Neutral Citation Number: [2009] IEHC 28

THE HIGH COURT

2005 1148 JR

Between

Brian Fortune

Applicant

And

The Revenue Commissioners

Respondents

Judgment of O'Neill J. delivered the 23rd day of January 2009

In these proceedings the applicant was granted leave to apply for judicial review by this Court (Peart J.) on the 24th October, 2005, for the following reliefs:-

1. An order of *certiorari* quashing the assessment of the 20th September, 2005, issued by the respondents against the applicant seeking to withdraw tax relief previously granted to the applicant pursuant to s.35 of the Finance Act 1987.

2. An order of prohibition prohibiting the respondents, their servants or agents from taking any further steps in seeking to withdraw the tax relief granted to the applicant pursuant to s.35 of the Finance Act 1987 in relation to the companies known as Stylefile Limited, Kavside Limited, Routeway Limited, Harlonian Limited and Newforge Limited.

3. A declaration that the applicant is entitled to the said tax relief pursuant to the provisions of s.35 of the Finance Act 1987 and s.481 of the Taxes Consolidation Act 1997.

4. A declaration that the action of the respondents, their servants or agents in seeking to withdraw the said tax relief from the applicant herein is unreasonable and/or irrational and/or contrary to the principles of natural and constitutional justice and amounts to a breach of the applicant's constitutional right to fair procedures.

5. A declaration that the methodology employed by the respondents, their servants or agents in seeking to review the circumstances in which the applicant was granted said tax relief was *ultra vires* and/or unreasonable and/or contrary to the principles of natural and constitutional justice.

6. A declaration that the action of the respondents, their servants or agents in purporting to withdraw the said tax relief from the applicant is *ultra vires*, void and of no force or effect.

7. A declaration that the respondents, their servants or agents in purporting to withdraw the said tax relief is acting in breach of the legitimate expectations of the applicant.

8. A declaration that the respondents, their servants or agents in seeking to withdraw the said tax relief is acting in breach of the applicant's rights pursuant to Articles 6 and Article 1 Protocol 1 of the European Convention on Human Rights, 1950.

9. A declaration that the applicant has furnished the respondents, their servants or agents with all information as the respondents may reasonably require in order to grant relief to the applicant pursuant to s.35 of the Finance Act 1987.

1. Facts

In April 1995, the applicant invested the sum of IR£25,000 in five film production companies, namely, Stylefile Limited, Kavside Limited, Routeway Limited, Harlonian Limited and Newforge Limited by way of share investment. These five companies were established by the Merlin Film Group for the purpose of producing films in Ireland. Merlin Film Group promoted the investment in these companies to the applicant.

Section 35 of the Finance Act 1987 (the Act of 1987), which is now s.481 of the Taxes Consolidation Act 1997, introduced a special tax incentive scheme to encourage investment in *"qualifying"* film production companies by persons unconnected with such companies. The relief set out in s.35 of the Act of 1987 permitted a deduction, equal to 80% of the amount invested from the investor's total profits or income in respect of a *"qualifying"* investment made in a film production company, in the tax year in which the investment was made. This was subject to an investment limit.

A number of criteria had to be satisfied for an investment to qualify for tax relief under this section. Firstly, the company in which the investment is made must have been a company engaged solely in the production and distribution of a *"qualifying"* film. A *"qualifying"* film was a film in respect of which the Minister for Minister for Arts, Heritage, Gaeltacht and the Islands (the Minister) had issued a certificate. The purpose of this certificate was to certify that the film in question was a qualifying film. Certificates issued by the Minister were subject to mandatory conditions such as, that not less than a specified percentage of the work on the production of the film be carried out in Ireland and that not more than 60% of the cost of production of the film be met by relevant investments. In addition to these mandatory requirements, the Minister was empowered to attach such further conditions in the certificate as he or she considered proper. Secondly, the

investor seeking to claim relief required a certificate from the production company to confirm that the conditions for relief, insofar as they related to the film and the production company, were satisfied. This certificate, known as a *"Film 3"* certificate did not emanate unilaterally from the film production company. It had to be authorised by the respondents before it issued.

On the 23rd November, 1995, the five production companies in question applied to the respondents for authorisations to issue *"Film 3"* certificates to them in respect of films they intended to make. The authorisations were granted and the *"Film 3"* certificates were issued. In these circumstances the certificates were, in fact, pre-authorised by the respondents. In these certificates the production companies undertook that the conditions of the relief, insofar as they related to the company and the qualifying films, were or would be satisfied. The production companies then forwarded the *"Film 3"* certificates to the investors, including the applicant, on various dates between the 29th February, 1996 and the 30th April, 1996, so that they could claim relief.

Only one of the films in respect of which the five production companies applied for certificates – *Angela Mooney Dies Again* – was ever made. The production companies actually made six other films together with the aforementioned one. Applications for certificates from the Minister in respect of these other films were made but the production companies did not apply to the respondents for authorisations to issue *"Film 3"* certificates to the investors in respect of the six new films.

The applicant was granted tax relief by the respondents in the assessment to tax issued on the 25th July, 1996, in respect of the tax year 1994/1995 after submitting the *"Film 3"* certificates from the production companies in which he invested. The production companies were subsequently liquidated via a members' winding up on dates between the 20th April, 2000 and the 3rd November, 2004.

The respondents wrote to the applicant by letter dated the 26th April, 2004, informing him that consideration was now being given to the withdrawal of the relief that the applicant had been granted for the tax year 1994/1995 on the basis that the criteria set out in the legislation and in the certificate issued by the Minister were not satisfied. Section 35 of the Act of 1987 provides for a claw-back of relief in the event that the statutory conditions for relief had not been satisfied. The letter of the 26th April, 2004, reads as follows:-

> *"Enquiries found that the amounts invested were part of a fund intended to be used to produce a number of films. The fund was distributed among the five companies. It would appear that a substantial part of this fund was paid to a Galway company Concorde Anois Teo.*
>
> *From the records and accounts of Concorde Anois it appears that part of the money paid to them was used in the production of the various films and part was transferred to Transpacific Corporation A.V.V. Philippines.*
>
> *Sufficient documentation has not been provided to Revenue to verify to their satisfaction that the money paid to Transpacific Corporation A.V.V. Philippines was expended on the production of the film. As a consequence I am not satisfied that the conditions detailed above [in the legislation and in the certificate of the Minister] were met."*

Concorde Anois Teo., a studio facility company, provided certain services to the five film production companies. The respondents requested information as to the involvement of Concorde Anois Teo. in the making of the films. A list of the films Concorde Anois Teo. was involved with was furnished to the respondents by that company by cover letter dated the 19th July, 2000.

On the 17th June, 2004, Merlin Film Group, acting on behalf of the investors, including the applicant, with their knowledge and consent requested the respondents to defer any decision on the withdrawal of relief in respect of investment in the production companies pending determination in the Circuit Court of a similar case it was party to (*Bartondale v. Revenue Commissioners* (Unreported, Circuit Court, O'Donohoe J., 29th April, 2005)).

The applicant received confirmation from the respondents, by letter dated the 20th September, 2005, that the tax relief was going to be withdrawn together with a notice of assessment of the same date. The applicant appealed the said notice of assessment by notice of appeal dated the 28th September, 2005. Judicial review proceedings were instituted on the 24th October, 2005.

2. Section 35 of the Finance Act 1987

Section 35 of the 1987 Act, which is now s.481 of the Taxes Consolidation Act 1997, provides for tax relief to those who invest in the making of certain films. It states as follows:-

> *"35. – (1) In this section –*
>
> *'allowable investor company' means, in relation to a qualifying company, a company which is not connected with the qualifying company;*
>
> *'film' means a film which is produced –*
>
> *(a) on a commercial basis with a view to the realisation of profit, and*
>
> *(b) wholly or principally for exhibition to the public in cinemas or by way of television broadcasting,*
>
> *but does not include a film made for exhibition as an advertising programme or as a commercial;*
>
> *'qualifying company' means a company which –*
>
> *(a) is incorporated in the State, and*
>
> *(b) is resident in the State and is not resident elsewhere, and*

(c) exists solely for the purposes of the production and distribution of a qualifying film or qualifying films;

'qualifying film' means a film in respect of which not less than 75 per cent. of the work on the production of the film is carried out in the State and not more than 60 per cent. of the cost of the production of the film is met by relevant investments;

'qualifying period' means the period commencing on the date of the passing of this Act and ending on the third anniversary of that date;

'relevant investment' means a sum of money which is-

(a) paid in a qualifying period to a qualifying company, whether in respect of shares in that qualifying company or otherwise, by an allowable investor company on its own behalf, and

(b) paid by such allowable investor company for the purpose of enabling the qualifying company to produce a qualifying film, and

(c) used by the qualifying company, within two years of the receipt of that sum, for that purpose,

but does not include a sum of money paid to the qualifying company on terms that it will be repaid, and a reference to the making of a relevant investment shall be construed as a reference to the payment of such a sum to a qualifying company.

(2) Subject to the provisions of this section, where, in an accounting period, an allowable investor company makes a relevant investment, it shall, on due claim and on proof of the facts, be given a deduction of the amount of that investment from its total profits for the accounting period:

…

(3) …

(4) A claim to relief under this section may be allowed at any time after the payment of a sum to a qualifying company, which, if it is used, within two years of its being paid, by the qualifying company for the production of a qualifying film, will be a relevant investment, if the inspector is satisfied that all the conditions for relief are, or will be, satisfied, but the relief shall be withdrawn if, by reason of the happening of any subsequent event or the failure of an event to happen which at the time the relief was given was expected to happen, it appears that the company making the claim was not entitled to the relief allowed.

(5) An allowable investor company shall not be entitled to relief in respect of a relevant investment unless it is established to the satisfaction of the inspector, or, on appeal, of the Appeal Commissioners, that the relevant investment –

(a) has been made for bona fide commercial purposes and not as part of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax,

(b) that the relevant investment has been, or will be, used in the production of a qualifying film, and

(c) the relevant investment is made at the risk of the company and neither the company nor any person who would be regarded as connected with the company, is entitled to receive, directly or indirectly, any payment from the qualifying company other than a payment made on an arm's length basis for goods and services supplied or a payment out of the proceeds of exploiting the film to which the company is entitled under the terms subject to which the relevant investment is made.

(6) Where any relief has been given under this section which is subsequently found not to have been due, it shall be withdrawn by making an assessment to corporation tax under Case IV of Schedule D for the accounting period or accounting periods in which the relief was given, and, notwithstanding anything in the Tax Acts, such an assessment may be made at any time.

…."

3. Section 481 of the Taxes Consolidation Act 1997, as inserted by s.28 of the Finance Act, 2004
The Finance Act 2004 (the Act of 2004) amended the procedures for the administration of the scheme of film relief. Section 28 of the Finance Act 2004 inserted a new sub-section 22 into s.481 of the Act of 1997. It states as follows:-

*"The **Revenue Commissioners** shall be responsible for verifying compliance with conditions specified in any certificate issued by the Minister prior to the day appointed by order made by the Minister for Finance for the coming into operation of this sub-section [1st January 2005], where the qualifying company has not, prior to the day so appointed, submitted the items, statements, reports or other matters required to be submitted to the Minister under the terms of such certificate to enable the Minister to verify such compliance [emphasis added]."*

4. Ultra vires Issue
The first issue that falls to be determined is whether or not the respondents had the power to supervise and decide if there was compliance with the conditions outlined in the Minister's certificate.

(i) Counsels' Submissions
Counsel for the applicant, Mr. Hogan S.C., submitted that it was the Minister alone who was charged with determining the

conditions upon which a film would be eligible for tax relief and that these conditions appeared on the face of the certificate as issued. He identified the respondents' role in the process as authorising the *"Film 3"* certificate for the production company to the effect that the investment was a qualifying investment.

Counsel for the respondents, Mr. McDonald S.C., contended that s. 35(4) of the Act of 1987 expressly allowed for the withdrawal of relief in the event of a failure of a production company to comply with any of the conditions issued to it by the Minister in the certificate and that s. 35(6) of the Act of 1987 envisaged the withdrawal of relief being effected by the raising of an assessment on the investor by the respondents. He pointed out that the information memorandum given to investors, including the applicant, provided that there must be compliance with the Minister's certificate and that this is a matter of fact that fell to be determined by the appropriate inspector of taxes following an examination of all the relevant factors on a claim for tax relief. It was highlighted by Mr. McDonald that the Minister's certificate stated on its face that the final documentation associated with the film project should be furnished to the respondents, thereby illustrating clearly, in his submission, that the respondents had the power to determine whether there had been compliance with the Minister's certificate.

Following the conclusion of the hearing of these proceedings the parties reconvened before this Court on the 16th November, 2008, to make additional submissions relating to this issue of the *vires* of the respondents. These submissions were based on s.481 (22) of the Act of 1997. As outlined above, s.481 of the Act of 1997 replaced s.35 of the Act of 1987 and a new sub-section 22 was inserted into s.481 of the Act of 1997 by virtue of the Finance Act 2004 and it came into effect on the 1st January, 2005.

Mr. Hogan contended that s.481 (22) of the Act of 1997 had the effect of transferring a function from the Minister to the respondents and that it could be deduced from this that, prior to the 1st January, 2005, the respondents had no role, responsibility or power in verifying the conditions in the Minister's certificate. In essence, he argued that if it was the case that the respondents did have a responsibility or power to verify compliance with the conditions in the Minister's certificate prior to the introduction of s.481 (22) of the Act of 1997, then the addition of that very subsection would have been unnecessary.

On this point Mr. McDonald submitted that s.481 (22) of the Act of 1997 merely transfers the function of initial verification of conditions in a certificate from the Minister to the respondents. The purpose of s.481 (22) of the Act of 1997, in his submission, was to ensure that compliance reports due in respect of films that had already been certified by the Minister were submitted to the respondents and it could not be inferred from this new sub-section that the respondents never had any role in verifying compliance with certificate conditions as the respondents always had a separate responsibility and power, distinct from that of the Minister, to ensure that the conditions for film relief were met. In particular, he noted that the respondents had a separate role in relation to the claw-back of tax relief, which is specifically provided for in s.35 of the Act of 1987/s.481 of the Act of 1997. He submitted that as s.481 (22) of the Act of 1997 is an amending provision, it cannot be used in the interpretation of pre-existing statutory provisions and he relied on the judgments of the Supreme Court in *Cronin (Inspector of Taxes) v. Cork and County Property Company Limited* [1986] 1 I.R. 559 in this regard.

(ii) Decision on the *ultra vires* issue

The sources which contained the conditions to merit tax relief for investment in films are the Minister's certificate and s.35 of the Act of 1987, which is now s.481 of the Act of 1997. The *"Film 3"* certificate contains a confirmation by the company in which the investment is made that the conditions for relief *"so far as they apply to the company and the film are satisfied."* A sample Minister's certificate that issued to the production companies in which the applicant invested in is exhibited in the affidavit of Gunther Falkenthal sworn on 24th October, 2005. It relates to the film *A Very Unlucky Leprechaun,* a film that was made but in respect of which an authorisation was not issued by the respondents for the *"Film 3"* certificate. That certificate states as follows:-

> *"I, Síle De Valera, T.D., Minister for Arts, Heritage, Gaeltacht and the Islands, hereby certify that, in relation to the under-mentioned film, the said film may be treated as a qualifying film for the purposes of the said Section 35 subject to the following conditions:-*
>
> *…*
>
> *- the submission of the final documentation associated with the film project, including all contracts, agreements and Completion Bond, together with such other material as they may require, to the Revenue Commissioners.*
>
> *…"*

A similar clause was contained in the Minister's certificate in respect of the film *Angela Mooney Dies Again.*

These certificates make it clear that it was specifically envisaged in the Minister's certificate that the respondents would examine whether or not the conditions as set out in the said certificate were complied with upon completion of the film.

Section 35(4) of the Act of 1987 states that a claim to relief under s.35 of the Act of 1987 will be allowed if, *inter alia*, *"… the inspector is satisfied that all the conditions for relief are, or will be satisfied* [emphasis added]". This provision grants express power to the inspector, an agent of the respondents, to monitor and ensure compliance with all the conditions for relief. "All" the conditions for relief must necessarily include the conditions in the Minister's certificate. The Minister's certificate is, in my opinion, entirely consistent with the terms of s.35 (4) of the Act of 1987.

As to the subsequent coming into effect of s.481 (22) of the Act of 1997, as inserted by s.28 of the Finance Act 2004, which expressly gave power to the respondents to supervise compliance with the Minister's certificate, it is clear that this statutory provision is an amending one. I am satisfied that the statement of principle, enunciated by Griffin J. in *Cronin (Inspector of Taxes) v. Cork and County Property Company Limited* [1986] 1 I.R. 559 at p. 572, applies to this case. He stated as follows:-

> *"With regard to the submission of counsel for the company that the amendment of s.18 by s.29 of the Finance*

Act, 1981, was an implied acceptance by the Oireachtas of the construction of s.18 for which they contended, the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."

Therefore, s. 481(22) of the Act of 1997, as inserted by s.28 of the Finance Act 2004, cannot be employed as an interpretative tool in an examination of the meaning of s.35 of the Act of 1997.

In light of the above reasons, I am satisfied that the respondents had the power to monitor and ensure compliance with the Minister's certificate.

5. Relevant/Irrelevant Material
The second issue to determine is the extent to which the respondents can enquire into the expenditure of film production companies, in particular, whether they had the power to enquire into the accounts of Concorde Anois Teo. and into its payments to Transpacific Corporation A.V.V. Philippines. It must be considered whether the respondents were competent to follow the investment of the applicant in the production companies through to enquiring into the expenditure by Concorde Anois Teo. and into its alleged failure to demonstrate that money paid to Transpacific Corporation A.V.V. Philippines was spent on the production of films in Ireland as *per* the Minister's certificate.

(i) Counsels' Submissions
Mr. Hogan made the case that the respondents were not entitled to go behind the expenditure of the film production companies. He argued that the respondents acted *ultra vires* in seeking to examine the chain of expenditure to a company unrelated to the production company in which the applicant invested. He contended that it was *ultra vires* the powers of the respondents to seek information which was not relevant to the granting of relief pursuant to s.35 of the Act of 1987.

Mr. McDonald submitted that in order for the respondents to monitor the compliance by a production company with the conditions set out in the Minister's certificate that the actual expenditure by the production company had to be examined.

(ii) Decision on the power of the respondents to enquire into the accounts of Concorde Anois Teo.
The statutory scheme for film relief requires that a film production company must demonstrate compliance with the conditions for relief, as set out in the Minister's certificate and s.35 of the Act of 1987. In the Minister's certificate for the film *A Very Unlucky Leprechaun,* the following conditions were included:-

"- not less than 75% of the work on the production of the film will be carried out in the State;

- not more than £993,650 may be raised for the project under the said Section 35, provided also that the sum so raised shall not exceed 60% of the actual cost of the production of the film and that all Section 35 investments shall be actually expended in the production of the film;

…

- direct expenditure on the employment of Irish personnel and on the purchase of Irish goods and services to be some £1,101,401;

- use of Irish caterers, and other Irish service companies associated with the film industry, as indicated in the application for the certificate;

…

- administration of the production budget to be undertaken by the production companies to whom this certificate has been issued;

…. "

In the Minister's certificate for the film Angela Mooney Dies Again, as exhibited in the affidavit of Breda Ruddle sworn on the 23rd day of January, 2006, the following conditions were included:-

"- not less than 75% of the work on the production of the film will be carried out in the State;

- not more than £1,219,832 may be raised for the project under the said Section 35 provided also that the sum so raised shall not exceed 60% of the actual cost of production of the film and that all Section 35 investments shall be actually expended in the production of the film.

…

- direct expenditure on Irish personnel and on the purchase of Irish goods and services to be some £1,850,243.

- use of Irish caterers, and other Irish service companies associated with the film industry, as indicated in the application for the certificate;

…

- administration of the production budget to be undertaken by the production companies to whom this certificate is issued;

…."

The question of whether conditions, such as those above, are met in any given case is a question of fact to be proved on the evidence. For example, a production company is required by virtue of these conditions to clearly demonstrate that that money expended by them was spent on Irish goods and services or on the employment of Irish personnel. This cannot be achieved by providing bald invoices from one company to another. Therefore, the respondents, in my opinion, having the power to ensure compliance with the Minister's certificate under s.35 of the Act of 1987, were entitled to make enquiries into the end or final destination of the expenditure by the film production companies.

6. Legitimate Expectation
The next issue that arises is whether the applicant had a legitimate expectation that the relief accorded to him would not be withdrawn in circumstances where he did not hear from the respondents for eight years after the relief was granted to him.

(i) Counsels' Submissions
Mr. Hogan noted that tax relief was granted to the applicant in 1996 in circumstances where a *"Film 3"* certificate had been granted and that the applicant did not receive further communication from the respondents for over eight years. He submitted that this gave the applicant a legitimate expectation that he was entitled to the relief as granted and that the matter was closed. He further submitted that the issuance of the *"Film 3"* certificate and/or the respondents' *Taxpayers' Charter of Rights* (which enshrines an entitlement that his rights and obligations would be dealt with by the respondents in a timely and clear manner) constituted a representation by the respondents upon which the applicant relied. The absence of communication from the respondents in over eight years was of significance, in his submission, in establishing the applicant's belief that he was entitled to the relief. He argued that in withdrawing the tax relief that the respondents are attempting to impose a régime that was not in force at the relevant time and has not been published or announced to date, in that, they changed the method of establishing the expenditure considered relevant for the purpose of relief under s.35 of the Act of 1987. In this regard he stated that it used to be that the expenditure of the production company vis-à-vis the qualifying company was examined but it now appeared that the expenditure of the production company on service providers and, in turn, the expenditure of the bodies receiving money from the service providers was being looked at too. Mr. Hogan relied on the decision of the Privy Council in *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629 and the decision of the House of Lords in *Council of Civil Service Unions and Ors. v. Minister for the Civil Service* [1984] 3 All E.R. 935 in support of his proposition that the applicant had a legitimate expectation that he would not be deprived of the benefit of tax relief.

On behalf of the respondents Mr. McDonald again reiterated that the statutory scheme for film investment relief is clear and unambiguous as to the circumstances where relief can be withdrawn and, as a result, a legitimate expectation that the relief would not be withdrawn could not arise. He added that the doctrine of legitimate expectation does not usually apply where substantive benefit is sought.

(ii) Decision on the issue of legitimate expectation
In *Glencar Exploration plc. v. Mayo County Council (No.2)* [2002] 1 I.R. 84 Fennelly J. outlined the three criteria to be satisfied in order to establish a legitimate expectation at pp.162-163:

> *"Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."*

As already alluded to, tax relief under s. 35 of the Act of 1987 is conditional on the production company in which the investment is made satisfying the conditions set out in that section and in the Minister's certificate. The applicant's investment, therefore, was always subject to the risk that the production companies would not satisfy the relevant conditions for relief some time after the applicant was granted tax relief and this risk was always a matter outside the control of the applicant.

Section 35(4) of the Act of 1987 states that the relief *"shall be withdrawn if, by reason of the happening of any subsequent event or the failure of an event to happen which at the time the relief was given was expected to happen, it appears that the company making the claim was not entitled to the relief allowed"*. Section 35(6) provides for the withdrawal of relief if it is found that *"relief has been given under this section which is subsequently found not to have been due, it shall be withdrawn by the making of an assessment…"* and it goes on to provide that "such an assessment may be made at any time". Consequently, a legitimate expectation to the non-withdrawal of relief cannot arise in circumstances where ss. 35(4) and 35(6) of the Act of 1987 expressly provide that tax relief can be withdrawn. The criterion for establishing a legitimate expectation, namely, a representation, cannot be said to exist in the present case.

Insofar as the applicant appears to be shocked or surprised by the withdrawal of relief he must be taken to have known he ran the risk of the relief being withdrawn. The applicant received an information memorandum from the Merlin Film Group, a shareholders' investment agreement, the tax opinion of Ernst & Young and the legal opinion of McCann Fitzgerald in advance of investing in the film production companies. These documents made it clear that the relief is subject to the provisions of s.35 of the Act of 1987 and the conditions as specified therein. The Information Memorandum for Merlin Premier Film Fund/Merlin Film Group reads as follows:-

> *"To obtain relief for an investment under Section 35 of the Finance Act 1987 as amended ("Section 35") the company in which an investment is made must be a qualifying company, the investment must be a relevant investment and the film must be a qualifying film as the terms are defined in Section 35. The questions whether,*

for the purposes of Section 35, a company is a qualifying company and whether an investment made in a qualifying company is a relevant investment are questions of fact to be decided by the appropriate Inspector of Taxes after an examination of all the relevant factors on a submission of a claim for tax relief. Furthermore, the question of whether a genuine risk exists in respect of the investment made by the qualifying investor and whether a film is a qualifying film are matters for the relevant Inspector of Taxes.

…

Before making an investment on the terms described in this Memorandum investors should consult their professional advisors in particular have regard to the risks involved, their own financial circumstances and their position."

The application form of Merlin Premiere, which the applicant duly signed, contained the following clauses:-

"I hereby irrevocably undertake and agree to make such subscription upon the terms of this Application Form and the Deed of Indemnity duly completed by me…

I further acknowledge as follows:

…

(c) that the investment as set out in the Shareholders' Investment Agreement is being made at my risk;

…."

There was no suggestion made that Merlin Film Group or the applicant's tax or legal advisers were impeded by any lack of information or co-operation from the respondents. In such circumstances the applicant must be taken to have been fully informed of the risks involved.

I am satisfied that the respondents were permitted and entitled to withdraw the relief upon finding that the conditions for relief were not met as provided for in s.35 of the Act of 1987. The promotional documentation furnished to the applicant made specific reference to the fact that this could occur. The framework of the tax relief scheme meant that the grant of relief was dependent on the production companies fulfilling the conditions set out in the s.35 of the Act of 1987 and the Minister's certificate and this was a clause in shareholders' agreement. Having regard to the terms of s.35 of the Act of 1987 coupled with the numerous warnings of the potential for relief being withdrawn in the promotional material I cannot accept cannot that the respondents made a representation to the applicant such as to ground a claim for breach of a legitimate expectation.

There was no evidence adduced to this Court demonstrating a failure by the respondents to observe any term of its *Taxpayers' Charter of Rights*. The applicant did not demonstrate, on the facts of this case, that the law was not administered consistently in his case. What happened was that conditions were not fulfilled and the applicant was aware or ought to have been that the relief he availed of could be withdrawn in such an event.

The applicant made the case that he had a legitimate expectation to have the scheme for film relief applied to him as it was in 1995, in that, he was entitled to have his investments treated in accordance with the régime applicable at the time he made the investments and that they were not to be subjected to a review by reference to a different standard to that applicable when the relief was originally sought and granted. I am satisfied that the scheme, as it applied in 1995 with provision for the withdrawal of relief, was, in fact, applied to the applicant when the relief was withdrawn in 2005.

The Supreme Court, in *Wiley v. The Revenue Commissioners* [1994] 2 I.R. 160, found that the plaintiff in that case did not have a legitimate expectation based on the respondents' previous practice to a refund of excise duty to which he was not actually entitled to under the terms of the scheme. Finlay C.J. reached the conclusion that for the Revenue Commissioners to repay excise duty to a person who did not come within the terms of the approved scheme would be *ultra vires* and a breach of their statutory obligations. The applicant in this case is in a similar position to the plaintiff in that case, in that, his relief is being withdrawn on the grounds that he was not entitled to the relief in the first place.

I am satisfied that the applicant's case based on the existence of a legitimate expectation, for the reasons outlined above, must fail.

7. Delay
The last issue for consideration is whether there has been inordinate and inexcusable delay on the part of the respondents which prejudiced the applicant, in resisting the 2005 assessment which purports to withdraw the relief granted almost 10 years earlier.

(i) Counsels' Submissions
Mr. Hogan argued that the delay of over eight years on the part of the respondents in attempting to withdraw the tax relief was inordinate, inexcusable and prejudicial to the applicant. He submitted that in 2004 the respondents indicated to the applicant that the tax relief may be withdrawn but that the respondents had made enquiries with Concorde Anois Teo. as to the films it had been involved in producing as far back as 2000. The prejudice to the applicant arose, it was submitted, in the inability of the applicant to defend the assessment on the merits due to the fact that the film production companies, whose compliance with conditions for the relief were in question, no longer existed and from the fact that the applicant was forced to re-open accounts and re-visit his tax affairs of over eight years ago. Mr. Hogan argued that the respondents were not now entitled to seek to re-open its previous tax treatment of the applicant more than eight years after granting the relevant relief in circumstances where no fault attached to the applicant and where the applicant was never informed during the relevant period that the tax relief was under review. Reliance was placed in this regard on the constitutional principle of fair procedures; recent case law on delay including the cases of *Stephens v. Flynn Ltd* [2005] I.E.H.C. 148 (Unreported, High Court, 28th April, 2008, Clarke J.), *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, *Re Knocklofty House Hotel Ltd (In Liquidation)* [2005] 4 I.R. 497, *Keogh v. Wyeth Laboratories Inc. & Ors.* [2006] 1 I.R. 345, *Noonan (aka Hoban) v. The Director of Public Prosecutions* [2007] I.E.S.C. 34 (Unreported, Supreme Court, 27th

July, 2007) and *Farrelly v. The Board of Beaumont Hospital* [2006] I.E.H.C. 58 (Unreported, High Court, 1st February, 2006, Gilligan J.); the requirement in Article 6 of the European Convention of Human Rights that a case be heard within a reasonable time and on certain provisions of the *Taxpayers' Charter of Rights*.

For the respondents, it was submitted that the legislature expressly provided in s. 35(6) of the Act of 1987 that relief may be withdrawn by the raising of an assessment at any time, notwithstanding any time limits that might otherwise have applied. Mr. McDonald submitted, that this meant that the issue of delay did not arise because of the express statutory provision entitling and requiring the respondents to raise an assessment at any time. This provision meant, in his submission, that the case law involving delay in other contexts, such as disciplinary hearings, criminal trials or civil claims, was of no assistance. He added that the raising of assessments to tax is an administrative function and not a judicial one and he cited the High Court and Supreme Court judgments in *Deighan v. Hearne* [1986] 1 I.R. 603 (High Court) and [1990] 1 I.R. 499 (Supreme Court) as authority for his argument. He also attributed some of the delay experienced in the process to the applicant himself, in that, Merlin Film Group requested the deferral of any decision on the withdrawal of relief in respect of the five production companies in question pending the outcome of Circuit Court proceedings in the *Bartondale* case. Addressing the alleged prejudice encountered by the applicant, he submitted that the applicant accepted his tax relief subject to and in the knowledge that it could be withdrawn if the production companies did not ensure compliance with s.35 of the Act of 1987 and the Minister's certificate. He submitted that the applicant failed to demonstrate the precise prejudice he suffered. Mr. McDonald went on to suggest that as there appeared to be a close and ongoing relationship between Merlin Film Group, Transpacific Corporation A.V.V. Philippines and Concorde Anois Teo., that there was no reason to suppose that any appropriate documentation would not be available to the applicant from Merlin Films, Transpacific Corporation A.V.V. Philippines or Concorde Anois Teo. to furnish to the respondents to assist the applicant's case against the 2005 assessment.

(i) Decision on the issue of delay
The applicant first invested in the production companies in April 1995. It was indicated to him by the respondents that consideration was being given to the withdrawal of relief on the 20th April, 2004. On the 17th June, 2004, an inquiry into the accounts of the production companies was delayed pending the outcome of the appeal in the *Bartondale* case which concluded just under a year later. On the 20th September, 2005, the respondents indicated to the applicant that the relief was being withdrawn.

Under s.955 of the Act of 1997 the statutory time limit for raising an assessment is six years. This was also the statutory limit that applied when the applicant made his investment. Since the Finance Act 2003 (Commencement of Section 17) Order 2003 (S.I. 508 of 2003) the statutory limitation period for raising fresh assessments is now four years.

There can be little doubt, however, from the terms of s. 35(6) of the Act of 1987 that the legislature did envisage the withdrawal of tax relief by the raising of an assessment at any time and it expressly included the phrase "*… notwithstanding anything in the Tax Acts, such an assessment may be made at any time",* which necessarily implies the above statutory time limits do not apply to the withdrawal of relief granted under s.35. Here, the meaning of s. 35(6) of the Act of 1987 is so clear that another interpretation does not arise. It was the clear intention of the legislature to confer the power on the respondents to withdraw tax relief at any time. Hence, no statutory limitation period inhibited the raising of the 2005 assessment.

In considering whether there has been delay, such that the respondents should in equity now be restrained from proceeding with the 2005 assessment, the applicable legal principles are well settled and require that the applicant demonstrate either that there has been inordinate and inexcusable delay and that the balance of justice lies in favour of halting the assessment (as per *Primor plc. v Stokes Kennedy Crowley* [1996] 2 I.R. 459) or that the delay is of such length as to rob the applicant of any capacity of resisting the assessment (as per *Toal v Duignan (No. 2)* [1991] I.L.R.M. 140]

It is noteworthy that, in 2004, the inquiry into the accounts of the production companies was delayed pending the outcome of the appeal in *Bartondale*. This was at the request of the applicant. It can be inferred from this that the applicant acquiesced in this delay of approximately a year. The delay at issue, therefore, is the remainder of the delay between the granting of the relief and the withdrawal of it.

In this case there is no evidence that any specific relevant material necessary to enable the applicant defend the assessment has been lost to the applicant. On the contrary, similar issues arose in the *Bartondale* case which was completed in 2005 and as it is clear that there was no problem in that case arising from material lost due to the passage of time, it can readily be inferred that, as of 2005, the materials relevant to the 2005 assessment were in existence and could be made available to the applicant, notwithstanding the liquidation of the companies in which he invested.

I am satisfied that the applicant has not demonstrated, firstly, that any delay that has occurred is inexcusable, given that all of the material relevant to compliance with the conditions for relief was solely within the knowledge and possession of the Merlin Film Group and the companies it promoted and the companies in which the applicant invested and those companies with which they traded for the purpose of producing the films in question. Whilst the delay in the efforts by the respondents to establish the true position with regard to the expenditures of the companies in which the applicant invested, could be said to be inordinate stretching as it does over some eight years, I am not satisfied having regard to the difficulties encountered by the respondents in those efforts, that the delay is inexcusable. In any event I am quite satisfied that there is no evidence which could satisfy this Court that the delay involved has resulted in the loss of relevant material such as to prejudice the applicant in defending the assessment.

The Supreme Court, in the case of *Deighan v. Hearne* [1990] 1 I.R. 499 found that the assessment of tax was an administrative function and not a judicial one. This finding does not go so far as to mean that the general principles which emanate from protracted civil litigation cases would not be applicable to a case involving the exercise an administrative function.

Article 6 of the European Convention on Human Rights guarantees due process in civil and criminal cases. It provides, *inter alia*, that *"everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* However, it has long been accepted by the European Court of Human Rights that Article 6 has no application whatsoever in respect of proceedings relating to the assessment or imposition of tax. Article 6(1) applies to determinations of *"civil rights and obligations or of any criminal charge".* Public law matters, such as tax matters, are excluded, as was confirmed by the European Court of Human Rights in *Ferrazzini v. Italy* (2002) 34 E.H.R.R.

45. Accordingly, the applicant’s argument under Article 6 must fail.

For all of the reasons set out above, I must refuse the reliefs sought.