TC04474

Appeal number: TC/2013/3026

INCOME TAX – preliminary issue - discovery assessments – extended time limits - ss 29 and 36 TMA 1970 – death of taxpayer – whether art 6 Human Rights Convention engaged – whether contrary to overriding objective in Tribunal Procedure Rule 2 to allow proceedings to continue

FIRST-TIER TRIBUNAL
TAX CHAMBER

Personal representatives of Mr MICHAEL WOOD (Deceased) **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster

Sitting in public at Bedford Square, London on 18 September 2014

Mr Tarlochan Lall of counsel, instructed by Covertax Chartered Tax Advisors, for the Appellant

Mr Peter Massey (HMRC Appeals Unit) for the Respondents

DECISION

1. By Directions issued on 17 April 2014 the Tribunal (Judge Poole) directed that the following question be determined as a preliminary issue in these proceedings:

> "Whether (and, if so, to what extent) the assessments against the late Michael Wood made under the extended time limits set out in section 36(1A)(a) Taxes Management Act 1970 should be set aside by reason of his death."

Facts

2. The late Mr Wood was a dentist. In 2010 HMRC were conducting enquiries into his tax returns for the tax years 2006-07 and 2007-08. On 2 June 2010 Mr Wood attempted to make a disclosure under HMRC's "Tax Health Plan" – this was a campaign that gave medical professionals an opportunity to tell HMRC about undeclared income by making a voluntary disclosure, in return for reduced penalties. Mr Wood's disclosure concerned admitted underdeclarations of income for the tax years 2002-03 to 2007-08 totalling £743,424; he made a tax payment of £352,983. HMRC contended that the disclosure was not covered by the terms of the Tax Health Plan (and so not eligible for any favourable settlement terms) and in December 2010 opened a "COP 9 investigation" into Mr Wood's tax affairs. Code of Practice 9 governs cases where HMRC suspect a person of committing tax fraud.

3. HMRC investigators met with Mr Wood and his advisers on 18 March 2011 and Mr Wood agreed to commission a disclosure report on his tax affairs ("the Disclosure Report"). The Disclosure Report was to cover the preceding twenty years and was due to be provided in September 2011. The Disclosure Report was not produced. On 14 August 2012 HMRC issued assessments for the tax years 1992-93 to 2005-06 inclusive, totalling over £1.3 million. In the precursor letter to the assessments HMRC stated that they were "issuing assessments going back to 1992/93 as I believe your returns for these years may be incorrect because of your deliberate or negligent behaviour." On 12 September 2012 Mr Wood's advisers appealed to HMRC against all the assessments. On 28 March 2013 the decision to issue the assessments was upheld by a formal internal review by HMRC; the review decision stated "I have considered this very carefully and I believe you deliberately evaded making a full disclosure of your income." On 22 April 2013 Mr Wood appealed to the Tribunal. The stated grounds of appeal were as follows:

> "… At a meeting with HMRC on 18 May 2011 Mr Wood agreed to commission a disclosure report which would examine the accuracy of his tax returns and notify HMRC of any further matters requiring disclosure. The disclosure report has taken longer to prepare than anticipated, and as a result of this delay HMRC has issued estimated protective assessments for all years from 1992/93 to 2005/06. It is still the Appellant's intention to submit the full disclosure report, together will supporting documentation, to HMRC to enable the appeals to be determined by agreement and it is hoped that the report will be submitted shortly.

> The Appellant states that the estimated assessments are excessive and incorrect for the following reasons:
>
> 1. A full disclosure of all omitted income was made in the THP disclosure.
> 2. The Appellant is non-UK domiciled for all the years in question and has not remitted income arising overseas to the UK.
> 3. HMRC's estimates are in any event grossly excessive and do not take into account the facts.
> 4. Income from property may actually be overstated in the Appellant's returns as the income has been treated as belonging wholly to the Appellant, whereas his wife may actually be beneficially entitled to part of the income. This issue is being dealt with in the disclosure report."

The covering letter to the notice of appeal stated, "…the Appellant will shortly be submitting a detailed report and supporting documentation to HMRC, which we hope will form the basis of a settlement by agreement."

4. On 17 May 2013 HMRC issued penalties for all the years assessed, totalling over £950,000. In the precursor letter to the penalty determinations HMRC stated that they believed Mr Wood had been "either neglectful or fraudulent in submitting incomplete or incorrect tax returns leading to an under-payment of tax for the 1992/93 to 2005/06 years." Mr Wood's advisers subsequently appealed to HMRC against the penalties.

5. Mr Wood died on 22 May 2013. His widow (Mrs Greer Wood) is his personal representative.

6. On 10 June 2013 the Tribunal (at this point unaware of Mr Wood's death) suspended the requirement for HMRC to produce their statement of case and gave the Appellant a deadline of 9 August 2013 for submission of the Disclosure Report and any amendments to the grounds of appeal. On 9 July 2013 the Tribunal was informed of Mr Wood's death. The Tribunal granted extensions of time to 6 September and then 7 October 2013 for production of the Disclosure Report.

7. On 19 September 2013 HMRC cancelled the penalties, stating "I was advised to discharge the penalty because your client would not have the right to a fair trial because of his untimely death."

8. On 27 September 2013 the Appellant's advisers wrote to HMRC raising the point which is now before this Tribunal as a preliminary issue. That letter succinctly and fairly states the point:

> "... I confirm that it is still the intention of the estate to provide a disclosure report where appropriate. However, we believe that HMRC's decision dated 19 September 2013 regarding our appeal

against penalties raises a fundamental issue in relation to the period from 1992/93 to 2005/06.

I attach a copy of your colleague's decision letter in relation to the review of the penalties for 1992/93 to 2005/06. As you can see, the penalties have been cancelled on the advice of HMRC's penalty expert on the grounds that Mr Wood would not have the right to a fair trial because of his untimely death. We agree with this interpretation, and we note that it is in accordance with HMRC's published guidance at FCIM02050.

In our opinion, the position is exactly the same in relation to the protective assessments for 1992/93 to 2005/06, upon which the penalty determinations were based. These assessments were made more than six years after the end of the year of assessment concerned and are made under the provisions of S36(1A)(a) TMA 1970 which relates to:

> " 36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-
>
> (a) Brought about deliberately by the person,"

You will be aware that the evidence given on Mr Wood's behalf and his presence at the meeting with HMRC on 18 March 2011 was that he "… was not aware of any other direct tax issues not included in the Tax Health Plan that needed to be disclosed." (HMRC minutes of meeting on 18 March 2011 para 33). You will also be aware that one of Mr Wood's grounds of appeal against the protective assessments was:

> "1. A full disclosure of all omitted income was made in the THP disclosure."

The protective assessments are based on Mr Wood's alleged behaviour and not the alleged behaviour of ".. .another person acting on behalf of that person." (S36(1B) TMA 1970).

It is not sufficient for there to be a loss of tax, such loss must also have been brought about by deliberately by Mr Wood.

It seems to us that in view of Mr Wood's untimely death it is impossible for him to receive a fair trial on the central issue of whether he acted deliberately in relation to the disputed further alleged tax liabilities, since he is obviously unable to defend himself.

Under the circumstances therefore we request that HMRC discharges the protective assessments for 1992/93 to 2005/06. The disclosure report can then be submitted addressing the later years.

…"

9. Further to Judge Poole's directions ([1] above), that preliminary issue now comes before me.

Law

10. HMRC's power to raise discovery assessments is conferred by s 29 Taxes Management Act 1970. The time limits for raising discovery assessments are set by ss 34 & 36 TMA 1970. Sections 29, 34 & 36 were amended by sch 39 Finance Act 2008 with effect from 1 April 2010. (I should note that after the hearing the parties provided me with further materials concerning the FA 2008 changes, which I have considered.) As the disputed assessments were raised in August 2012 it is the amended provisions ("the New Rules") rather than their predecessor ("the Old Rules") which apply, even though most of the tax years assessed pre-date the amendment. However, it is relevant to state both the Old Rules and the New Rules.

11. The Old Rules provided:

> "**34 Ordinary time limit …**
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not later than five years after the 31st January next following the year of assessment to which it relates
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> …
>
> **36 Fraudulent or negligent conduct**
>
> (1) An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates.
>
> …"

12. The New Rules provide:

> "**34 Ordinary time limit of 4 years**
>
> Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
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> …
>
> **36 Loss of tax brought about carelessly or deliberately etc**
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> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, or

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs),

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

…"

Appellant's case

13. Mr Lall for Mr Wood's estate submitted as follows.

14. The assessments for the fourteen tax years commencing 1992-93 should not be allowed to stand. Those assessments were raised by HMRC in the belief that they could show that Mr Wood acted "deliberately" to bring about a loss of income tax or CGT: s 36(1A)(a). In the precursor letter to the assessments HMRC stated that they were "issuing assessments going back to 1992/93 as I believe your returns for these years may be incorrect because of your deliberate or negligent behaviour." The evidence on which HMRC's belief was based had not been disclosed, but even if it were disclosed it was difficult to see how Mr Wood's personal representatives could (without Mr Wood) fairly contest at a hearing HMRC's allegation of deliberate behaviour by Mr Wood, especially over a period of fourteen years commencing twenty-two years ago. That unfairness was contrary to both (i) art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Article 6"), and (ii) Tribunal Procedure Rule 2.

Article 6

15. Article 6 provided:

"**Right to a fair trial**

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 the press and public may be excluded from all or part of the trial in the interests 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 to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights:
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> (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 facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own 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;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

16. HMRC's allegation that Mr Wood acted deliberately to bring about a tax loss for the fourteen tax years commencing 1992-93 amounted to a "criminal charge" for the purposes of Article 6. If Mr Wood were still alive then he could answer the criminal charge whether or not his conduct was deliberate and whether such conduct brought about the alleged tax losses. However, without his evidence, there could not be a fair trial of that charge.

17. The ordinary meaning of "deliberate" (OED 2010) is "consciously and intentionally; on purpose". Thus the particular state of mind of Mr Wood at the relevant times was in issue. HMRC had accepted that the *penalties* should be discharged because Mr Wood could not receive a fair trial of the allegation that he "deliberately evaded making a full disclosure of [his] income". HMRC had stated, "I was advised to discharge the penalty because your client would not have the right to a fair trial because of his untimely death." By the same rationale, there could be no fair trial of the allegation of deliberate behaviour bringing about a tax loss.

18. In this context where assessment is required whether the thing done is criminal in nature, the word "offence", in construing the views of the ECHR, must be given its ordinary meaning of "a breach of a law or rule". The alleged thing done was that Mr Wood brought about a loss of income tax deliberately. If so, that would amount to a breach of the law, namely not to cause loss of tax deliberately. The issue was whether such breach is criminal in nature.

19. Fiscal *penalties* were criminal charges for Article 6 purposes, as established by the ECHR in *Jusilla v Finland* [2009] STC 29.

"**Applicability of art 6**

29. The present case concerns proceedings in which the applicant was found, following errors in his tax returns, liable to pay VAT and an additional 10% surcharge. The assessment of tax and the imposition of surcharges fall outside the scope of art 6 under its civil head (see *Ferrazzini v Italy* (Application 44759/98) [2001] STC 1314, 3 ITLR 918, para 29). The issue therefore arises in this case whether the proceedings were 'criminal' within the autonomous meaning of art 6 and thus attracted the guarantees of art 6 under that head.

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 v United Kingdom* (Applications 39665/98 and 40086/98) (2003) 15 BHRC 145, ECHR 2003-X, para 82):

> '.. [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.
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> The very nature of the offence is a factor of greater import. …
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> 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, para 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see *Öztürk v Germany* (Application 8544/79) (1984) 6 EHRR 409, para 54; also *Lutz v Germany* (Application 9912/82) (1987) 10 EHRR 182, para 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*, para 86, citing, inter alia, *Bendenoun v France*, para 47).

32. The court has considered whether its case law supports a different approach in fiscal or tax cases. It recalls that in the *Bendenoun* judgment, which concerned the imposition of tax penalties or surcharge for evasion of tax (VAT and corporation tax in respect of the applicant's company and his personal income tax liability), the court did not refer expressly to *Engel* and listed four elements as being relevant to the applicability of art 6 in that case: that the law setting out the penalties covered all citizens in their capacity as taxpayers, that the

surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; that it was imposed under a general rule whose purpose is both deterrent and punitive; and that the surcharge was substantial (422,534 French francs (FF) in respect of the applicant and FF 570,398 in respect of his company, corresponding to €64,415 and €86,957 respectively). These factors may be regarded however in context as relevant in assessing the application of the second and third *Engel* criteria to the facts of the case, there being no indication that the court was intending to deviate from previous case law or to establish separate principles in the tax sphere. It must further be emphasised that the court in *Bendenoun* did not consider any of the four elements as being in themselves decisive and took a cumulative approach in finding art 6 applicable under its criminal head.

33. In *Janosevic v Sweden* (Application 34619/97) ECHR 2002-VII, the court made no reference to *Bendenoun* or its particular approach but proceeded squarely on the basis of the *Engel* criteria identified above. While reference was made to the severity of the actual and potential penalty (a surcharge amounting to 161,261 Swedish crowns (SKr), corresponding to €17,284, was involved and there was no upper limit on the surcharges in this case), this was as a separate and additional ground for the criminal characterisation of the offence which had already been established on examination of the nature of the offence (*Janosevic*, paras 68, 69; see also *Västberga Taxi Aktiebolag v Sweden* (Application 36985/97) (2002) 5 ITLR 65 decided on a similar basis at the same time).

34. In the subsequent case of *Morel v France* (Application 54559/00) ECHR 2003-IX, however, art 6 was found not to apply in respect of a 10% tax surcharge (FF 4,450, corresponding to €678), which was 'not particularly high' and was therefore 'a long way from the “very substantial” level' needed for it to be classified as criminal. The decision, which applied the *Bendenoun* rather than the *Engel* criteria attaches paramount importance to the severity of the penalty to the detriment of the other *Bendenoun* criteria, in particular that concerning the nature of the offence (and the purpose of the penalty) and makes no reference to the recent *Janosevic* case. As such, it seems more in keeping with the Commission's approach (see *Bendenoun v France*, Application 12547/86, Commission's report of 10 December 1992, Decisions and Reports (DR) in which the Commission based the applicability of art 6 chiefly on the degree of severity of the penalty, unlike the court in the same case, which weighed up all the aspects of the case in a strictly cumulative approach). *Morel* is an exception among the reported cases in that it relies on the lack of severity of the penalty as removing the case from the ambit of art 6, although the other criteria (general rule, not compensatory in nature, deterrent and punitive purpose) had clearly been fulfilled.

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 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 art 6.

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 art 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.

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 reoffending. 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 art 6. Hence, art 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 art 6, having due regard to the facts of the individual case, including any relevant features flowing from the taxation context."

20. The same conclusion had been reached in *King v UK* [ECtHR 13381/2004] where the ECHR (at paragraph 27) referred to the decision of Jacob J in the High Court:

"In May 2001 Jacob J dismissed the appeals against the findings of the 2000 Commissioners (see *King v Walden (Inspector of Taxes)* [2001] STC 822).

As regarded the applicant's complaints raised about the procedures under art 6, he found that the system of imposition of penalties for

> fraudulent or negligent delivery of incorrect returns or statements was 'criminal' for the purposes of the convention. He noted that the system was plainly punitive and deterrent, and the potential fine was very substantial and dependent on the culpability of the taxpayer, rather than being an administrative matter. "

21. The second *Engel* criterion was examined by the ECHR in *Ezeh* (cited above). That case concerned the applicants, whilst in prison, being charged with breaches of prison rules and consequently being awarded additional days in custody. The UK government had argued that the charges against the applicants were not criminal but disciplinary, consequently Article 6 did not apply. The ECHR held:

> "100. In explaining the autonomous nature of the concept of 'criminal' in art 6 of the convention, the court has emphasised that the contracting states could not at their discretion classify an offence as disciplinary instead of criminal, or prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, as this would subordinate the operation of the fundamental clauses of art 6 to their sovereign will. The court's role under that article is therefore to satisfy itself that the disciplinary does not improperly encroach upon the criminal (*Engel v Netherlands* [1976] ECHR 5100/71 at para 81).
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> 101. In *Campbell v UK* [1984] ECHR 7819/77 at para 71, it was noted that misconduct by a prisoner might take different forms; while certain acts were clearly no more than questions of internal discipline, others could not be seen in the same light. Relevant indicators were that 'some matters may be more serious than others', that the illegality of the relevant act might turn on the fact that it was committed in prison and that conduct which constituted an offence under the rules might also amount to an offence under the criminal law so that, theoretically at least, there was nothing to prevent conduct of this kind being the subject of both criminal and disciplinary proceedings.
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> 102. Moreover, criminal penalties have been customarily recognised as comprising the twin objectives of punishment and deterrence (*Ozturk v Germany* [1984] ECHR 8544/79 at para 53, *Bendenoun v France* [1994] ECHR 12547/86 at para 47 and *Lauko v Slovakia* [1998] ECHR 26138/95 at para 58).
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> 103. In the present cases, the court notes, in the first place, that the offences in question were directed towards a group possessing a special status, namely prisoners, as opposed to all citizens. However, the court does not accept the government's submission that this fact renders the nature of the offences prima facie disciplinary. It is but one of the 'relevant indicators' in assessing the nature of the offence (*Campbell v UK* [1984] ECHR 7819/77 at para 71).
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> 104. Secondly, it was not disputed before the Grand Chamber that the charge against the first applicant corresponded to an offence in the ordinary criminal law (ss 4 and 5 of the POA 1986). It is also clear that the charge of assault against the second applicant is an offence under the criminal law as well as under the prison rules. It is true that the latter charge involved a relatively minor incident of deliberately

colliding with a prison officer which may not necessarily have led to prosecution outside the prison context. It is also true that the extreme gravity of the offence may be indicative of its criminal nature, as indicated in *Campbell v UK* [1984] ECHR 7819/77 (see para 101, above). However, that does not conversely mean that the minor nature of an offence can, of itself, take it outside of the ambit of art 6 as there is nothing in the convention to suggest that the criminal nature of an offence, within the meaning of the second of the Engel criteria, necessarily requires a certain degree of seriousness (*Ozturk v Germany* [1984] ECHR 8544/79 at para 53). The reliance on the severity of the penalty in *Campbell v UK* [1984] ECHR 7819/77 at para 72 was a matter relevant to the third of the *Engel* criteria as opposed to a factor defining the nature of the offence.

Relying on convention case law, the government contested the weight to be attached to this concurrent criminal and disciplinary liability. However, in the case most directly in point, *Campbell v UK* [1984] ECHR 7819/77 at para 71, the court referred to even a 'theoretical' possibility of the impugned acts being the subject of concurrent criminal and disciplinary pursuit as a relevant factor in the assessment of the nature of the offence and it did so independently of the gravity of the offences in question. Accordingly, and even noting the prison context of the charges, the theoretical possibility of concurrent criminal and disciplinary liability is, at the very least, a relevant point which tends to the classification of the nature of both offences as 'mixed' offences.

105. Thirdly, the government submit that disciplinary rules and sanctions in prison are designed primarily to ensure the successful operation of a system of early release so that the 'punitive' element of the offence is secondary to the primary purpose of 'prevention' of disorder. The court considers that awards of additional days were, on any view, imposed after a finding of culpability (*Benham v UK* [1996] ECHR 19380/92 at para 56) to punish the applicants for the offences they had committed and to prevent further offending by them and other prisoners. It does not find persuasive the government's argument distinguishing between the punishment and deterrent aims of the offences in question, these objectives not being mutually exclusive (*Ozturk v Germany* [1984] ECHR 8544/79 at para 53) and being recognised as characteristic features of criminal penalties (see para 102, above).

106. Accordingly, the court considers that these factors, even if they were not of themselves sufficient to lead to the conclusion that the offences with which the applicants were charged are to be regarded as 'criminal' for convention purposes, clearly gives them a certain colouring which does not entirely coincide with that of a purely disciplinary matter."

22. Halsbury's Laws of England (Vol 96 at 617) states:

"A distinction is drawn between enactments which are penal in effect and the remainder, which may be called non-penal enactments. … the true test is now considered to be whether a particular construction

> inflicts a detriment, or greater detriment, on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are degrees of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. The substance, not the form, of the penalty is what matters."

23. From the foregoing it was submitted that the following propositions could be derived:

(1) The nature of the offence is more important than its classification under domestic law.

(2) Where the purpose of the rule in question can be identified as being to deter and punish, that would establish the criminal nature of the offence.

(3) Contracting states do not have the discretion to classify offences as disciplinary rather than criminal.

(4) Conduct which may amount to both a criminal and civil offence is a relevant factor and may indicate that the offence is criminal rather than civil.

(5) The fact that the state may choose to deal with the impugned offence in the civil sphere rather than the criminal sphere does not alter the nature of the offence.

(6) The gravity of the offence may be indicative of its criminal nature.

24. From those propositions it followed that the allegation by HMRC that Mr Wood brought about the loss of income tax deliberately was criminal in nature. In particular:

(1) HMRC had opened a COP 9 investigation into Mr Wood's affairs. COP 9 (as extant in 2011) was clear that it concerned "any situation where [HMRC] suspect serious tax fraud". In the COP 9 meeting held in March 2011 HMRC stated that they believed Mr Wood had brought about tax loss deliberately and "due to fraudulent conduct". Any assurances given to Mr Wood that he would not be prosecuted did not alter the underlying nature of the allegation. COP 9 is clear that HMRC reserve "complete discretion" to instigate a criminal prosecution but that, generally, HMRC will not prosecute "for the tax fraud which is the subject of that investigation". The fact that HMRC launch a COP 9 investigation indicates that they suspect "serious tax fraud" and thus the suspicion that conduct of a criminal nature has taken place. The choice to proceed by means of a civil investigation rather than a criminal prosecution is a pragmatic one by HMRC but does not cause the underlying matters to move from the criminal sphere to the civil sphere. Similarly, in *Ezeh* the discretionary classification of an offence as "disciplinary" rather than criminal did not alter its nature for art 6 purposes.

(2) The changes to time limits effected in the move from the Old Rules to the New Rules were notable. Under the Old Rules the ordinary time limit for making assessments was six years, but this was extended to 20 years where loss of tax was due to the "fraudulent or negligent" conduct of the taxpayer. Under the New Rules the ordinary time limit is four years, but this is extended (i) to six years where loss of tax is "brought about carelessly" by the taxpayer (and the

Explanatory Notes to the 2008 Finance Bill stated that this corresponded to "negligent conduct" under the Old Rules), and (ii) to twenty years where the loss of tax is "brought about deliberately" by the taxpayer. The extension to 20 years under the New Rules also applied to other circumstances (eg failure to notify a tax avoidance scheme under the DOTAS disclosure provisions) but nevertheless one of the heads under which the ordinary time limit can be extended to 20 years may correspond to "fraudulent conduct". What was clear was that the ordinary time limit under the New Rules required no degree of culpability, while the time limit for careless conduct (previously negligent conduct) had been reduced from 20 to six years; the 20 year time limit was now reserved for serious conduct – for example, deliberately bringing about tax loss. Thus the purpose of the extended time limit of 20 years must be to deter and or punish taxpayers who, for example, bring about tax loss deliberately. The feature of s 36(1A)(l)(a) which gives it a criminal nature is the "gateway" HMRC must pass through in order to make assessments for up to 20 years, namely that tax loss was caused deliberately. The feature of the time limit provisions which reinforces that criminal nature is that culpability and the degree of culpability determines how far back HMRC can assess. How far back HMRC can go back thereby acquires a penal nature. Carelessness increases the time limit from four years to six, ie by 50%. Deliberate conduct increases the time limit to up to 20 years, which is an increase by over three times over and above the time limit for carelessness and by over four times over and above the ordinary time limit of four years. The criminal nature of s 36(1A)(a) lies in the system by which assessments can be made over increasing periods; these were clearly "punitive and deterrent".

(3) Just as the system of imposition of penalties was plainly punitive and deterrent and thus criminal for the purposes of the convention (per *King* – and as rightly accepted by HMRC), so the system for extending time limits for assessments is plainly punitive and depends on culpability and so is criminal for the purposes of Article 6. Section 36(1A)(a), by permitting HMRC to assess for up to 20 years, inflicts greater detriment than s 36(1) which allows HMRC to assess for up to six years. The former is concerned with deliberate conduct, the latter with carelessness. Both of those concepts involve degrees of culpability. The former involves a materially higher degree of culpability and carries with it greater consequences. While deliberate and careless conduct under s 29 give HMRC the same rights, namely the ability to assess, s 36 paves the way for divergent consequences which depend on degrees of culpability associated with carelessness and deliberate conduct. Consequently, while s 29 might not be described as being penal, by contrast s 36(1A) can be described as being penal. The Old Rules provided for the same consequences for negligent or fraudulent conduct. With effect form 2010, the New Rules provide for vastly different consequences for careless and deliberate conduct. Section 36(1A) inflicts greater detriment for deliberate conduct. As such it is penal and acts as a deterrent.

25. HMRC had submitted that the assessments were essentially protected by art 1 to the First Protocol to the Convention:

"**Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

However, that was a misconception of the taxpayer's case. It was not contended that the tax charged by the disputed assessments was a criminal penalty in itself; rather that the act of assessing the tax under the extended time limits constituted a criminal charge for the purposes of Article 6. Tax assessments over a long period of 20 years, when it is more likely than not that the taxpayer will not have records or other evidence to substantiate amounts that were actually due, carry the risk that assessments based on estimates may result on the collection of taxes by reference to greater amounts than were actually due. As such the nature of HMRC's powers to assess under s36(1A)(a) over a period of up to 20 years is penal.

26. HMRC's reliance on *O'Rorke* (below) was misplaced because the legislation there considered concerned "neglect" (an objective concept) rather than "deliberate" conduct (a subjective concept). Similarly, HMRC's reliance on *Khan* (below) was misplaced because the legislation there considered concerned an objective test (for whether there were reasonable grounds for suspicion – see [39] of *Khan*). The Appellant, by contrast, relied on the subjective nature of deliberate conduct in the s36(1A)(a) gateway.

27. The acknowledgement by HMRC that in *King* s 36 was still in its Old Rules form was important; the criminal limb of Article 6 was not before the court and it was understandable that the taxpayer should not have suggested that the Old Rules were penal. The Appellant claims that the changes made to s36 in bringing in the New Rules marked a significant shift in the law.

28. HMRC had pointed to s 36(1B) (loss brought about by another person acting on behalf of the taxpayer) in support. The Appellant disputed that s s 36(1B) was in point but it would arguably reinforce the criminal nature of s 36(1A)(a) as the impugned taxpayer may incur liability as a result of the conduct of another person. Further, whether a fair trial could be secured for the taxpayer may turn on whether that other person is available to give evidence.

Tribunal Procedure Rule 2

29. Tribunal Procedure Rule 2 provides (so far as relevant):

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

…

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; …"

30. The Appellant could not contest the appeal fairly and justly without the evidence of Mr Wood. HMRC have not particularised Mr Wood's alleged deliberate conduct. As such, the Appellant does not even know what the alleged deliberate conduct is, when it occurred, and over what period.

31. The Appellant would not be able to participate fully in the proceedings as she will be handicapped without the evidence of Mr Wood. Assessing whether Mr Wood caused tax losses deliberately necessarily goes to testing his state of mind at all relevant times. HMRC have accepted that a fair trial could not be ensured with regard to the penalty assessments because they must have recognised that the Appellant would have difficulty in contesting allegations of fraud and/or negligence, so the Appellant would not be able to participate fully in the penalty proceedings. The same must apply to the Appellant having to contest allegations of deliberate conduct. HMRC must have been relying on the same evidence that is available to them for showing fraud and/or negligence and/or deliberate conduct. HMRC must know what that evidence is; the Appellant does not know.

32. Tribunal Procedure Rule 33 provides:

"**33. Hearings in a party's absence**

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

33. The disputed assessments were made against Mr Wood and he will clearly be absent owing to his untimely death. The Appellant, although Mr Wood's personal representative, will, as stated, be handicapped by his absence. The Appellant would therefore argue that it would not be in the interests of justice to proceed with the appeal in Mr Wood's absence.

34. Section 40 TMA 1970 governs the position where assessments are raised after a taxpayer's death. It was accepted that in the current case s 40 was not directly in point – the disputed assessments having been issued while Mr Wood was still alive – but the policy behind s 40 was clear and relevant. Section 40 requires assessments to be issued within four years after the end of the year of assessment in which the death occurred, even where careless or deliberate behaviour was involved. Further, even where careless or deliberate behaviour was involved HMRC could not go back earlier than six years before the death :

"**40 Assessment on personal representatives**

> (1) For the purpose of the charge of tax on the executors or administrators of a deceased person in respect of the income, or chargeable gains, which arose or accrued to him before his death, the time allowed by section 34, 35 or 36 above shall in no case extend more than 4 years after the end of the year of assessment in which the deceased died.
>
> (2) In a case involving a loss of tax brought about carelessly or deliberately by a person who has died (or another person acting on that person's behalf before that person's death), an assessment on his personal representatives to tax for any year of assessment ending not earlier than six years before his death may be made at any time not more than 4 years after the end of the year of assessment in which he died.
>
> …"

Parliament has specifically recognised inherent difficulties personal representatives would face by having to deal with assessments covering longer periods. In essence, Parliament has recognised the unfairness of imposing the burden on personal representative of having to deal with longer periods, no matter how culpable the behaviour of the deceased. Here HMRC sought to impose such a burden by different means.

35. The Appellant invited HMRC to withdraw the extended period assessments as they have withdrawn the penalties. If that was not done then the Appellant would seek to have the relevant parts of HMRC's case struck out pursuant to Rule 8.

Respondents' case

36. Mr Massey for HMRC submitted as follows.

37. These proceedings were appeals against estimated assessments issued by HMRC. HMRC had been obliged (by statutory time limits) to issue those estimated assessments because Mr Wood had failed to deliver the Disclosure Report despite his promise made at the March 2011 meeting. The Appellant appeared to accept that the assessments were "protective" in nature. HMRC had not yet been required to state their case; that requirement had been suspended by the Tribunal pending promised delivery by the Appellant of the Disclosure Report. The Disclosure Report was still awaited; from the explanations given by Mr Wood's advisers to both HMRC and the Tribunal, it was a reasonable assumption that the Disclosure Report was, and had been for some time, close to completion. No criticism could be made of HMRC for not yet having set out their grounds for believing that Mr Wood behaved deliberately in causing a tax loss. HMRC accepted that at the substantive hearing of the Appellant's appeal HMRC would bear the burden of demonstrating (on the balance of probabilities) that Mr Wood's behaviour had been deliberate.

38. Mr Wood had confessed to underdeclarations of tax in some years. If HMRC's concerns in relation to earlier years were justified but the assessments were set aside, then Mr Wood's estate would receive a wholly unjustified windfall.

Article 6

39. HMRC accept that *penalties* that arise from deliberate behaviour are "criminal" for the purpose of Article 6 because of the nature of the offence, the seriousness of the behaviour and the level of the maximum penalty. It is not disputed that the penalties charged on Mr Wood under s 95 TMA 1970 did fall under Article 6 on this basis and for that reason were cancelled. Thus HMRC's policy and conduct on s 95 TMA 1970 penalties was in accordance with the ECHR decision in *King* (below). Furthermore, following the ECHR judgments in *A.P., M.P, and T.P. v Switzerland* (1997) 26 EHRR 541 and *EL and others v Switzerland* [1997] ECHR 20919/92, s 100A(1) TMA 1970 (which allowed HMRC to determine penalties on the personal representatives after a person had died) was repealed because HMRC accepted it was incompatible with those cases.

40. In *King* the ECHR ruled that Article 6 did cover certain fiscal penalties but did *not* cover "procedures concerning the assessment of tax owing":

> "1. Existence of a 'criminal charge'
>
> 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). As however regards the imposition of penalties, calculated as a percentage of the unpaid tax, the court considers that these cannot be regarded as pecuniary compensation for any costs that may have been incurred as a result of the taxpayer's conduct but that their main purpose is to exert pressure on taxpayers to comply with their legal obligations and to punish breaches of those obligations. …"

41. *Ferrazzini* had also been followed by the High Court in *Sharkey v HMRC* [2006] STC 2026 (at [43]) and *HMRC v Sokoya* [2008] STC 3332, where Floyd J stated:

> "[11] Mr Sokoya attempted to support his appeal by reference to arts 6 and 8 of the European Convention on Human Rights, made part of our law by the Human Rights Act 1998. Insofar as he places reliance on art 6, I have had my attention drawn to the decision of the European Court of Human Rights in *Ferrazzini v Italy*, application number 44759/98, dated 12 July 2001. Ms Sen Gupta [HMRC's counsel] submitted that that case decided that the administration of direct tax obligations does not fall under the purview of art 6. That is a highly persuasive authority to that effect, and I agree."

42. In *Khan v Director of the Assets Recovery Agency* [2006] STC (SCD) 154 discovery assessments were made under s 29 TMA 1970, pursuant to a power conferred by s 317 Proceeds of Crime Act 2002 ("PoCA"). There, as in the current case, penalties had also been issued but cancelled on Article 6 grounds (due to ill health):

> "7. At the time of the July hearing there were also outstanding appeals against penalties under s 95 of TMA of 80% totalling £43,825. The penalties clearly involved criminal charges for the purposes of art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), see *King v United Kingdom* (*No 2*) [2004] STC 911, 76 TC 699. Following the July hearing the Director withdrew the penalties so that the appeal is now solely concerned with the assessments under s 29."

43. Mr Khan further argued, as in the current case, that Article 6 was also relevant to the s 29 assessments but that was rejected by the Special Commissioners (Sir Stephen Oliver and Theodore Wallace):

> "DOES ARTICLE 6 ECHR HAVE AN EFFECT ON Pt 6 ASSESSMENTS?
>
> 18. We examine this in the light of Mr Power's [taxpayer's counsel's] submissions.
>
> 19. To satisfy the qualifying condition in s 317(1)(a), the Director has to make a determination that there has been 'criminal conduct', ie conduct constituting 'an offence' within s 326(1). This, it was argued for Mr Khan, brings the case within the 'criminal charge' ambit of art 6.
>
> 20. Here, it was argued for Mr Khan, he has no conviction for any relevant offence; he is to be presumed innocent. If therefore Mr Khan is to be afforded his art 6 rights, he must be given the opportunity to rebut the suspicion of criminal conduct before the assessment is raised. He must, for example, be charged, be informed of the nature and cause of the 'accusation' against him and be given the chance to defend himself in person or through legal assistance. Here the Director's grounds for suspicion that Mr Khan has been involved in money laundering were based on evidence in statements of two officers of the Agency. This, it was said for Mr Khan, requires a determination that Mr Khan has committed some form of criminal conduct. That determination must, on the strength of the 'criminal conduct' limb of art 6, be reviewable by an independent and impartial tribunal such as the Special Commissioners.
>
> 21. On that basis the question whether art 6 is engaged because the s 29 tax assessment relates to Mr Khan's civil rights and obligations is not in issue. But suppose it were, postulates Mr Power, the tribunal should not follow the majority opinion in *Ferrazzini v Italy* [2001] STC 1314, particularly as Mr Khan's property rights are involved here.
>
> 22. Why is this relevant to the present proceedings? Mr Khan's state of health may be such that he cannot give instructions as to the handling of the present appeals and that he cannot attend and give evidence. The present position under the law is that, in the case of a tax assessment validly made under s 29 of TMA, the appeal tribunal has no power to discharge the assessment by reason of the taxpayer's disability from taking the necessary steps to challenge it. *Eagles* (*Inspector of Taxes*) *v Rose* (1945) 26 TC 427 decides that an assessment stands despite the fact that the General Commissioners have been unable to reach a decision on the evidence before them. The Court of Appeal in *Rose v*

Humbles (*Inspector of Taxes*) [1972] 1 WLR 33, 48 TC 103 decided that the appellant's inability to give evidence at an appeal against a Sch E assessment did not justify the court in setting the assessment aside. The point is that a tax assessment creates a liability which survives until discharged on appeal or by agreement. That is the position unless art 6 gives the taxpayer some additional protection. Thus, if an assessment on Mr Khan can be categorized as a criminal charge, the enhanced protection given by arts 6.2 and 6.3 will be available to him. That enhanced protection, if available, may by some means that as yet to be determined come to Mr Khan's aid. Otherwise Mr Khan has to contend that his liability resulting from the assessment falls within the scope of the expression 'civil rights and liabilities' in art 6.1; and, if so, he has to contend that the normal protection afforded by art 6.1 is greater than the appeal rights given by the Taxes Management Act as interpreted by the courts.

23. It is not in dispute that the Special Commissioners are a 'tribunal' within s 6(3)(a) of the Human Rights Act 1998; as such we are required to act compatibly with art 6 convention rights of an appellant such as Mr Khan. Nor is it in dispute that the Director, in assessing her assessment powers, is to do so in a way that is best calculated to contribute to the reduction of crime; that is the principle underlying s 2 of PoCA.

24. Criminal or unlawful conduct is relevant to the three recovery powers given to the Director. Confiscation orders under Pt 2 (relating to England and Wales) require a criminal conviction of the person in question. Civil recovery proceedings in Pt 5 relate to the proceeds of unlawful conduct (i e conduct 'unlawful under the criminal law' (s 241 of PoCA)). Property so obtained may be recovered and cash may be forfeited, in both cases in civil proceedings instituted by the Director (in England and Wales) whose powers are exercisable whether or not any proceedings have been brought for an offence in connection with the property. By the combined effects of ss 266(1) and 241(3) of PoCA the Director has to satisfy the court on balance of probabilities that the property is recoverable. The Director's 'general Revenue functions' under Pt 6 are significantly different. They come into play and enable her to take on the tax assessing function of the Revenue and Customs Commissioners (the Revenue) where the relevant qualifying condition in s 317(1) is satisfied. This is 'that the Director has reasonable grounds to suspect that (a) income arising … to a person … is chargeable to income tax … and arises as a result of that person's or another's criminal conduct …' (as defined in s 326). Once assessed the onus is on the taxpayer to show on balance of probabilities that the assessment should be discharged or reduced.

25. An issue in *Director of the Assets Recovery Agency v Customs and Excise Commissioners and Charrington and others* [2005] EWCA Civ 334 was whether Pt 5 civil recovery proceedings instituted by the Director should be classified as criminal proceedings for the purposes of art 6. The Court of Appeal, in para 17, decided that they did not for the following among other reasons. For the recovery proceedings to be effective there needed to be no arrest, no formal charge, no conviction,

no penalty and no criminal record. In other words there was no exercise of the state's powers to condemn or punish for wrongdoing that called for the enhanced protection of art 6.2. That decision is in line with *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6, a decision of the Court of Appeal of North Ireland.

26. In the present case the jurisdiction of the Special Commissioners is engaged, not because Mr Khan has been arrested or charged, let alone convicted, in relation to any criminal offence nor because the sums assessed have been obtained 'by conduct unlawful under the criminal law'; the right of appeal arises because Mr Khan has been assessed to tax in pursuance of s 29 of TMA on Sch D income, ie trading income taxable under Case 1 and bank deposit income taxable under Case 3. Once the qualifying condition has been satisfied, the assessment by the Director is made on the same basis as any other assessment. The person receiving an assessment made by the Director has to displace it or pay up in the same way as any other taxpayer. Indeed he has a ground of appeal open to him that would not be open to a taxpayer assessed by the Revenue; he can challenge the validity of the assessment on the grounds that the qualifying condition has not been satisfied.

27. If Pt 5 civil recovery proceedings are not protected as criminal charges by art 6, tax assessment proceedings relating to Pt 6 general Revenue functions do not involve criminal charge status either. The tax assessment has none of the features of the criminal charge as identified in the *Charrington* and the *Walsh* judgments. Unlike Pt 5 proceedings where conduct unlawful under the criminal law has to be proved, criminal conduct is not, once the qualifying condition has been satisfied, an ingredient in the assessing or recovery process except possibly in relation to the s 29 conditions.

28. Is art 6 protection given because the Special Commissioner proceedings concern the determination of Mr Khan's civil rights and obligations? We think not. Indirect taxes may be in a different position, but income tax assessments (as distinct from civil penalty assessments) have been consistently declared by the European Court of Human Rights not to involve civil rights and obligations. We quote, for example, the opening words of the 'Court's Assessment' in the judgment of the European Court of Human Rights in *King v UK* (*No 2*) [2004] STC 911 at 920:

> '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).'

In *Ali and Begum* (*t/a Shapla Tandoori Restaurant*) *and others* (2002) VAT Decision 17681, an indirect tax appeal, the tribunal expressed the view that the reasoning of the majority in *Ferrazzini* was not appropriate to the indirect tax system of the United Kingdom. Nonetheless the approach of the European Court of Human Rights to

> direct tax is now well established; it is based on the pragmatic ground that otherwise the Court would be overwhelmed by direct tax appeals. It was further argued for Mr Khan that income tax assessments, such as the ones in issue here, involve property rights. We cannot see this as a distinguishing feature from other tax appeals covered by the *Ferrazzini* principle as restated in *King v UK* (No 2). Moreover, insofar as reliance is placed on art 1 of the First Protocol, tax assessments such as the present are subject to the requirement for proportionality within the words of exclusion which preserve the state's right to confer laws necessary to secure the payment of taxes. …"

44. Although *Khan*, as a Special Commissioners' decision, was not strictly binding on this Tribunal, it was highly persuasive given the distinguished panel and the detailed reasoning.

45. Paying the correct amount of tax is a civil obligation that falls within the state's margin of appreciation in Article 1 Protocol 1 of ECHR. There should be no doubt that this is pecuniary in nature and not in any way punitive or deterrent. There is nothing in assessing the tax that a person has a civil obligation to pay (but did not) which is punitive or deterrent in nature; it is simply a recovery of that which was due. A penalty is different and may well act and be intended to act as a punishment or a deterrent because it is an amount over and above the civil obligation to pay taxes. There is no offence to consider and there is no penalty being imposed.

46. In *HMRC v O'Rorke* [2014] STC 279 the Upper Tribunal (reversing the First-tier Tribunal) determined that a "personal liability notice" issued under s 121C Social Security Administration Act 1992 did not amount to a criminal charge under Article 6. Hildyard J stated:

> "[3] Put very shortly, and as amplified later, s 121C SSAA 1992 creates an ancillary (but alternative) personal liability for payment of national insurance contributions ('NIC') for certain officers of a company where that company is primarily liable but has failed to pay the contributions in question in consequence of a relevant officer's 'fraud or neglect'.
>
> …
>
> [57] The anchor of the FTT's approach, as I read the decision, is their characterisation of s 121C as being criminal for the purposes of the Human Rights Act and in any event essentially punitive, and as thereby attracting the common law presumption that *mens rea* is an essential ingredient of the offence (or, more accurately here, its proof is an essential pre-condition of liability). To my mind, their approach elides two separate considerations.
>
> [58] It is, in my view, important to bear in mind what the real issue was in *Jussila* and the cases there cited: this was to determine whether the provision fell under the criminal head of art 6, in which case the essentially procedural protections (for example, of an oral hearing) afforded by art 6 of the Convention would apply, or under its civil head, in which case they would not (see *Jussila* at para 29). The question was not, in other words, concerned with the interpretation of

the substantive provision, but the procedural protections to govern the process by which it was to be given effect.

[59] The characterisation of the provision as 'criminal' for these purposes cannot, in my judgment, provide a reliable guide to the intention of the domestic legislature (the UK Parliament) in choosing 'neglect' as an alternative basis of liability. As it seems to me, the presumption cannot be based on a characterisation of the provision as criminal for the purposes of art 6 if it would not be so characterised under domestic law.

[60] The second consideration is whether, given that under domestic law (as indeed the FTT accepted) the provision would not be characterised as criminal, its depiction for the purposes of domestic law as 'punitive' or 'penal in nature' triggers the presumption. I do not think it does, even if that depiction is accepted.

[61] Both in *Sweet v Parsley* and in *B (a minor) v DPP* the presumption was confined to criminal offences. The characterisation of the provision as penal emphasises that the court should construe its scope with particular care, and where two interpretations are available, favour the interpretation most beneficial to the taxpayer (see *Chilcott*); but that is rather different and no presumption is thereby imported.

[62] Then the question is whether, bearing in mind the need for caution, there is any proper basis why, without the importation of any presumption, 'neglect' should bear anything other than its ordinary meaning of an objectively tested departure from a standard of care, as explained in *Blyth v Birmingham Waterworks Co*. In that context, the most obvious possible indication that some subjective ingredient is required is the use of the word 'culpable' (which brings into mind notions of moral blameworthiness) and the provision for apportionment of liability depending on the degree of 'culpability' of each officer.

[63] Especially that last provision has indeed given me pause for thought. But I have reached the clear view that it does not signify any different test than that ordinarily applied in establishing neglect, and that the provision for apportionment simply reflects the possibility (even likelihood) that some officers may have had particularly relevant responsibilities, or been in a position to do more than others.

[64] I should perhaps add that, to my mind, the depiction of the provision as 'penal in nature' to some extent begs the question. In my view, the effect of the provision is simply to enable HMRC, upon proof of fraud or neglect on the part of an officer, to recover from the officer that which he or she could and should have procured his company to pay. That is an incident of office and a consequence of a failure to perform it: in providing this recourse the provision does not seem to me to be necessarily 'penal in nature', any more than liability under the old Directors Liability Act 1890 for false or inaccurate statements in a prospectus issued by a company was 'penal': and see *Thomson v Lord Clanmorris* [1900] 1 Ch 718 at 725–726, [1900–3] All ER Rep 804 at 807 (Court of Appeal)."

47. Both s 121C SSAA 1992 and s 29 TMA 1970 allow HMRC to recover unpaid NIC or tax and are not intended to penalise the taxpayer.

48. Section 36 TMA 1970 provides for an extended time limit for s 29 discovery assessments in specified circumstances. It was noteworthy that in *King* the assessments had been raised by HMRC under the s 36 extended deadlines (albeit the Old Rules). Section 36 (New Rules) covered a number of circumstances, one of which was where the tax loss was "brought about deliberately by the person". The test for deliberate behaviour included the behaviour of a person acting on the taxpayer's behalf: s 36(1B). HMRC's view was as stated in their publications:

> "A deliberate inaccuracy in a document occurs when a person (or another person acting on behalf of that person) knowingly gives HMRC an inaccurate document. A person who sends us a document containing a deliberate inaccuracy may assert that they did not intend to cause a loss of tax. For the purposes of assessing that loss of tax, the person will be treated as having deliberately brought about the loss of tax which resulted from the inaccuracy whether or not it was their intention."

49. The notion of and statutory test for "deliberate" behaviour for assessing purposes is very different from those in relation to penalties. This in itself demonstrated that an allegation and evidence of criminal behaviour is not required; if it were then it would be inappropriate for the legislation to provide that it is not only the behaviour of the taxpayer but that of a person acting on their behalf which falls to be considered. There were two levels to the test of behaviours: one for penalties and a different one for assessing purposes. This is made clear by the differences between the statutory tests. Furthermore, the test in relation to penalties arises at the point of submitting the return. This can be contrasted with the test under s 36 for making assessments. The test in s 36 for "deliberate" behaviour extends not only to the behaviour at the time of making the return (as it does for penalties) but also any period after then over which the taxpayer could have prevented the loss of tax but did not do so. Therefore even if a person submits a return which is not known to be wrong at the time it is submitted, a person is acting deliberately if they do not amend that return after it comes to their attention that the return is incorrect. Thus there is a difference between the tests for penalties (which HMRC accept are criminal for the purpose of Article 6) and for assessments beyond 6 years (which HMRC do not).

50. The approach of the courts in the above cases had been to examine a given sanction to see whether its characteristics were such as to engage Article 6. The Appellant was attempting to turn that approach on its head by seeking to make the assessing procedure penal and thus infer that s 36 imposed a sanction. Liability to tax did not depend on taxpayer behaviour. Assessment did not determine liability; liability arose from the charging provisions. That had been stated by Lord Dunedin in *Whitney v CIR* 10 TC 88 (at 110):

> "… there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex*

> *hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

51. If the disputed assessments are correct, Mr Wood had a tax liability all along. The only effect of s 36 is to ensure that the assessing mechanism does not go out of date; it did not put Mr Wood or his estate in any worse position than if he had paid the correct amount of tax when he should have. There was no detriment or penalisation.

Rule 2

52. Rule 2 is first and foremost an "objective" and not an absolute right. There will be occasions when unfairness is unavoidable: *Stubbs v HMRC* [2008] STC (SCD) 265. Fairness must apply to both parties; it would be unfair and unjust for HMRC, on behalf of the taxpaying population in general, to be shut out of litigating any case after a person has died. Rule 2 is about case management and the way cases are prepared and heard rather than being determinative on the substantive matter. The restricted remit of the Tribunal in relation to matters of "fairness" had been set out by the Upper Tribunal in *HMRC v Hok Ltd* [2013] STC 225 (at [56-57]). The Appellant was seeking to afford the Tribunal supervisory jurisdiction over the conduct of HMRC, specifically in allowing it to decide whether the decision to assess or to continue litigation was fair. That would be directly contradictory to the decision in *Hok*; the appropriate forum for such contentions was Judicial Review proceedings.

53. Rule 2(2)(c) (participation of parties) was qualified by the words "so far as possible". The Appellant was Mr Wood's widow who would be able to participate. While clearly Mrs Wood will not necessarily be in a position to give evidence that Mr Wood might have done, that is not what Rule 2 requires. Even if it did, then there is nothing in Rule 2 which provides for the summary dismissal of HMRC's case if the Rule cannot be accommodated.

54. The views of the Special Commissioners in *Khan* (above) were also relevant to the matters now raised in relation to Rule 2.

55. There was no merit in the Appellant's submissions on Rule 33, which is simply about the procedure to be followed when a party who has had notice does not attend a hearing. Even when the Tribunal is satisfied that a hearing should not proceed in a party's absence (either the appellant or the respondents or indeed both) the result is not that the appeal is allowed but that it is adjourned and re-listed. Again, the Appellant is Mr Wood's widow who would be able to attend and participate.

56. Section 40 TMA 1970 deals with the situation where a person has died and an assessment is raised afterwards, and was not in point here. The interpretation of s 40 is clear and has no relevance to the issue of whether or not assessments already in place at the time of death can be pursued.

57. Mr Wood was alive when the assessments were issued and he was supposedly in a position of being close to completing the Disclosure Report. That in itself would suggest that there would be no, or very little, difficulty in ascertaining what Mr

Wood's case would have been had he been alive to put it. It is not clear therefore why Mrs Wood would be in a difficult position to present her late husband's defence which was said to have been almost ready anyway. It might be relevant that Mrs Wood had been assessed jointly on some of the disputed income, and therefore would in any event have an evidential burden to discharge. That was all a matter for the substantive hearing of the appeals.

Consideration and Conclusions

58. The preliminary issue for me to determine is as set out at [1] above:

> "Whether (and, if so, to what extent) the assessments against the late Michael Wood made under the extended time limits set out in section 36(1A)(a) Taxes Management Act 1970 should be set aside by reason of his death."

59. The Appellant makes two (alternative) arguments why those assessments should be so set aside. First, that requiring the Appellant (as Mr Wood's personal representative) to contest the disputed assessments would be a breach of her human rights conferred by Article 6 (2) & (3). Secondly, that requiring the Appellant (as Mr Wood's personal representative) to contest the disputed assessments would be contrary to the overriding objective of the Tribunal under Rule 2.

The Article 6 argument

60. This argument can succeed only if HMRC's making the disputed assessments under the extended time limits conferred by s 36 constitutes a taxpayer being "charged with a criminal offence". Mr Lall for the Appellant put forward a number of attractive points in support of this proposition (which I have summarised at [13 - 28] above) but, for the reasons set out below, I have concluded that the criminal limb of Article 6 is not engaged in the current case.

61. I take it as uncontroversial that what I might call a straightforward assessment to tax does not engage Article 6 – *Ferrazzini* (at [29]):

> "In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the convention was adopted, those developments have not entailed a further intervention by the state into the 'civil' sphere of the individual's life. The 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 tax authority remaining predominant. Bearing in mind that the convention and its protocols must be interpreted as a whole, the court also observes that art 1 of Protocol 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 Netherlands* (1995) 20 EHRR 403 at 434, para 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."

62. The Appellant contends that the distinguishing factor here is that a straightforward assessment to tax would have been time-barred by s 36(1) and HMRC have instead had to assess under the extended time limit permitted by s 36(1A). Of the circumstances detailed in s 36(1A) HMRC have been clear that they rely on s 36(1A)(a), which is triggered where a tax loss has been "brought about deliberately". The Appellant contends that the allegation of deliberately bringing about a tax loss constitutes the taxpayer being "charged with a criminal offence".

63. I also take it as uncontroversial (see, for example, *Jusilla* at [30], quoted at [19] above) that in interpreting the phrase "charged with a criminal offence" in Article 6 I must apply the three *Engel* criteria:

(1) The definition of the offence in the UK legislation.

(2) The nature of the offence.

(3) The degree of severity of the penalty incurred.

Definition of the offence

64. On the first criterion I consider it is clear that there is no explicit criminal offence defined by ss 29 and 36. However, that is "no more than a starting point" (*Ezeh* at [82]).

Nature of the offence

65. The second criterion is more important (per *Jusilla* at [38], quoted at [19] above) and it requires "a rule whose purpose was deterrent and punitive" (*ibid*).

66. The Appellant contends that:

(1) The purpose of s 36(1A)(a) is indeed to deter and punish;

(2) Deliberately bringing about a tax loss is punished by exposing the taxpayer to assessments going back 20 years, while the exposure is much shorter for lesser culpability (ie carelessness) (six years) or lack of culpability (four years); and

(3) An effect of those extended exposures is to act as a deterrent from deliberately bringing about a tax loss.

67. The extended time limit conferred by s 36(1A) covers four circumstances - I should note that the fourth of these was inserted by statutory amendments (by s 277 FA 2014) after the disputed assessments were issued but is, I consider, relevant for the present purposes of construing the New Rules. HMRC can assess for 20 earlier years for tax losses (a) brought about deliberately by the taxpayer; (b) attributable to the taxpayer's failure to notify chargeability to tax; (c) attributable to disclosable tax

avoidance schemes which the taxpayer has failed to notify; or (d) (the new provision) attributable to certain tax avoidance schemes where the taxpayer has failed to report a "monitored" promoter's reference number. Mr Lall urged that each of these, or at least circumstance (a), should be taken separately, especially as HMRC had clearly stated that their justification for assessing Mr Wood was under circumstance (a). However, I think that in construing the purpose of the extended time limit in s 36(1A) I should consider together all the circumstances to see whether the purpose of the potential exposure to assessments for up to 20 years earlier is "deterrent and punitive".

68. Although, as Mr Lall emphasised, circumstance (a) depends on the deliberate culpability of the taxpayer, I consider that element of deliberate culpability is not essential for the other three circumstances. For example, a taxpayer who was simply unaware of his or her chargeability to CGT on the disposal of an asset (and thus failed to notify chargeability) could properly be assessed up to 20 years later.

69. I have obtained considerable guidance from two authorities: the 2005 Court of Appeal case of *Director of the Assets Recovery Agency v Customs and Excise Commissioners and Charrington and others* [2005] EWCA Civ 334 (cited by the Special Commissioners in *Khan* at [25]) and the 2013 Upper Tribunal case of *O'Rorke* ([2014] STC 279).

70. In *Charrington* HMRC seized over £2 million cash from Mr C's home in 1992. Mr C admitted that he had been involved in the smuggling into the UK of enormous quantities of cocaine, and the money laundering of the proceeds. He was arrested and charged but he was not prosecuted, apparently because he was acting as a police informant. The Director of the Assets Recovery Agency then sought a recovery order, which included the cash seized by HMRC, pursuant to ss 243 & 266 Proceeds of Crime Act 2002 – ie legislation which was enacted some years after the events in question – as being property obtained through unlawful conduct. Mr C first claimed that the seized cash was unconnected to the drugs smuggling but instead represented commissions he had earned for his part in legitimate transactions concerning diamonds. That explanation was dismissed by the Administrative Court as "truly incredible" and "simply unbelievable", and that conclusion was upheld by the Court of Appeal (at [13]). Thus property had been obtained through unlawful conduct. Mr C then argued that Article 6 was in point (per Laws LJ at [14]):

> "It is said that the case should be classified as criminal proceedings for the purposes of Article 6 and Article 7 of the European Convention on Human Rights. Were that to be right, the relevant legislation here would fall to be condemned as retrospective and so repugnant to Article 7, and it would also be said that the applicant has not enjoyed the full protections to which he was entitled under Article 6 by way of a proper trial and the opportunity to call evidence."

71. In considering this point Laws LJ (at [17]) reiterated an extract from his own judgment in *R (on the application of Mudie) v Kent Magistrates' Court* [2003] QB 1238 concerning the application of the *Engel* criteria:

> "It is certainly beyond contest that the concept of 'criminal charge' possesses an autonomous meaning in the European Court of Human Rights jurisprudence. It is also true that the first of the 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 criminal charge. Are they an instance of the use of state power to condemn or punish individuals for wrongdoing?"

72. He then continued (*ibid*):

> "In the Northern Ireland case of *Walsh*, Mr Justice Coghlin said at paragraph 18:
>
> > "It seems to me that, in substance, proceedings by way of a civil recovery action under the provisions of Part 5 of the POCA differ significantly from the situation of a person 'charged with a criminal offence' within the meaning of Article 6. [Counsel] reminded the court of the fact that, in the circumstances of this particular case, the person from whom the Agency seeks to recover the property is the same person said to have engaged in unlawful conduct. That is certainly true but what seems to me of greater importance is the fact that there is no arrest nor is there any formal charge, conviction, penalty or criminal record, the serious personal consequences of involvement in criminal proceedings in respect of which the convention provides the enhanced protection of article 6 (2) and (3)."
>
> Finally Mr Justice Collins at paragraph 58 of *Jia Jin He* [[2004] EWHC 3021 (Admin)] said:
>
> > "I have no doubt that Coghlin J was correct in deciding as he did that these were civil proceedings. I do not need, I think, to say more than that I entirely agree with the reasons that he gives to reach that conclusion. His conclusion is entirely consistent with, and supported by, both domestic and Strasbourg jurisprudence."
>
> It does not seem to me necessary to say any more. … For my part, it seems to me that both Mr Justice Coghlin and Mr Justice Collins were entirely right."

73. Turning to *O'Rorke*, the background was explained by the First-tier Tribunal ([2012] SFTD 553) thus:

> "[9] Section 121C(1)(b) [Social Security Administration Act 1992] states that an officer of a body corporate can be personally liable to pay NICs which that body corporate has failed to pay. The PLN [personal liability notice] sets out the extent of his liability.

> [10] A PLN can only be issued if the failure to pay NICs is attributable to the 'fraud or neglect' of that officer, who is designated as a 'culpable officer'.
>
> [11] Where more than one officer of the body corporate is within the ambit of the PLN provisions, s 121C(2) allows HMRC to apportion the liability depending on the 'culpability' of each officer.
>
> [12] A person receiving a PLN can appeal under s 121D(2)(b) SSAA on the grounds that the failure was not 'attributable to any fraud or neglect' on his part. The onus of proof in any appeal is on HMRC (s 121D(4)).
>
> [13] Mr O'Rorke was previously the finance director of L Wear & Co. He resigned as director on 22 February 2007.
>
> [14] L Wear & Co went into liquidation on 5 March 2007. As at the date of the liquidation, the company owed HMRC £321,306.60 of unpaid NICs.
>
> [15] On 3 September 2009, HMRC issued a PLN to Mr O'Rorke, in the amount of £290,307.60. On 25 June 2010 this was reduced to £218,593.77."

74. The First-tier Tribunal (at [68]) held that "the PLN provisions are 'criminal' within the meaning of the Convention." That conclusion was reversed on appeal by the Upper Tribunal where Hildyard J stated:

> "[60] The second consideration is whether, given that under domestic law (as indeed the FTT accepted) the provision would not be characterised as criminal, its depiction for the purposes of domestic law as 'punitive' or 'penal in nature' triggers the presumption. I do not think it does, even if that depiction is accepted.
>
> …
>
> [64] I should perhaps add that, to my mind, the depiction of the provision as 'penal in nature' to some extent begs the question. In my view, the effect of the provision is simply to enable HMRC, upon proof of fraud or neglect on the part of an officer, to recover from the officer that which he or she could and should have procured his company to pay. That is an incident of office and a consequence of a failure to perform it: in providing this recourse the provision does not seem to me to be necessarily 'penal in nature', any more than liability under the old Directors Liability Act 1890 for false or inaccurate statements in a prospectus issued by a company was 'penal': and see *Thomson v Lord Clanmorris* [1900] 1 Ch 718 at 725–726, [1900–3] All ER Rep 804 at 807 (Court of Appeal)."

75. From *Charrington* and *O'Rorke* I consider there are three important points which all count against the Appellant.

76. First, Hildyard J's statement that, "the effect of the provision [s 161C] is simply to enable HMRC, upon proof of fraud or neglect on the part of an officer, to recover

from the officer that which he or she could and should have procured his company to pay. That is an incident of office and a consequence of a failure to perform it: in providing this recourse the provision does not seem to me to be necessarily 'penal in nature', any more than liability under the old Directors Liability Act 1890 for false or inaccurate statements in a prospectus issued by a company was 'penal'". I should highlight that in *O'Rorke* HMRC's justification for the PLN was Mr O'Rorke's neglect rather than any alleged fraud. However, I take Hildyard J to be saying that whether fraud or neglect is proved the effect of s 161C is the same: merely the recovery "from the officer that which he or she could and should have procured his company to pay", which is not (per Hildyard J) penal in nature. It seems to me that exactly the same position attaches to the extended assessment time limit in s 36(1A). The effect of s 36(1A)(a) is simply to enable HMRC, upon proof of the deliberate bringing about of a loss of tax, to recover from the taxpayer that which he or she could and should have paid; and recourse to the extended assessment time limit is not penal in nature.

77. Secondly, Laws LJ's test: "Are they an instance of the use of state power to condemn or punish individuals for wrongdoing?" I do not consider that the extended assessment time limit in s 36(1A) is such an instance. As I have already observed, the circumstances in which an extended time assessment can be issued includes cases where a taxpayer was simply unaware of his or her chargeability to CGT on the disposal of an asset, and thus failed to notify chargeability (s 36(1A)(b)). I do not see that lack of awareness as being a wrongdoing that is being condemned or punished. Even if, which I have already stated I do not accept, s 36(1A)(a) should be read alone from the other circumstances cited in s 36(1A), I return to the point in the previous paragraph – that the effect of s 36(1A)(a) is not to condemn or punish but simply to enable HMRC, upon proof of the deliberate bringing about of a loss of tax, to recover from the taxpayer that which he or she could and should have paid.

78. Thirdly, Laws LJ's endorsement of the indicia in *Walsh*: "…there is no arrest nor is there any formal charge, conviction, penalty or criminal record, the serious personal consequences of involvement in criminal proceedings in respect of which the convention provides the enhanced protection of article 6 (2) and (3)." Again, the only consequence of the availability of the extended assessment time limit is that HMRC can recover from the taxpayer tax which he or she could and should have paid.

79. For all the above reasons, I do not accept that the second *Engel* criterion is satisfied.

Degree of severity of the penalty incurred

80. It is necessary also to consider the third *Engel* criterion because ((per *Jusilla* at [31], quoted at [19] above) "The second and third criteria are alternative and not necessarily cumulative. It is enough that … the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere …".

81. I do not accept that the third *Engel* criterion is satisfied for much the same reasons as I have dismissed the second *Engel* criterion. I do not accept that s 36(1A) renders a taxpayer "liable to a penalty". It simply enables HMRC, upon proof of the deliberate bringing about of a loss of tax, to recover from the taxpayer that which he or she could and should have paid. As I do not consider a penalty to have arisen, I do not need to consider its "nature and degree of severity".

Conclusion on Article 6

82. I conclude that none of the three *Engel* criteria are satisfied and thus that HMRC's making the disputed assessments under the extended time limits conferred by s 36 does not constitute a taxpayer being "charged with a criminal offence". Accordingly, there is no breach of the Appellant's human rights conferred by Article 6 (2) & (3).

The Rule 2 argument

83. The Appellant contends that requiring her (as Mr Wood's personal representative) to contest the disputed assessments would be contrary to the overriding objective of the Tribunal under Rule 2 (set out at [29] above).

84. At the hearing I asked Mr Lall what remedy or result his client was seeking from the Tribunal. Mr Lall very properly stated that the current matter before me was the preliminary matter for determination; he added if the preliminary matter was determined in the Appellant's favour then he would expect HMRC to withdraw the disputed assessments and, if they did not do that, then the Appellant would request that the relevant parts of HMRC's case should be struck out.

85. While I appreciate that the matter before me is the stated preliminary issue, I must consider it in the light of the proceedings generally – especially given the overarching scope of Rule 2 and the overriding objective. A full chronology of events is given at [2 - 9] above. While Mr Wood was alive he admitted a substantial underdeclaration of income, which he subsequently maintained was a full disclosure of his omitted income. In March 2011 he agreed to commission the Disclosure Report. The Disclosure Report was still outstanding in April 2013 when Mr Wood lodged his notice of appeal with the Tribunal. In the notice of appeal and covering letter Mr Wood's representatives acknowledged that the disputed assessments were protective in nature, and had been issued as a result of the delay in producing the Disclosure Report "which has taken longer to prepare than anticipated". The Tribunal stayed the proceedings to allow extra time for finalisation of the Disclosure Report. Several extensions of time were granted to allow for that finalisation, the latest (so far as I am aware) was in response to a letter dated 2 September 2013 from the Appellant's representatives stating, "Unfortunately I have to advise you that the disclosure report will not be ready by 6 September, but should be finalised within 30 days of that date."

86. Therefore, the picture I have (and from Mr Massey's submissions I take it this is also HMRC's understanding) is that at 6 October 2013 the Appellant's accountants

held the Disclosure Report in a form suitable for submission as promised back in March 2011. The Disclosure Report has still not been submitted because of the intervention of the determination of the preliminary issue that is now before me, and I make no criticism of the Appellant for holding the Disclosure Report pending that determination.

87. An important point is that HMRC have not yet been required to submit their statement of case. That requirement was stayed by the Tribunal pending delivery of the Disclosure Report, and I consider and agree that was the correct course of action by the Tribunal. Mr Lall submits that his client is in the dark as to how HMRC have arrived at the disputed assessments, especially as Mr Wood was adamant that his voluntary disclosure was a full one of all omitted income – that Mr Wood had (my words) made a clean breast of all his past underdeclarations. Mr Massey submits that HMRC have an ongoing COP9 (ie suspected serious tax fraud) investigation; that standard practice in such cases is, for obvious reasons, not to disclose any information they hold as to their interest in the taxpayer's affairs until at least scrutiny of the taxpayer's formal disclosure report; and that it would be premature to bring these appeal proceedings to an end before HMRC have had an opportunity to consider the Disclosure Report.

88. To this delicate situation I am being invited to apply a very blunt tool. The exact wording in the preliminary issue is whether the disputed assessments "should be set aside by reason of [Mr Wood's] death". Mr Lall proposes that, if his client is successful on the preliminary issue and HMRC do not withdraw the disputed assessments, then the relevant parts of HMRC's case should be struck out. I assume that the Tribunal would be invited to bar HMRC from taking further part in the proceedings, pursuant to Rule 8, on the basis that there is no reasonable prospect of their case succeeding (Rule 8(3)(c) refers), given the assumed outcome of the preliminary issue.

89. I do appreciate the difficult situation in which the Appellant finds herself and Mr Lall has made some very good points on her behalf. However, having carefully considered all the points put before me and for the reasons which follow, I consider that on balance the best achievement of the overriding objective would be accomplished not by "setting aside" the disputed assessments, but instead by requiring delivery of the Disclosure Report and (subsequently) HMRC's statement of case. I agree with Mr Massey that until both those events have occurred then it would be premature to bring these appeal proceedings to an end.

90. I deal first with two points raised by Mr Lall for the Appellant – one of which I can dispose of briefly but the other has caused me considerable thought. First, I do not accept Mr Lall's submission that Rule 33 (*Hearings in a party's absence*) is relevant here. The notice of appeal was lodged during Mr Wood's lifetime and thus he was originally a "party" under Rule 1(3). My understanding of the legal position is that on Mr Wood's death in May 2013 the right of litigation survived for the benefit of his estate and passed to his personal representative, being his widow: s 1(1) Law Reform (Miscellaneous Provisions) Act 1934. Thus the present parties for the purpose of Rule 33 are Mrs Wood (as personal representative of her late husband) and

HMRC. Mrs Wood is and will be entitled to attend any hearing (Rule 30). Thus the fact of Mr Wood's death does not of itself trigger Rule 33, and I do not need to consider it further.

91. Secondly, Mr Lall cites s 40 TMA 1970 (*Assessment on personal representatives*) (see [34] above). I consider the main thrust of s 40 is aimed at providing certainty for personal representatives in finalising an estate: HMRC cannot issue an assessment more than four years after the end of the tax year in which the taxpayer died. Section 40 is not directly in point in this appeal (because the disputed assessments were issued while Mr Wood was still alive) but Mr Lall highlights one aspect of s 40: the fact that s 40(2) is explicit that even if HMRC can meet the four year deadline and even if the assessment is to make good a tax loss brought about deliberately by the deceased, then HMRC still cannot assess a tax year ending earlier than six years before the death. I have considered carefully that provision in the context of Rule 2; if s 40 abandons assessment of deliberate underdeclarations by a deceased more than six tax years before death (where the assessments are made post-mortem), then does that point to a lack of fairness and justice in allowing HMRC to pursue the disputed assessments in the current appeal? I have concluded that there is an important distinction between s 40 and the current situation. The fact that the disputed assessments were issued before, rather than after, Mr Wood's death is, I consider, not merely a minor issue of timing; rather, it highlights that Mr Wood was aware of HMRC's concerns and had promised to address them by production of the Disclosure Report. The disputed assessments were raised on a protective basis because the Disclosure Report was delayed, and the liabilities under those assessments crystallised (subject to the appeal) before Mr Wood's death. That is, I consider, a different situation from that envisaged by s 40, where Parliament has determined to limit the period susceptible to assessment where the assessments are not raised until after the taxpayer's death and thus the personal representatives are tasked with administering a liability of the estate that the deceased taxpayer may have been unaware of.

92. Having considered all the above matters my conclusion is that at the current state of these proceedings it would not be fair and just to "set aside" the disputed assessments. On the contrary, until the exact nature of the basis of HMRC's assessments is clear, the Tribunal cannot say whether the Appellant is unduly adversely prejudiced by being required to continue the proceedings. That requires service of HMRC's statement of case and that, in turn, requires the delivery of the Disclosure Report. Given the background which I have summarised above, it is reasonable to assume that the Disclosure Report as it stood at October 2013 (and now stands) states what Mr Wood would have told HMRC were he still alive. If there are any points which the Appellant's representatives have had to "square-bracket" because of absence of specific instructions following Mr Wood's death then doubtless that will be made clear in the Disclosure Report. When HMRC have had a reasonable opportunity to consider the contents of the Disclosure Report then they should be in a position to state their case in opposition to the appeal against the disputed assessments. Mr Massey for HMRC correctly accepts that HMRC bear the burden of proof in relation to any allegation of deliberate behaviour by the late Mr Wood bringing about a tax loss.

93. I am not in a position to delve into the details of Mr Wood's tax affairs, but I note that one of his grounds of appeal contends that he was domiciled outside the UK and thus his unremitted overseas income was irrelevant to his UK tax liabilities. No doubt that is addressed in detail in the Disclosure Report. It may be that if HMRC receive the Disclosure Report then it will satisfy them that their suspicions of undisclosed underdeclarations (whatever those suspicions might be) have been adequately answered and dismissed. Or it may instead be that HMRC hold reliable information that contradicts the contents of the Disclosure Report, or indicates that certain matters have been omitted from the Disclosure Report. I emphasise that is all speculation but I put it down because, out of fairness, it is very much in my mind that until the Disclosure Report is handed over and HMRC respond, both parties are likewise speculating as to what the proper next step in the dispute might be. It is that lack of clarity (on both sides) that further indicates to me that I should determine the preliminary issue against the Appellant, and make case management directions to move the proceedings forward.

Decision and Directions

94. The determination of the preliminary issue is that the disputed assessments should not be set aside by reason of Mr Wood's death.

95. The Tribunal DIRECTS:

(1) No later than 60 days after the date of issue of this decision the Appellant shall send or deliver the Disclosure Report to the Respondents, and shall confirm to the Tribunal that she has done so.

(2) No later than 60 days after the date on which the Appellant complies with the foregoing Direction the Respondents shall produce their statement of case pursuant to Tribunal Procedure Rule 25.

(3) Leave to apply.

Appeals

96. 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. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 12 JUNE 2015