHC 1174 (Admin), [2012] STC 1691:

> "[71] In his skeleton argument Mr Margolin acknowledges that if a taxpayer has acquired a legitimate expectation that he is entitled to the benefit of a particular concession he also has a legitimate expectation that such concession will not be withdrawn retrospectively and that any withdrawal will be managed fairly. He accepts, in effect, that the defendants should give reasonable notice of any withdrawal or alteration of a concession so as to allow the taxpayers time to make any necessary adjustments to their affairs. I agree with that approach."

60. Mr Nawbatt sought to argue that *Cameron* was a case about a concession being withdrawn and that the approach recorded at paragraph 71 did not extend to the withdrawal of statements of policy or guidance. I do not consider that *Cameron* can be distinguished in that way. The submission recorded at paragraph 71 was a straightforward outworking of the Commissioners' duty to treat taxpayers fairly. That is why Wyn Williams J was able to agree with it so readily. It reflects a body of case law which makes clear that fairness lies at the heart of the Commissioners' dealings with the public, and that case law is not limited to concessions, but applies more generally. Further, there is no principled basis on which to categorise concessions differently, given that concessions are just one type of "communication" between the Commissioners and the taxpaying public, and so form part of the cooperative relationship discussed by Moses LJ in *Davies and Gaines-Cooper.*

61. Accordingly, it is clear, in my judgement, that the Commissioners were required to consider whether it was fair to taxpayers to withdraw the 2003 Guidance. What was fair depended on the circumstances surrounding the original Guidance and its proposed withdrawal. The obligation to act fairly brought with it the obligation to perform a balancing exercise, to weigh the taxpayers' legitimate expectations generated by the 2003 Guidance, and the consequent unfairness of withdrawing it in 2009, against the public interest in collecting the tax due under the statute, as

the Commissioners now interpreted it. The important point is that all aspects of unfairness needed to be taken into account at this stage.

62. There is nothing on the face of RCB 30/09 to suggest that the Commissioners considered whether RCB 30/09 was fair; and if it was unfair, how unfair, and what could or should be done to mitigate that unfairness. RCB 30/09 itself suggests that the Commissioners considered themselves compelled, having received legal advice, to withdraw the 2003 Guidance and issue RCB 30/09 in its place, and then to apply RCB 30/09 to any claim under the 2003 Guidance which, for whatever reason, remained open (subject to the taxpayer showing any overriding "detrimental reliance"). If that was what the Commissioners thought, I do not think it was correct. The Commissioners' managerial discretion is broad; it was open to the Commissioners not to collect the tax if for any reason they thought it would be conspicuously unfair to do so; unfairness was not limited to detrimental reliance. But RCB 30/09 has not been the focus of this challenge, and I have not been shown any material which addresses the Commissioners' reasons for withdrawing the 2003 Guidance, beyond RCB 30/09 and RCB 60/09. I am therefore not sure what the true position is, and what considerations were addressed by the Commissioners in advance of RCB 30/09.

The Closure Notices

63. Mrs Sanderson was the decision maker in the Claimant's case. Her first witness statement explains her process of thinking. She was well aware that issues of fairness needed to be considered when she made her decision. She considered the terms of RCB 30/09 and 60/09, she was aware of internal guidance (entitled *"Where HMRC provides incorrect information and advice",* set out in her statement) and she applied the decision of the 'HMRC Personal Tax Contentious Issues Panel' which had considered how to manage individual claims outstanding under the 2003 Guidance. All of this guidance pointed to the necessity for the taxpayer to show detrimental reliance, or some disadvantage or prejudice "personal" to the Claimant or his circumstances, failing which, RCB 30/09 would be applied. Thus, Mrs Sanderson's focus was narrow. She was in essence looking for strong evidence of detrimental reliance.

FACTORS IN THE BALANCING EXERCISE

64. The existence (or not) of detriment as a result of a taxpayer's reliance on a mistaken promise or assurance by the Commissioners is undoubtedly one factor to be taken into account in the balancing exercise. But in this case, it was insufficient (and incorrect) to stop there.

65. The factor which Mr Mullan was keen to stress above all as bearing on fairness in this case, was the fact that claims by other taxpayers in a similar position to the Claimant had been allowed. This was a form of "comparative unfairness", which is different from detrimental reliance to which Mrs Sanderson had regard. I was shown a witness statement from Geoffrey Everett, chartered tax advisor, partner in Smith & Williamson LLP, and member of the Chartered Institute of Taxation and the Association of Tax Technicians. He said that following the 2003 Guidance, he had undertaken a review of clients who had exercised share options in unapproved schemes in the in-date tax years, and submitted claims for those clients who could

claim *Mansworth v Jelley* losses: the majority of the claims for repayment or reduction in capital gains tax were accepted by the Commissioners; the only claims for which enquiries were received were those relating to clients employed in the financial sector: he had six such cases. The Commissioners do not dispute that other taxpayers have had the benefit of the 2003 Guidance. They were unable to say, even roughly, how many have benefited from it, or what was the total approximate tax cost of claims which have been agreed under the 2003 Guidance.

66. It appears, therefore, that of those who had a legitimate expectation arising out of the 2003 Guidance (the "2003 cohort"), some at least obtained the promised benefit, but there was a subset of that cohort, including the Claimant, who did not (the "subset"). The subset consists of around 600 individuals (it is not clear to me whether they are all ABN employees or whether they included employees of other banks under investigation by the Commissioners during the relevant period).

67. Mr Nawbatt argued that there was no discrimination and no unfairness in treating the subset differently, for two connected reasons. First, he argued, the subset comprised those like the Claimant who had an enquiry open when RCB 30/09 was published, and that this was, in and of itself, a material distinguishing feature. Secondly, he argued that as a result of the enquiries, the Commissioners were within time to impose the different (and correct) tax treatment on the subset and so collect the tax, whereas the Commissioners could not do so in relation to the others who benefited from the statutory protections in section 9A TMA 1970. He emphasised that within the subset, everyone was treated the same: all those who had been subject to enquiries had their claims refused. In advancing this argument, Mr Nawbatt supported the approach of Mrs Sanderson, outlined in her witness statement, as follows (para 20):

> "To the extent the Claimant suggests that he has been treated inconsistently with those who were not the subject of an enquiry it is simply not possible to make any such comparison the two situations are entirely different and the general scheme of taxation provides for the situations to be treated differently."

68. Dealing with Mr Nawbatt's first point: the effect of an enquiry is to keep the claim on hold for as long as the enquiry subsists. There is self-evidently a difference, in fact, between a taxpayer whose claim is on hold because of an enquiry, and a taxpayer whose claim is concluded because no enquiry was ever opened. But that factual difference does not provide an answer to the intrinsic unfairness in the result, which is that taxpayers who were in an identical position in 2003 have been treated differently, with those in the subset paying more tax than the others in the same cohort.

69. Dealing with the second point: Mr Nawbatt relied on the statutory protections contained in section 29 TMA 1970, which provide, so far as is relevant, that:

> "(2) … the taxpayer shall not be assessed … if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time that it was made."

70. He said, and I accept, that s 29(2) was designed to promote legal certainty for taxpayers, and would be available to protect anyone in the 2003 cohort whose claim was concluded before RCB 30/09 was issued, and who could maintain (correctly, in light of the 2003 Guidance) that their returns had been submitted in accordance with the 'practice generally prevailing' at the time. Section 29(2) gives rise to a further factual difference between the subset, whose members could not rely on s 29(2), and the rest of the 2003 cohort, who could. But s 29(2) seems to me to make the imposition of RCB 30/09 more, rather than less, unfair: but for the enquiries which were opened in relation to some claims, which enquiries were (at least at the outset) nothing to do with the individual claimants but were prompted by investigations into the employers, those individuals would have benefited from s 29(2), just like others in the 2003 cohort.

71. In summary, I accept that ss 9A and 29(2) give rise to factual and legal differences between the subset and the rest of the cohort. But those differences do not make it *fair* to impose the tax on the subset, they just give the Commissioners the opportunity to do so. The effect of those provisions was that the claims by the subset remained within the Commissioners' reach in 2009 and beyond, whereas the claims by the rest of the 2003 cohort were by that time dead. That was a particularly important factor to take into account in weighing the fairness of withdrawing the 2003 Guidance from the subset: there was obvious unfairness in subjecting the subset to a tax liability which the rest of the cohort had escaped. This is not just a matter of private complaint by those who are in the subset and have to pay more tax than their comparators, it is a public interest issue because taxpayers have been treated differently, and that risks undermining public confidence in a fair and non-discriminatory tax system (going back to Lord Scarman's analysis in *Fleet Street Casuals*). Comparative fairness was, in my judgement, a significant issue in this case, which should have been considered by Mrs Sanderson in conducting the balancing exercise.

72. There are other features of the Closure Notices which are troubling, at least to me. By RCB 30/09, the Commissioners took away the Claimant's legitimate expectation that *past* claims would be taxed in a particular way. The 2003 Guidance only applied to disposals pre-dating 10 April 2003, because of the statutory amendment in FA 2003. On one view at least, RCB 30/09 and any decision in an individual case based on it, was retrospective in effect. The Commissioners' current guidance on correcting mistakes (referred to by Mrs Sanderson in her statement at para 35) states that:

> "where we provide you with erroneous advice that is binding on us and subsequently notify you that it is incorrect, the established legal position is that you will only be required to start accounting for tax on the correct basis from the date of notification. All cases will be subject to any statutory time limits."

It is not clear to me how the Commissioners square RCB 30/09 with this policy: RCB 30/09 required the Claimant (and others in the subset) to account for tax on the correct basis (as the Commissioners saw it) in relation to past disposals; this was not, on its face at least, a prospective correction.

73. Further, the reason the Claimant finds himself in this position is because of a mistake made by the Commissioners in 2003. That factor, although perhaps not carrying much weight on its own, is part of the overall picture and should have been taken into account. In *R (Rashid) v Secretary of State for the Home Department* [2004] EWHC 2465 (Admin), the Court concluded that the authorities (there, the Secretary of State for the Home Department, in the context of immigration policy) should not be able to profit from a mistake, by correcting that mistake in such a way as to deprive an individual of a benefit he would have had, but for that mistake. Whilst that case is clearly not on all fours with this case, there is a point of fairness illustrated by it, which has some application here.

74. Finally, there is surely some weight to be attached to the fact that the Commissioners took so long to recognise and rectify their mistake. Although I accept that there was no improper motive in the length of time taken for the enquiries, the fact is that RCB 30/09 was published six years after the original mistake was made in 2003 (and after the problem had been resolved by statutory amendment for any disposals after 10 April 2003), and the Closure Notices under challenge in this case were issued eleven years after the claims were made. That is, on any view, a very long time. The Claimant was entitled to think his tax affairs would be settled more swiftly than that. Again, this is perhaps not a strong point taken alone, but should be taken into account as part of the overall assessment. (I do not accept that there was an onus on the Claimant to seek to close the enquiries, or that in some way he brought the delay upon himself. These were enquiries opened by the Commissioners, while the employers were subject to investigation, and the obligation was on the Commissioners to close those enquiries once the issues were resolved.)

75. It is not for me to say how much weight these factors, together or separately, should carry, and whether overall there was conspicuous unfairness in issuing the Closure Notices. That evaluation is a matter for the Commissioners, exercising their statutory functions, and armed with all necessary information, which information I do not believe I have. But I record my instinctive response, which is that RCB 30/09 and the Closure Notices based on it were very unfair. By RCB 30/09, the Commissioners deliberately took away from the subset an advantage which they had many years previously, by mistake, conferred on the whole of the 2003 cohort. The members of the cohort who were not affected by RCB 30/09 retained their advantage, permanently; the subset lost out, and were comparatively worse off as a result. That was discriminatory. This case is a long way on its facts from the *Weston* cases, none of which involved a mistake which was generated by a statement published by the Commissioners to the world, or which gave rise to a legitimate expectation, or involved frustration of that legitimate expectation by selective correction of the mistake, applying to some and not others.

CONCLUSION

76. I do not criticise Mrs Sanderson for approaching this case in the narrow way that she did. The steps she took were in line with the Commissioners' own guidance. That guidance focussed on detrimental reliance, and indicated that in the absence of detrimental reliance, the tax due under the statute should be collected.

77. In this case, there were wider issues to take into account. Once a legitimate expectation on the part of the taxpayer had been established, the Commissioners were obliged to balance all aspects of unfairness to determine whether, overall, there would be conspicuous unfairness in collecting the tax due. In this case, the Claimant was complaining of unfairness which went far beyond detrimental reliance (although his complaint included that feature). The Commissioners did not consider those other aspects of unfairness. The Closure Notices which were the product of the balancing exercise must for that reason be quashed.

78. The matter must be remitted to the Commissioners to take a fresh decision, taking into account all aspects of unfairness.

79. There were a number of arguments raised by the parties which I have not addressed in this judgement. Specifically, Mr Mullan argued that the Closure Notices were unlawful under Article 1, Protocol 1 of the European Convention on Human Rights, read with Article 14. It is not necessary for me to deal with that point given that this matter is to be remitted.

80. This application for judicial review is allowed. The Closure Notices are quashed.