[2018] UKFTT 697 (TC)

TC06842

Appeal number: TC/2010/01716

AGGREGATES LEVY – preliminary issue – rock extracted from opencast gold mine – whether rock exempt from aggregates levy as consisting of "shale or slate" – section 17(4) Finance Act 2001- expert evidence – penalty – whether assessment and penalty a "criminal charge" within Article 6 European Convention on Human Rights

FIRST-TIER TRIBUNAL
TAX CHAMBER

OMAGH MINERALS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, Belfast on 1-3 March 2017, 10-12 January 2018 and written submissions January, July and August 2018.

Frank O'Donoghue QC, instructed by Elliott Duffy Garrett, Solicitors, for the Appellant

Christopher McNall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Decision amended under Rule 37 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

© CROWN COPYRIGHT 2018

DECISION

Introduction

1. The Respondents ("**HMRC**") have assessed Omagh Minerals Limited ("**the appellant**") in the sum of £304,290 ("**the assessment**") in respect of alleged arrears of aggregates levy for periods 01/09 and 04/09 and have charged a penalty ("**the penalty**") of £15,214.50 under Part 2 of Schedule 6 Finance Act 2001 ("**FA 2001**"). The appellant now appeals this assessment and penalty. HMRC are also seeking "ordinary" interest of £4,454 under paragraph 8 Schedule 5 FA 2001 ("**the interest**").[1]

2. The appeal relates to rock removed from the appellant's opencast gold mine in 2008 – 2009. Essentially, HMRC contends that the rock consisted of mica schist and quartz i.e. rock which is not exempt from aggregates levy under section 17(4) FA 2001. The appellant, on the other hand, says that the rock consisted of "shale or slate" within the exemption contained in section 17(4) FA 2001 and that, therefore, no liability to aggregates levy arose.

3. This decision relates to a preliminary issue which the parties have asked me to determine. The hearing of the substantive issue ("**the substantive issue**") in relation to the assessment to aggregates levy and the related penalty remains to be concluded. The preliminary issue relates to the question whether the proceedings before me constitute proceedings of a criminal nature such that the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("**the Convention**") apply.

4. The parties produced helpful written submissions on this issue. After considering those submissions, I asked the parties to consider how Article 6 would apply if, in relation to the assessment, I decided that the proceedings in relation to the assessment were not within Article 6 (e.g. applying *Ferrazzini* – see below) but that, in relation to the penalty, the proceedings did relate to a "criminal charge". I drew the parties' attention to the submissions of Mr O'Donoghue which argued, without referring to authority, that Article 6 would apply to the whole proceedings because they were criminal in nature. The parties then produced further informative written submissions for which I was most grateful.

Penalty Provisions

5. In the periods material to this appeal the relevant penalty provision was paragraph 9 Schedule 6 FA 2001, which provided as follows:

---

[1] "Ordinary" interest is to be distinguished from "penalty" interest under paragraphs 8, 9 and 10 Schedule 5 FA 2001. Although there has been no formal appeal in respect of interest, I assume that the interest issue will stand or fall with the assessment.

“Misdeclaration or neglect

9(1) Subject to sub-paragraphs (3) to (5) below, where for an accounting period—

(a) a return is made which understates a person’s liability to aggregates levy or overstates his entitlement to any tax credit or repayment of aggregates levy, or

(b) at the end of the period of 30 days beginning on the date of the making of any assessment which understates a person’s liability to aggregates levy, that person has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners,

the person concerned shall be liable to a penalty equal to 5 per cent of the amount of the understatement of liability or (as the case may be) overstatement of entitlement.

(2) Where—

(a) a return for an accounting period—

(i) overstates or understates to any extent a person’s liability to aggregates levy, or

(ii) understates or overstates to any extent his entitlement to any tax credits or repayments of aggregates levy,

and

(b) that return is corrected—

(i) in such circumstances as may be prescribed by regulations made by the Commissioners, and

(ii) in accordance with such conditions as may be so prescribed,

by a return for a later accounting period which understates or overstates, to the corresponding extent, any liability or entitlement for the later period,

it shall be assumed for the purposes of this paragraph that the statement made by each such return is a correct statement for the accounting period to which the return relates.

(3) Conduct falling within sub-paragraph (1) above shall not give rise to liability to a penalty under this paragraph if the person concerned provides the Commissioners with full information with respect to the inaccuracy concerned—

(a) at a time when he has no reason to believe that enquiries are being made by the Commissioners into his affairs, so far as they relate to aggregates levy; and

(b) in such form and manner as may be prescribed by regulations made by the Commissioners or specified by them in accordance with any such regulations.

(4) Conduct falling within sub-paragraph (1) above shall not give rise to liability to a penalty under this paragraph if the person concerned

satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for his conduct.

(5) Where, by reason of conduct falling within sub-paragraph (1) above—

5 (a) a person is convicted of an offence (whether under this Act or otherwise), or

(b) a person is assessed to a penalty under paragraph 7 above,

that person shall not by reason of that conduct be liable also to a penalty under this paragraph."

10 6. For completeness I should add that paragraph 7 Schedule 6 FA 2001 provides for civil penalties in the case of evasion i.e. conduct involving dishonesty and paragraph 8 of that Schedule concerns liability for directors in relation to a body corporate which is liable to a penalty under paragraph 7.

Article 6 ECHR

15 7. The text of Article 6 ECHR provides as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but 20 the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would 25 prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

30 (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own 35 choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

40 (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Submissions

8. Mr O'Donoghue, for the appellant, referred me to the decision of the Grand Chamber of the European Court of Human Rights ("**the Court**") in *Ferrazzini v Italy* (Application 44759/98) [2001] ECHR 464 and [2001] STC 1314. The case involved a tax assessment which took 14 years to conclude. The applicant argued that the length of the proceedings relating to the determination of the issue had exceeded a "reasonable time" contrary to Article 6(1). The Court declared the complaint admissible but held, by a majority of 11 votes to 6, that Article 6(1) of the ECHR does not apply to tax disputes because tax disputes are not civil rights and obligations to which Article 6 applies.

9. In *Ferrazzini* the applicant and another person transferred land, property and a sum of money to a limited liability company which the applicant had just formed and of which he owned – directly and indirectly – almost the entire share capital and was the representative. The company, whose object was organising farm holidays for tourists (*agriturismo*), applied to the tax authorities for a reduction in the applicable rate of certain taxes payable on the above-mentioned transfer of property, in accordance with a statute which it deemed applicable, and paid the sum it considered due. The case concerned three sets of proceedings. The first concerned in particular the payment of capital gains tax and the two others the applicable rate of stamp duty, mortgage registry tax and capital transfer tax and the application of a reduction in the rate.

10. In other words, the dispute concerned potential substantive liabilities to Italian tax and did not concern penalties.

11. The Court concluded:

> "29. [T]he Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1, which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 48-49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

12. Six judges of the Grand Chamber delivered a powerful dissenting opinion, which has commanded considerable support amongst commentators. Nonetheless, the result of *Ferrazzini* is that in a dispute between the State and a taxpayer in relation to substantive tax liabilities, there is no right to a fair trial under Article 6. It was accepted by both parties in that case that the proceedings were not of a criminal nature.

13. Next, Mr O'Donoghue relied on another decision of the Court (again, a decision of the Grand Chamber) in *Jussila v Finland* [2007] 45 EHRR 39. In *Jussila* the taxpayer had underdeclared VAT and, consequently, was subjected to surcharge penalty of 10% of the underdeclared tax. The taxpayer argued that the penalty was a criminal charge for the purposes of Article 6 and that his rights under that Article had been infringed because he had been denied the right to a hearing (his appeal had been determined in the papers without an oral hearing). Although the Court decided that it was not necessary in the circumstances of the particular case for there to be an oral hearing and that a determination on the papers was adequate, it held that the 10% surcharge was a "criminal charge". The Court said:

> "30. The Court's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria, sometimes referred to as the "*Engel* criteria" were most recently affirmed by the Grand Chamber in *Ezeh and Connors v. the United Kingdom* ([GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003 X):
>
> '... [I]t is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
>
> The very nature of the offence is a factor of greater import. ...
>
> However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. ...'
>
> 31. The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh and Connors*, cited above, § 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, § 54; also *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, § 55). This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Ezeh and Connors*, § 86, citing, *inter alia*, *Bendenoun v. France*, § 47)."
>
> …
>
> 36. Furthermore, the Court is not persuaded that the nature of tax surcharge proceedings is such that they fall, or should fall, outside the protection of Article 6. Arguments to that effect have also failed in the context of prison disciplinary and minor traffic offences (see, variously, *Ezeh and Connors* and *Öztürk*, cited above). While there is no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards

in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention. In this case the Court will therefore apply the *Engel* criteria as identified above.

5 37. Turning to the first criterion, it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive.

38. The second criterion, the nature of the offence, is the more important. The Court observes that, as in the *Janosevic* and *Bendenoun* 10 cases, it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not persuaded by the Government's argument that VAT applies to only a limited group with a special status: as in the previously-mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he 15 opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose 20 was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head 25 notwithstanding the minor nature of the tax surcharge."

14. Mr O'Donoghue submitted that in the present case HMRC had imposed a penalty of just over £15,000 for underpayment of aggregate levy – the penalty was levied pursuant to paragraph 9 of Schedule 6 FA 2001. Applying the *Engel* criteria, Mr O'Donoghue accepted that the penalty was not classified in Schedule 6 as punitive 30 in nature but as part of the fiscal regime[2]. However, he noted that, as was observed in *Jussila*, this was not determinative. As regards the second *Engel* criterion, the penalty was clearly intended to be deterrent and punitive in nature. The assessment in respect of interest was the element intended as pecuniary compensation. In relation to the third *Engel* criterion, the degree/severity of the penalty, the monetary amount was 35 significant and Mr O'Donoghue noted that the appellant had been allowed to pursue its appeal by reference to section 41(2)(b) FA 2001 i.e. the hardship provisions.

15. It followed, according to Mr O'Donoghue, that because the proceedings involved a "criminal charge", the provisions of Article 6 applied to the whole of the proceedings and not just that part that related to the penalty. Thus, even though the 40 issue of assessment was not the determination of a civil right or obligation, when the liability to pay the assessment and interest was combined with the determination of the obligation to pay the penalty (the penalty being a "criminal charge"), the proceedings were criminal for the purposes of Article 6 and that the protections of Article 6 in relation to proceedings of a criminal nature were accordingly engaged.

[2] Which I understood to mean that Mr O'Donoghue conceded that the penalty in this case was not "criminal" as a matter of domestic law.

16. In support of his submission, Mr O'Donoghue referred to *Jussila* at [45]-[46]:

> "45. While the Court has found that Article 6 § 1 of the Convention extends to tax surcharge proceedings, that provision does not apply to a dispute over the tax itself (see *Ferrazzini v. Italy* [GC], cited above*). It is, however, not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a "criminal charge" from those parts which do not. The Court must accordingly consider the proceedings in issue to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessment to a certain extent* (see *Georgiou v. the United Kingdom* (dec.), no. 40042/98, 16 May 2000 and *Sträg Datatjänster AB v. Sweden* (dec.), no. 50664/99, 21 June 2005).
>
> 46. In the present case, the applicant's purpose in requesting a hearing was to challenge the reliability and accuracy of the report on the tax inspection by cross-examining the tax inspector and obtaining supporting testimony from his own expert since, in his view, the tax inspector had misinterpreted the requirements laid down by the relevant legislation and given an inaccurate account of his financial state. His reasons for requesting a hearing therefore concerned in large part the validity of the tax assessment, which as such fell outside the scope of Article 6, although there was the additional question of whether the applicant's bookkeeping had been so deficient so as to justify a surcharge. The Administrative Court, which took the measure of inviting written observations from the tax inspector and after that a statement from an expert chosen by the applicant, found in the circumstances that an oral hearing was manifestly unnecessary as the information provided by the applicant himself formed a sufficient factual basis for the consideration of the case." (Emphasis added)

17. Accordingly, in Mr O'Donoghue's submission, Article 6 did not apply to the entirety of the proceedings if it was not possible to separate those parts of the proceedings which determined a "criminal charge" from those parts which do not (*Jussila* at [45]). The focus had to remain on the proceedings and the separation of the proceedings. Mr O'Donoghue argued that it was not simply a question of separating out concepts of assessment, interest and penalty. All of these were separable as they were different concepts. Instead, it was necessary to look at the proceedings and how they could be separated.

18. According to Mr O'Donoghue, in the present appeal it was not possible to separate those parts of the proceedings related to the imposition of the penalty from those parts that did not. The penalty arose because of a determination that the rock removed from the excavation was not exempt as "shale or slate") and that it attracted aggregates levy. Liability to pay the assessment, the interest and the penalty were all dependent on the issue of whether the material removed was exempt. The overwhelming majority of the proceedings had been taken up by evidence on this factual issue i.e. whether or not the rock removed was exempt from aggregates levy. Thus, the assessment, interest and penalty were all dependent on the finding as to the constituent elements of the material removed and its volume.

19. Dr McNall, for HMRC, submitted that the assessment did not engage Article 6. The dispute in relation to the assessment was a tax dispute between a taxpayer (the appellant) and a tax authority (HMRC). It did not involve the "determination of…civil rights and obligations" within the meaning Article 6(1).

5 20. The starting point of any analysis, Dr McNall submitted, was the application of the *Engel* criteria.[3]

21. As regards the first criterion (classification in domestic law) Parliament had provided for civil penalties under Schedule 6 Part 2 FA 2001 but had provided for criminal sanctions in Part 1 (e.g. "fraudulent evasion" the production of a document 10 which was false in a material particular with the intent to deceive, knowingly or recklessly making false statements). This "bifurcated structure", as Dr McNall described it, had been deliberately adopted by Parliament within its margin of appreciation. This was a strong indication that the penalty should not be treated as criminal because such treatment would disrupt the scheme of Schedule 6.

15 22. Dr McNall noted that in *Engel* itself a deprivation of liberty was held to be "of too short a duration to belong to the criminal law" at [85].

23. Next, Dr McNall referred to the decision of the Upper Tribunal (Morgan J and Judge Herrington) in *Personal Representatives of Wood v HMRC* [2016] UKUT 346 (TCC) which involved discovery assessments amounting to £1.3 million pursuant to 20 section 29 Taxes Management Act 1970. *Wood* affirmed the guidance in *Jussila* at [33] that the degree of severity of the penalty that the person concerned risked incurring had to be taken into account. At [34] the Upper Tribunal endorsed the application of the reasoning of the Court of Appeal in *R (Mudie and another) v Dover Magistrates' Court* [2003] EWCA Civ 237. This was a case in which condemnation 25 proceedings in respect of unlawfully imported goods had been brought before a magistrates court. The magistrates had declined to make a representation order (allowing for public funding of legal representation) in relation to condemnation proceedings. The application of Article 6 and the question whether condemnation proceedings were civil or criminal proceedings was therefore critical. Laws LJ (with 30 whom Lord Phillips MR and Brooke LJ concurred) said at [36]:

---

[3] Dr McNall helpfully referred me to the description of these three criteria in the judgment of Lord Phillips MR in the Court of Appeal in *R(McCann) v Crown Court at Manchester* [2001] 1 WLR 1084, page 1098 at [52]:

"This decision [*Engel*] identified three principal criteria which it has become the European Court's practice to consider when deciding whether proceedings have a criminal character:

(1) the manner in which the domestic state classifies the proceedings;

(2) the nature of the offence; and

(3) the character of the penalty to which the proceedings may give rise."

I note that the second and third criteria are alternative and not necessarily cumulative, but this does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge: see *Jussila* at [31].

> "It is certainly beyond contest that the concept of "criminal charge" possesses an autonomous meaning in the Strasbourg jurisprudence. It is also true that the first of the three criteria, that is the domestic classification of the proceedings, is treated as no more than a starting point. But that proposition should not distract the court from the question whether, given the three criteria, the proceedings in issue are in substance in the nature of a criminal charge. *Are they an instance of the use of state power to condemn or punish individuals for wrongdoing?* The Strasbourg court and our own courts have held that condemnation proceedings are not in any such category." (Emphasis added)

24. Dr McNall noted that regard had to be had to the fact that there was no arrest, detention or charge; no conviction or criminal record and no serious personal consequences of the kind typically caused by involvement in criminal proceedings. These were factors that were treated as relevant by the Upper Tribunal in *Wood* and by the Court of Appeal in *Mudie* but were not present in this appeal.

25. The penalty imposed on the appellant was, argued Dr McNall, not within the criminal sphere. It was a preventative or regulatory measure. It could not be said that the predominant purpose of the statutory scheme applying to aggregates levy as a whole, or to the penalty in particular, was punitive.

26. As regards the third *Engel* criterion (the nature and degree of severity of the penalty that the appellant had risked incurring), Dr McNall suggested that there was a degree of overlap with the second criterion.

27. The penalty was fixed at a maximum of 5%. The penalty did not depend on the degree of culpability of the taxpayer. It was wholly independent of any prosecution or enquiry into dishonest or criminal conduct.

28. Dr McNall said that he had been unable to locate any reported decision (whether European or domestic) in which a court had considered a percentage penalty (fixed or otherwise) at the 5% level. This was a very modest percentage. The percentage in *Euro Wines*[4] was 20% (but in a regime where penalties were adjusted with reference to potential lost revenue at up to 100%). In *Janosevic* the percentage was 40%.

29. In addition, Dr McNall noted that ability to pay was irrelevant (*British-American Tobacco v HMRC* [2017] UKFTT 190 (TC) at [484]).

30. The assessment was subject to the conventional rule that it "stands good" unless the taxpayer displaces it. (*Grunwick Processing Laboratories v CCE* [1987] STC 357) i.e. the burden of proof was on the taxpayer (see also *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at page 639h-j and 642c).

---

[4] *Euro Wines (C&C) Ltd v Revenue And HMRC* [2016] UKUT 359 (TCC) (Birss J and Judge Berner) and in the Court of Appeal [2018] EWCA Civ 46.

31. In his further written submissions, Dr McNall argued that even if the penalty was a "criminal charge" that did not mean that the proceedings in relation to the assessment were criminal proceedings for the purposes of Article 6.

32. The assessment, Dr McNall observed, was not dependent on the penalty. The
5 law, facts and matters relating to the assessment remained the same irrespective of whether the penalty was charged or not. Dr McNall accepted that if the assessment was displaced then the penalty fell with it, but not *vice versa*.

33. The underlying position was that challenges to an assessment did not engage Article 6 (*Ferrazzini*). There was no reason why the underlying Article 6 position as
10 regards the assessment should be changed by the issue of a penalty.

34. Dr McNall referred to the decision of the Court in *Georgiou and another (t/a Marios Chippery) v United Kingdom* [2001] STC 80 ((Application no 40042/98)) which involved protracted proceedings in relation to both an assessment and a penalty. The applicants owned a fish and chip shop in Leicester. In 1990, after an
15 investigation by Customs officers, the applicants admitted that they had underdeclared the shop's takings, removed cash from its till and had withheld purchase invoices from their accountants since 1986. Assessment were made on the applicants in May 1990 in respect of underdeclared output tax between January 1986 and October 1989 based on a weekly suppression rate derived from the till grand total. The applicants asked the
20 commissioners to reconsider the assessments and in November 1990 amended assessments were issued for a reduced amount of underdeclared output tax. In December 1990 a notice of assessment to a penalty pursuant to section 13 Finance Act 1985 was issued against the applicants for dishonest evasion of value added tax (VAT) for 16 accounting periods between 1986 and 1989. The applicants appealed
25 against the amended assessments and against the penalty assessment. The tribunal heard the appeal over 49 working days from March to July 1993. On 28 April 1994 it dismissed the applicants' appeal. The High Court affirmed the tribunal's decision and the Court of Appeal dismissed the applicants' appeal and refused them leave to appeal to the House of Lords. The applicants then applied to the Court contending, inter alia,
30 that their rights under Article 6(1) of the Convention, which provided, *inter alia*, that in the determination of his civil rights and obligations or of any criminal charge against him, everyone was entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal, had been violated because: (i) the grant of legal aid had not permitted the instruction of leading counsel to argue their case
35 before the Court of Appeal; (ii) they had been denied access to a number of relevant documents at the tribunal hearing; and (iii) the tribunal had not released its decision until nine months after the hearing had been concluded and the proceedings had taken a full seven years from start to finish. They submitted that the penalty proceedings under section 13 constituted a 'criminal charge' within the meaning of Article 6(1) and
40 that, although the assessments themselves did not determine either 'civil rights' or 'criminal charges', the proceedings should be examined as a whole, given that the penalty procedure depended on the assessments for its validity.

35. The Court considered that the penalties were likely to be a "criminal charge" (see at page 88):

5
"The court notes that the penalty proceedings in the present case were classified as civil, rather than criminal, in domestic law. However, as in Bendenoun v France (1994) 18 EHRR 54 at 74–76, paras 44–48, the penalty was intended as a punishment to deter re-offending, its purpose was both deterrent and punitive and the penalty itself was substantial. These factors taken together indicate that the penalty imposed in the present case was a 'criminal charge' within the meaning of art 6(1)."

36. The Court held at page 88:

10
15
"As to whether the assessments themselves should also be seen as 'criminal charges' for the purpose of the art 6 guarantees, the applicants argue that since the penalty procedures rely on the assessments for their validity, it would be wrong not to look at the proceedings as a whole. The court accepts that it is not possible, given the various matters which were being determined by the tribunal, to separate those parts of the proceedings which determined a 'criminal charge' from those parts which did not. It will consider the proceedings to the extent to which they determined a 'criminal charge' against the applicants, although that consideration will necessarily involve the 'pure' tax assessments to a certain extent."

20
25
37. Dr McNall noted that the penalty regime in *Georgiou* was very different from that in the present appeal. In *Georgiou* the penalty provisions penalised persons who had done act or omitted to do an act for the purpose of evading tax in circumstances where the conduct involved dishonesty. That was not the penalty regime in the present case. Moreover, the penalty in *Georgiou* was 100%, reducible to not less than 50% for cooperation. In other words, Dr McNall argued that the penalty in *Georgiou* was nakedly punitive. There was no clear finding that the penalties were criminal. In relation to the comments of the Court quoted at [32] above, this did not constitute the *ratio* of the case and the remarks were *obiter* because the Court rejected the taxpayers' Article 6 contentions as "manifestly ill-founded" (at page 90 b).

30
38. In *King v United Kingdom (2)* [2004] STC 911, the Court was asked to consider the applicability of Article 6 to long-running proceedings which involved both assessments (on a wilful default/neglect basis) and penalty determinations. The Court said at page 920 h:

35
"The court would note, first of all, that the procedures concerning the assessment of tax owing by the applicant fall outside the scope of art 6(1) as neither concerning the determination of a 'criminal charge' or of any of the applicant's civil rights or obligations (for example, *Ferrazzini v Italy* [2001] STC 1314, (2001) 3 ITLR 918, para 29)."

40
39. *King* was an authority which undermined the appellant's argument – the concurrent existence of an assessment and penalty did not bring proceedings within Article 6.

40. Dr McNall submitted that the issue of considering both tax assessments and penalties at the same hearing was also touched on in *Jussila* where the Court said at [45]:

> "While the Court has found that Article 6 § 1 of the Convention extends to tax surcharge proceedings, that provision does not apply to a dispute over the tax itself (see *Ferrazzini v. Italy* [GC], cited above). It is, however, not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a "criminal charge" from those parts which do not. The Court must accordingly consider the proceedings in issue to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessment to a certain extent (see *Georgiou v. the United Kingdom* (dec.), no. 40042/98, 16 May 2000 and *Sträg Datatjänster AB v. Sweden* (dec.), no. 50664/99, 21 June 2005)."

41. Dr McNall had been unable to locate any reported decision in the UK which supported the proposition for which the appellant argued, viz that if an appeal involves both a tax assessment and a penalty (where the latter was a "criminal charge"), Article 6 was engaged as regards the whole of the proceedings.

Discussion

The assessment

42. On the authority of *Ferrazzini* it is clear that the assessment, when viewed alone, does not involve civil rights and obligations to which Article 6 applies. The decision of the Court in that case is clear [5] and has been followed in a number of subsequent decisions. It therefore represents the settled jurisprudence of the Court.

The penalty

43. As regards the penalty, notwithstanding the lucid arguments of Dr McNall, I have concluded that it represents a "criminal charge" for the purposes of Article 6.

44. The leading authority in relation to tax penalties as to whether they constitute a criminal charge under Article 6 is *Jussila*.

45. The importance of *Jussila* lies not just in the fact that it is a decision of the Grand Chamber of the Court but because the whole purpose of the decision was to determine the correct approach to the application of Article 6 in relation to *small* tax penalties. The penalty in *Jussila* was €308.8 (10% of the understated tax). *Jussila* was, therefore, a case about small tax penalties – that was the whole point of the case. The reason that the application was heard by the Grand Chamber was because there were earlier conflicting authorities of the Court (see *Jussila* at [32]-[35]) in relation to small tax penalties. In *Bendenoun v. France* 12547/86 [1994] ECHR 7 the Court had not referred to the *Engel* criteria and the subsequent decision of the Court in *Morel v*

[5] Notwithstanding the convincing arguments of the dissenting minority, as to which I might respectfully comment: "*victrix causa diis placuit sed victa catoni*".

France ((dec.), no. 54559/00, ECHR 2003 IX), which followed *Bendenoun*, relied on the lack of severity of the penalty to conclude that it did not fall within Article 6(1). On the other hand, in *Janosevic v. Sweden* [2002] ECHR 618, in which the Court did not refer to *Bendenoun*, the Court simply applied the *Engel* criteria. The Court in
5 *Jussila* noted at [33] that in *Janosevic*:

> "While reference was made to the severity of the actual and potential penalty (a surcharge amounting to 161,261 Swedish crowns (SEK), corresponding to EUR 17,284, was involved and there was no upper limit on the surcharges in this case), *this was as a separate and*
10 *additional ground for the criminal characterisation of the offence which had already been established on examination of the nature of the offence* (*Janosevic*, §§ 68-69; see also *Västberga Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, 23 July 2002 decided on a similar basis at the same time)." (Emphasis added)

15 46. After referring to the differing strands of authority, the Court's conclusion in *Jussila* was stated at [35]-[36]:

> "35. The Grand Chamber agrees with the approach adopted in the *Janosevic* case, which gives a detailed analysis of the issues in a judgment on the merits after the benefit of hearing argument from the
20 parties (cf. *Morel* which was a decision on inadmissibility). No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6.
>
25 36. Furthermore, the Court is not persuaded that the nature of tax surcharge proceedings is such that they fall, or should fall, outside the protection of Article 6. Arguments to that effect have also failed in the context of prison disciplinary and minor traffic offences (see, variously, *Ezeh and Connors* and *Öztürk*, cited above). While there is
30 no doubt as to the importance of tax to the effective functioning of the State, the Court is not convinced that removing procedural safeguards in the imposition of punitive penalties in that sphere is necessary to maintain the efficacy of the fiscal system or indeed can be regarded as consonant with the spirit and purpose of the Convention. In this case
35 the Court will therefore apply the *Engel* criteria as identified above.

47. Thus, the Court concluded that the correct approach to adopt was to apply the *Engel* criteria[6] and that if, on the application of those criteria, the penalty was

---

[6] I summarised the *Engel* criteria in *British-American Tobacco v HMRC* [2017] UKFTT 190 (TC) as follows:
"471. The concept of a "criminal charge" has an autonomous meaning. The ECtHR's established case-law sets out three criteria to be considered in the assessment of the applicability of the criminal aspect. These criteria are sometimes referred to as the "*Engel* criteria" following the decision of the Court in *Engel and others v The Netherlands (No 1)* (1976) 1 EHRR 647 (see also *Ezeh and Connors v. the United Kingdom* [2003] ECHR 485).
472. The *Engel* criteria, in summary, require that the following must be taken into account: (a) the classification of the penalty in domestic law; (b) the nature of the offence; and (c) the nature and degree of severity of the penalty that the person concerned had risked incurring. The domestic classification of

correctly analysed as a criminal charge under one of those criteria, the position was not altered by the fact that the penalty was small.

48. Turning to the facts of the case before it, the Court's conclusion in *Jussila* was as follows:

> "37. Turning to the first criterion, it is apparent that the tax surcharges in this case were not classified as criminal but as part of the fiscal regime. This is however not decisive.
>
> 38. The second criterion, the nature of the offence, is the more important. The Court observes that, as in the *Janosevic* and *Bendenoun* cases, it may be said that the tax surcharges were imposed by general legal provisions applying to taxpayers generally. It is not persuaded by the Government's argument that VAT applies to only a limited group with a special status: as in the previously-mentioned cases, the applicant was liable in his capacity as a taxpayer. The fact that he opted for VAT registration for business purposes does not detract from this position. Further, as acknowledged by the Government, the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending. It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. Without more, the Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge.
>
> 39. The Court must therefore consider whether the tax surcharge proceedings complied with the requirements of Article 6, having due regard to the facts of the individual case, including any relevant features flowing from the taxation context."

49. Following this approach, it is clear to me that the nature of the penalty under paragraph 9 Schedule 6 FA 2001 is a criminal charge for the purposes of Article 6. I accept that the penalty in this case is a civil and not criminal penalty as a matter of domestic law. But that domestic classification is simply a starting point in determining the autonomous meaning of the concept of a "criminal charge" for the purposes of Article 6. More importantly, I consider that the purpose of the penalty is to deter taxpayers from underdeclaring tax on their returns and to punish those that do

---

the penalty is only one of the factors, and is not decisive. Not only was the domestic law classification not decisive, it carried relatively less weight than the other factors of the nature of the offence and the nature and degree of severity of the penalty (see for example, *Yau and Ors v Customs & Excise* [2001] EWCA Civ 1048 per Mummery LJ at [26]). These latter two criteria were alternative, and not cumulative; it was sufficient if the offence in question was by its nature criminal from the point of view of the Convention or that the nature and degree of severity of the penalty placed the sanction in general in the criminal sphere. However, a cumulative approach is equally permitted if it was not possible to reach a conclusion by reference to the individual criteria (see the helpful summary of the relevant ECtHR case-law in the recent decision of the Upper Tribunal (Birss J and Judge Berner) in *Euro Wines (C&C) Ltd v Revenue and Customs Commissioners* [2016] UKUT 359(TCC) at [15]-[21]."

so. Manifestly, the penalty is not of a compensatory nature – compensation is achieved by the interest charged under paragraph 8 Schedule 5 Finance Act 2001 which compensates HMRC for the fact that the Exchequer has been out of its money (the assessment itself giving HMRC the missing tax).

5 50. I am not moved by Dr McNall's mini-review of the different percentages of penalties imposed in various cases. The nature of the penalty does not, in my view, turn on whether the penalty is 5%, 10%, 20% or more. That does not assist in determining the nature of the penalty under the second *Engel* criterion. Nor, as the facts of *Jussila* eloquently demonstrate (a penalty of €308.80), is the absolute amount 10 of the penalty a determining factor. These are relevant matters but they relate primarily to one of the *Engel* criteria (the third *Engel* criterion).

51. Moreover, I reject Dr McNall's submission that the penalty in this case was "regulatory" rather than "criminal". That is simply to use a different adjective to describe a penalty but it does not assist, in any meaningful way, its correct 15 classification for Convention purposes. It is perfectly possible to use the criminal law to "regulate" behaviour. Moreover, it is not a description which is consistent with the test applied in *Jussila* – a test that has been followed in numerous subsequent cases and must now be taken to represent the settled jurisprudence of the Court on this question.

20 52. Also, while considering the misleading comparison between "regulatory" and "criminal" sanctions, it is worth bearing in mind the comments of the Upper Tribunal (Birss J and Judge Berner) in *Euro Wines (C&C) Ltd v HMRC* [2016] UKUT 359 (TCC). In that case, the FTT had held that a penalty under paragraph 4(1) Schedule 41 FA 2008 was not a criminal charge for the purposes of Article 6 because the purpose 25 of the penalty was to encourage compliance rather than being punitive. The Upper Tribunal rejected this approach at [23][7] in the following words:

> "We do not consider that the FTT was right to seek to draw this distinction. First, we can see no principled distinction between mere encouragement towards compliance and deterrence from non-30 compliance. They are essentially two sides of the same coin. Any difference depends on the process adopted to encourage or deter; a warning or guidance might be regarded as falling on the side of encouragement, whereas in our judgment a penalty is clearly on the side of deterrence."

35 53. Accordingly, I have concluded that the penalty in this case is a "criminal charge" for the purposes of Article 6 under the second *Engel* test.

[7] Which, with respect, must cast some doubt on the reasoning of Etherton J (as he then was) in *Sharkey v HMRC* [2006] EWHC 300 (Ch) where the primary purpose of a £50 penalty was said to be to secure the production of a document (in that case) rather than punishment or deterrence. Again with respect, punishment and deterrence are simply a means of securing compliance.

If the penalty is a criminal charge are the entire proceedings criminal in nature?

54. The next question is whether the assessment and penalty proceedings should be viewed as a whole and whether the protections of Article 6 in relation to a "criminal charge" should be applied to the entire proceedings before me.

5 55. I have come to the conclusion that Article 6 does not apply to the whole of the proceedings and is engaged only as regards that part of the proceedings which involves the penalty.

56. In this case, as Dr McNall observed, the assessment is not conditional upon the penalty. The assessment is a purely conventional procedure to determine the liability
10 of a taxpayer to tax (in this case aggregates levy) for certain specified periods.

57. Applying *Ferrazzini*, I consider that I am bound to hold that the assessment does not engage the criminal head or, indeed, any head of Article 6.

58. That conclusion, in my judgment, is not affected by the penalty. That the penalty is contingent upon the assessment being upheld is clear enough. Paragraph
15 9(1)(a) Schedule 6 FA 2001 requires HMRC to show that the appellant's return has understated its liability to aggregates levy, but HMRC does this, in my view, by relying on the determination of the appeal in relation to the assessment proceedings which are outside the scope of Article 6. If the appeal in relation to the assessment is determined in HMRC's favour, HMRC can rely on this fact in relation to paragraph
20 9(1)(a).

59. HMRC must, however, show that the penalty has been correctly calculated. Paragraph 9(4) then places the burden of proof on the appellant to show that there was a reasonable excuse for its conduct. The determination of the assessment appeal is the primary issue in dispute and the penalty appeal is subsidiary to and contingent upon
25 that primary issue.

60. Usually, the burden of proof falls on the taxpayer to displace an assessment (see, for example, *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 630 9h-j and 642c). There is a good reason for this rule. In most cases, the facts relevant to a liability to tax will be within the knowledge of the
30 taxpayer or, at least, the taxpayer will be better placed to produce evidence of the underlying facts (e.g. documents, witnesses etc). I would be loath to disturb such a well-established rule – one which in my view is eminently sensible – by holding that the criminal head of Article 6 applied to assessments as well as to penalty proceedings whenever assessment appeals are heard with penalty appeals.

35 61. Furthermore, whilst in the UK assessment and penalty proceedings are often heard together[8], this is not the case in every signatory state. It would be odd, therefore, if the application of Article 6 to an assessment appeal depended fortuitously on whether an assessment appeal was heard separately or together with a penalty appeal.

[8] Often, of course, penalty appeals are heard in isolation because there is no dispute as to the substantive tax liability.

This would be a strange conclusion, which of itself suggests that Mr O'Donoghue's argument cannot be correct.

62. I accept, however, that there may be cases – as the Court observed in *Georgiou* – where the incidence of liability in respect of a penalty is so intimately linked to the manner in which the substantive liability to tax arose that the two proceedings cannot be separated and that, consequently, the consideration of the proceedings in relation to a criminal charge must to some extent involve consideration of the substantive tax assessment. Thus in *Georgiou* the penalty proceedings required a finding of dishonesty after the consideration of extensive evidence at the hearing spanning 49 days – evidence which related to the assessment and the penalty. In that context, the Court's observations concerning the difficulty of separating the proceedings were entirely understandable.

63. This appeal is very different. Here, the main issue is whether the rock extracted by the appellant was exempt from aggregates levy. That is the main issue in the assessment appeal. The penalty is contingent on the answer to that question, but is a separate issue. I see no difficulty in separating the proceedings, as regards the application of Article 6, in relation to the assessment from those relating to the penalty.

64. I therefore determine this preliminary issue as follows:

(1) the assessment does not engage Article 6;

(2) the penalty is a "criminal charge" for the purposes of Article 6 of the Convention; and

(3) Article 6 does not apply to the whole of the proceedings (i.e. to both the assessment and the penalty proceedings) but applies only to proceedings in relation to the penalty.

Appeal rights and extension of time period for an appeal

65. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

66. I direct that the application must be received by this Tribunal not later than 56 days after the decision is sent to that party in respect of the substantive issue, as

described above. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

5

GUY BRANNAN
TRIBUNAL JUDGE

10

RELEASE DATE: 31 October 2018