[2016] UKUT 0346 (TCC)

Appeal number: UT/2015/0108

INCOME TAX– discovery assessments made against taxpayer relying on extended time limits on grounds of deliberate conduct - death of taxpayer - whether assessments should be discharged on grounds personal representative cannot receive a fair trial-ss 29 and 36 TMA 1970 –Art 6 Human Rights Convention-appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE PERSONAL REPRESENTATIVE OF MICHAEL WOOD (Deceased) **Appellant**

- and -

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

TRIBUNAL: Mr Justice Morgan
Judge Timothy Herrington

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 20 June 2016

Tarlochan Lall, Counsel, instructed by Male and Wagland Solicitors, for the Appellant

David Yates, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("FTT") (Judge Kempster) released on 12 June 2015 (the "Decision").

2. By the Decision the FTT determined the following preliminary issue:

> "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."

In determining the preliminary issue in favour of the Respondents ("HMRC") the FTT decided that requiring the Appellant, Mrs Greer Wood (as Mr Wood's personal representative) to contest the disputed assessments would not be a breach of her human rights conferred by Article 6 of the European Convention on Human Rights (ECHR) because HMRC's making of the disputed assessments under the extended time limits conferred by s 36 of the Taxes Management Act 1970 ("TMA") did not constitute a taxpayer being "charged with a criminal offence". The FTT also decided, having considered the overriding objective of the FTT under Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to deal with cases fairly and justly, that it would not be fair and just to "set aside" the disputed assessments at the current state of the proceedings. The FTT concluded that until the exact nature of the basis of the assessments was clear, the FTT could not say whether the Appellant would be unduly adversely prejudiced by being required to continue the proceedings.

3. Permission to appeal against the findings on the Article 6 issue was granted by Judge Kempster on 18 August 2015. There was no appeal against the findings on the Rule 2 issue.

The facts

4. The relevant facts, which are set out in detail at [2] to [9] of the Decision, can be summarised as follows.

5. In June 2010, the late Michael Wood admitted to under-declarations of income for the tax years 2002-03 to 2007-08 totalling £743,424 and made a payment of tax of £352,983. This admission was made with a view to taking advantage of an HMRC "disclosure opportunity" for medical professionals called the "Tax Health Plan" – this encouraged voluntary disclosure of unpaid taxes in return for a fixed tax geared penalty of 10% of the amount of tax under-declared.

6. HMRC were not satisfied that the disclosure by Mr Wood came within the terms of the Tax Health Plan and opened a Code of Practice 9 investigation into his affairs. On 18 March 2011, a meeting took place between HMRC, Michael Wood and his advisers. Michael Wood agreed to provide a disclosure report (the "Disclosure Report") into his affairs for the previous 20 years. The disclosure report was due to be

provided in September 2011 but had not been produced by the time of the hearing of the preliminary issue before the FTT.

7. In the absence of the Disclosure Report, on 14 August 2012 HMRC made discovery assessments pursuant to s 29 TMA for the tax years 1992-93 to 2005-06 totalling £1.3 million in terms of tax due. HMRC stated that they were issuing the assessments going back to 1992/93 as they believed that Mr Wood had deliberately evaded making a full disclosure of his income for the years in question. Accordingly, they had relied on the extended time limit for making a discovery assessment provided by s 36 TMA which, as discussed below, permits an assessment to be made in a case involving a loss of income tax brought about deliberately by the taxpayer to be made no more than 20 years after the end of the year of assessment to which it relates.

8. On 12 September 2012, Mr Wood, through his advisers, appealed to HMRC against the assessments.

9. On 28 March 2013, HMRC carried out a formal review under s 49E TMA. This review upheld the previous decision to issue the discovery assessments.

10. On 22 April 2013, Mr Wood notified his appeal to the FTT.

11. On 17 May 2013 HMRC issued penalties for the years assessed, totalling over £950,000 on the basis that they believed Mr Wood had been "either neglectful or fraudulent" in submitting incomplete or incorrect tax returns for the years in respect of which the discovery assessment had been made. Mr Wood's advisers subsequently appealed to HMRC against the penalties.

12. On 22 May 2013, Mr Wood died. His widow (Mrs Wood) is his personal representative and decided in that capacity to pursue the appeal to the FTT. The FTT subsequently suspended the requirement for HMRC to produce its statement of case and made directions for the Appellant to submit the Disclosure Report.

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

14. On 27 September 2013 the Appellant's advisers wrote to HMRC raising the point which became the subject of the preliminary issue in the appeal. The advisers contended that the position in relation to the assessments for 1992/93 to 2005/06 was exactly the same as had been recognised by HMRC in respect of the penalties, namely that in view of Mr Wood's death it was impossible for there to be a fair trial on the central issue of whether he acted deliberately in relation to the disputed further alleged tax liabilities.

15. On 31 May 2016, shortly before the hearing of this appeal, the Disclosure Report was delivered to HMRC. We were not shown the report but we were told that it states that there is a small amount of additional tax to pay as a result of various technical matters, rather than any issue of non-disclosure. It therefore appears that the

Appellant will be maintaining in the FTT the essential argument that there was no further disclosure to be made. By the date of the hearing of this appeal, the period within which HMRC were to serve their Statement of Case, following the Disclosure Report, had not expired and HMRC's Statement of Case had not been served. As a result, it was not clear at the hearing of the appeal precisely what matters would be in issue on the Appellant's appeal to the FTT against the assessments.

The Law

Legislation

16. The assessments which are the subject of this appeal were made by HMRC pursuant to the powers contained in s 29 TMA. This is the provision that allows HMRC, provided certain conditions are met, to make assessments after the expiry of the usual period during which they are allowed to open an enquiry into a taxpayer's self-assessment return.

17. Section 29 TMA, so far as material to this decision, provides:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment--
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above--
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board--

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to--

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

…"

18. Provided the conditions for the making of a discovery assessment are met, there are three separate time limits for the making of the assessment as follows:

(1) An ordinary time limit of 4 years after the end of the relevant year of assessment (s 34 TMA);

(2) A time limit of 6 years where the loss of tax was brought about carelessly by the taxpayer or a person acting on their behalf (s 36 (1) TMA); and

(3) A time limit of 20 years where the circumstances described in s 36 (1A) TMA apply.

19. We are concerned in this case with the time limit in s 36 (1A) which provides as follows:

"(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,

(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), or

(d)…

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)."

20. The conditions for extending time in s 36 TMA mirror those in s 29 (4). These time limits were introduced by the Finance Act 2008 with effect from 1 April 2010. Prior to this time, the "ordinary" time limit was just short of 6 years whereas the 20 year time limit applied to negligent or fraudulent conduct.

21. We were referred to certain passages from HMRC's Consultation Document issued on 17 May 2007 (the "Consultation Paper") which led in due course to the enactment of the relevant provisions in the Finance Act 2008.

22. Specifically, paragraph 2.3 of this document stated:

"… HMRC needs to ensure that there is widespread understanding that those who deliberately do not comply with the law will suffer significant disadvantage compared to compliant taxpayers. In this way potential non-compliers will be deterred from non-compliance and those who seek to comply will be reassured that the system is fair."

At paragraph 2.4 of this document it was stated:

"In practice this means HMRC must ensure that:

- it is easier for people to get their tax right;
- there is support for those who make mistakes and help to get it right in future;
- risk assessment means that more detailed checking falls on areas of highest risk;
- where tax has been underpaid or over claimed, HMRC put matters right;
- where people understate the tax they should pay, whether deliberately or because they have failed to take reasonable care, they face a penalty which is effective in deterring future non-compliance; and
- there is wider awareness of HMRC's activity to ensure compliance."

23. The Appellant relies on these passages for its contention that the purposes of the changes effected in the Finance Act 2008, and in particular the change in the time limits for negligence but retention of the 20 year limit for deliberate conduct, was to deter non-compliant taxpayers, as opposed to compliant taxpayers, with the former suffering "significant disadvantages", the aim being to impose a "penalty which is effective in deterring future non-compliance" and to remove disproportionate measures for negligent taxpayers.

24. Article 6 of the ECHR provides as follows:

"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...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (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."

Authorities

25. It is well-established that the assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head as these matters fall outside the scope of civil rights and obligations: see the judgment of the European Court of Human Rights ("ECtHR") in *Ferrazzini v Italy* (Application 44759/98) [2001] STC 1314 at [20] to [29]. This was affirmed in the domestic sphere recently by the Court of Appeal in *R (APVCO 19) v HMRC* [2015] STC 2272 at [68].

26. However, it is also well-established by a number of cases in the ECtHR that tax penalties can, depending on the circumstances, come within the concept of a "criminal charge" for the purposes of Article 6.

27. The principles to determine whether that is so in any particular case were succinctly summarised in the ECtHR in its judgment in *AP and others v Switzerland* (Application 19958/92) [1997] ECHR 19958/92 at [39] as follows:

> "The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In earlier case-law the Court has established that there are three criteria to be taken into account when it is being decided whether a person was "charged with a criminal offence" for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring…"

28. These criteria are commonly referred to as the "*Engel* criteria" after the ECtHR judgment in *Engel v Netherlands* [1976] 1 EHRR 647. The *Engel* criteria were

affirmed in *Ezeh v United Kingdom* (Applications 39665/98 and 400864/98) (2003) 15 BHRC 145 which dealt with the relative importance of the three criteria as follows, at [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 indication so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
>
> The very nature of the offence is a factor of greater import. …
>
> However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. …"

29. In the leading case of *Jussila v Finland* [2009] STC 29, which held that fiscal penalties involved criminal charges for Article 6 purposes, the ECtHR made the following observation at [31] on the passage from *Ezeh* quoted at [28] above:

> "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…. .The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character…. . 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."

30. In *Jussila* the ECtHR referred to the earlier case of *Bendenoun v France* (Application number 12547/86) [1994] ECHR12547/86 which took the following approach in deciding whether certain fiscal penalties were to be regarded as criminal for the purposes of Article 6 at [47] of its judgment:

> "In the instant case the Court does not underestimate the importance of several of the points raised by the Government. In the light of its case-law, and in particular of the previously cited *Ozturk*, it notes, however that four factors point in the opposite direction.
>
> In the first place, the offences with which Mr Benendoun was charged came under Article 1729 (1) of the General Tax Code (see para 34 above). That provision covers all citizens in their capacity as taxpayers, and not a given group with a particular status. It lays down certain requirements, to which it attaches penalties in the event of non-compliance.
>
> Secondly, the tax surcharges are intended not as pecuniary compensation for damage but essentially as a punishment to deter reoffending.
>
> Thirdly, they are imposed under a general rule, whose purpose is both deterrent and punitive.

> Lastly, in the instant case the surcharges were very substantial, amounting to FRF 422,534 in respect of Mr Benendoun personally and FRF 570,398 in respect of his company (see para 13 above); and if he failed to pay, he was liable to be committed to prison by the criminal courts (see para 35).
>
> Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 (1), which was therefore applicable."

31. The Court in *Jussila* considered whether this passage supported a different approach in fiscal or tax cases to the *Engel* criteria. This was answered in the negative, the court deciding that the four factors relied on in *Benendoun* should be regarded 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. The Court also emphasised that in *Benendoun* a cumulative approach was taken: see [32] of the judgment. On the facts of *Jussila* the Court decided without more that the criminal nature of the offence was established by the fact that the tax surcharges in question were not intended as pecuniary compensation for damage but as a punishment to deter reoffending, notwithstanding the minor nature of the surcharge in that particular case.

32. In *King v United Kingdom (No 3)* (ECtHR) [2005] STC 438 at [27] the court approved the finding of Jacob J in the High Court 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 because 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." However, the court noted, by reference to *Ferrazzini* that the procedures concerning the assessment of tax owing by the taxpayer fall outside the scope of Article 6 (1) as neither concerning the determination of a "criminal charge" or of any of the taxpayer's civil rights or obligations.

33. Similarly, in *HMRC v O'Rorke* [2014] STC 279 the Upper Tribunal determined that a "personal liability notice" issued to an officer of a company pursuant to S121C of the Social Security Administration Act 1992 in circumstances where a company was primarily liable for national insurance contributions but had failed to pay them in consequence of a "fraud or neglect" of the officer did not amount to a criminal charge under Article 6. Hildyard J stated at [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 the 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 1894 false and 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)."

34. The requirement that there be the exercise of the state's powers to condemn or punish for wrong doing before a provision could be regarded as amounting to a criminal charge was considered in the case of *Director of the Assets Recovery Agency v Customs and Excise Commissioners and Charrington and others* [2005] EWCA Civ 334, a case which concerned the question as to whether proceedings for the seizure of cash under a recovery order pursuant to the Proceeds of Crime Act 2002 as property obtained through unlawful conduct where the person holding the cash had not been prosecuted for criminal conduct amounted to a criminal charge for the purposes of Article 6. This was a report of a decision made by Laws LJ on an application to the Court of Appeal for permission to appeal and is therefore not citeable but he referred to a previous judgment of his own in *R (Mudie) v Kent Magistrates' Court* [2003] QB 1238 where he said:

> "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?"

35. Laws LJ also cited with approval a judgment of Coughlin J in the Northern Ireland case of *Walsh* where the judge said in relation to the same provisions that of greater importance than the fact that the person from whom the Agency sought to recover the property was the same person said to have engaged in the unlawful conduct was:

> "… 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)."

36. The reasoning in the cases referred to at [34] and [35] above was followed by the Special Commissioners in *Khan v Director of the Assets Recovery Agency* [2006] STC (SCD) 154, a case which involved the making of discovery assessments under s 29 TMA 1970 pursuant to a power conferred by s 317 Proceeds of Crime Act 2002. The issue to be determined was whether the qualifying condition in s 317 for the Director of the Assets Recovery Agency to make the assessment, namely that the Director makes a determination that there has been "criminal conduct", meant that the case was brought within the "criminal charge" ambit of Article 6. Mr Khan argued that Article 6 was relevant to the making of the discovery assessments but that argument was rejected at [26] and [27] of the decision as follows:

> "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, i.e. 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. 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."

37. The question of procedure in relation to discovery assessments was recently addressed by the Court of Appeal in *Hargreaves v HMRC* [2016] EWCA Civ 174. Arden LJ said this at [57] as regards the nature of an appeal against a discovery assessment:

> "Section 29 does not impose criminal liability. On the appeal under section 29 TMA Mr Hargreaves will have the privilege against self-incrimination but a wider right to silence does not arise as he is not subject to any criminal charge."

38. As regards the burden of proof in relation to a discovery assessment, it is clear that HMRC bear the burden (on the balance of probabilities) in relation to demonstrating that either of the conditions in s 29 (4) or (5) TMA are satisfied and that they also bear the burden in relation to s 36 (1A) TMA in demonstrating that some loss of tax was brought about deliberately by the taxpayer.

39. Once HMRC have satisfied these burdens, the burden then shifts to the taxpayer to prove that the assessment is incorrect: see Park J in *Hurley v Taylor (Inspector of Taxes)* [1998] STC 202 at 219 where he said:

> "I will first set out certain propositions of law, and then I will relate them to the facts of the case. My propositions of law are as follows.
>
> 1. By s 36(1) of the Taxes Management Act 1970 an assessment to income tax can be made on a person outside the normal six years period (but subject to a maximum 20 years cut-off) "for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct".
>
> 2. This requires the Revenue to show: (1) fraudulent or negligent conduct by the taxpayer; and (2) a loss of tax attributable to it.
>
> 3. On appeal to the commissioners the burden rests on the Revenue of establishing para 2(1) and (2). If they do not discharge the burden the appeal should be allowed (see e g *Hillenbrand v IRC* (1966) 42 TC 617 at 623 per the Lord President (Clyde)). I will call this "the s 36 burden".

> 4. The burden does not rest on the Revenue to any greater extent than the s 36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s 36. From then on s 50(6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer to establish that the assessment is wrong (see e g *Johnson v Scott (Inspector of Taxes)* [1978] STC 48 at 53).
>
> 5. Reverting to the s 36 burden which rests on the Revenue, it may or may not be discharged simply by capital statements which show deficiencies. Whether it is so discharged or not depends on whether the taxpayer tenders any explanation of the deficiencies, and if he does, on how the commissioners view his explanation…"

40. Statutory presumptions which transfer the "persuasive" burden to the accused in criminal proceedings are not necessarily incompatible with Article 6. In *Sheldrake v DPP* [2005] 1 AC 264 the House of Lords reviewed the relevant authorities and Lord Bingham said the following at [21] of his speech:

> "From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility and application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

41. HMRC accept that penalties that arise from deliberate behaviour on the part of the taxpayer 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. Furthermore, the ECtHR has held in *A. P., M. P, and T. P. v Switzerland* (1997) 26 EHRR 541 and *EL and others v Switzerland* [1997] ECHR 20919/92 that the heirs of a deceased taxpayer cannot be subject to a penal sanction for tax evasion committed by the taxpayer. Its reasoning was as follows:

> "It is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act….
>
> In the Court's opinion, such a rule is also required by the presumption of innocence enshrined in Article 6 (2) of the Convention. Inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law.…"

As we mentioned at [13] above, HMRC cancelled the penalties imposed on Mr Wood following his death.

The Decision

42. The FTT correctly observed at [60] of the Decision that the Appellant could only succeed on the Article 6 issue if HMRC's making of the disputed assessments under the extended time limits conferred by s 36 TMA constituted a taxpayer being "charged with a criminal offence". It then directed itself at [63] that in interpreting the phrase "charged with a criminal offence" in Article 6 it should apply the three *Engel* criteria. On its application of those criteria, the FTT concluded that the Appellant failed on the Article 6 issue.

43. On the first criterion (definition of the offence under domestic law), at [64] of the Decision, the FTT held that there is no explicit criminal offence defined by ss 29 and 36 TMA, recognising that was "no more than a starting point".

44. In reliance on what was said at [38] of *Jussila*, the FTT said at [65] of the Decision that the second criterion (nature of the offence) required "a rule whose purpose was deterrent and punitive".

45. In relation to the second criterion, the FTT relied heavily on the cases relied on by Laws LJ in *Charrington* and on *O'Rorke*. The FTT concluded at [75] to [79] as follows:

> "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."

46. In relation to the third criterion, the FTT concluded at [81] of the Decision:

> "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"."

47. In relation to the Rule 2 issue, the FTT decided that at the stage in the proceedings that had then been reached, 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: see [89] of the Decision. In other words, the question as to whether continuing with the proceedings would be contrary to the overriding objective of the FTT was to be deferred until the further steps described above had occurred. The FTT concluded at [92] of the Decision that until the exact nature of the basis of HMRC's assessments was clear, the FTT could not say whether the Appellant was unduly adversely prejudiced by being required to continue the proceedings. The FTT also observed at [92] that when HMRC 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 and that HMRC bore the burden of proof in relation to any allegation of deliberate behaviour by the late Mr Wood bringing about a tax loss.

Grounds of appeal and issues to be determined

48. As we have previously indicated, there was no appeal against the FTT's findings on the Rule 2 issue. In relation to the Article 6 issue, the Appellant contends

that the making of the Decision involves the three following errors of law on the part of the FTT:

> (1) *Charrington* and *O'Rorke* were misapplied to the Appellant's case because the Appellant's case was that application of s 36 (1A)(a) TMA did not simply enable HMRC to recover tax the taxpayer should have paid. There was a material risk of more tax than was due been recovered. The act of assessing tax under the extended time limit 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, carries the risk that assessments based on estimates may result in the collection of taxes by reference to greater amounts than were actually due. Therefore, the nature of HMRC's powers to assess under s 36 (1 A)(a) over a period of up to 20 years is penal.
>
> (2) The changes to the law brought about by Finance Act 2008 resulting in s 36 (1A) were "an instance of the use of State power to condemn or punish individuals for wrongdoing" as evident from the material in the Consultation Paper referred to at [22] above.
>
> (3) The indicia of "penalty" or a sanction of a penal nature and serious personal consequences of involvement in alleged deliberate conduct were present in this case.

49. Mr Lall advanced two propositions in support of the Appellant's case. First, HMRC having accepted that there can be no fair trial in relation to the penalties imposed upon the late Mr Wood it must accept that the position is no different in relation to their reliance on s 36 (1A) (a) TMA in the making of the disputed assessments. Secondly, the penal character of s 36 (1A) (a) arises from the fact that its application against the Appellant imposes on her the risk that she will end up being obliged to pay more than the amount of tax which was properly due.

50. At the hearing of this appeal, we asked Mr Lall what he hoped to achieve by a ruling in his favour that Article 6 applied in this case. His response was that he relied on the entitlement to a fair hearing conferred by Article 6(1). He did not separately rely on the presumption of innocence in Article 6(2) and, in particular, he did not contend that the reverse burden of proof on the Appellant infringed Article 6(2). Further, he accepted that Article 6(3)(c) which entitled a person charged with a criminal offence to defend himself "in person" did not mean that HMRC must abandon their assessment on the death of Mr Wood; he accepted that Article 6(3)(c) and, indeed, the other rights conferred by Article 6(3) were not infringed in the present case where the personal representative of Mr Wood could take advantage of those rights.

51. In view of Mr Lall's answer to our question as to the relevance of Article 6 in the present case and in view of the further fact that the Appellant has not appealed against the part of the decision which held that it remained possible to deal with the appeal against the assessments "fairly and justly" as required by Rule 2, it was not clear to us how the position of the Appellant would be improved by a ruling that the appeal to the FTT came within Article 6.

52. Even if we were to find that Article 6 (1) were engaged that finding would not, without more, entitle the Appellant to succeed on the preliminary issue. The FTT has already decided that it would be premature to make any finding that the disputed assessments should be discharged in advance of HMRC responding to the Disclosure Report and presenting its Statement of Case. Once those events have occurred, the FTT will be in a better position to assess how the overriding objective can best be achieved. In our view the position is no different in relation to the Article 6 issue; the question as to whether a fair trial can be achieved, and if so how, would have to be determined by the FTT, probably at a further case management hearing, in the light of all the circumstances as they stand following HMRC's service of their Statement of Case in response to the notice of appeal and disclosing the evidence on which they rely in support.

53. It follows at this stage that we should not be influenced by anything that Mr Lall tells us is apparent from the Disclosure Report (which we were not shown), namely that there is a limited admission of additional tax that is due which (he says) illustrates the gulf between the Appellant's position and that of HMRC with the consequence that there is a risk of HMRC seeking to recover more than the Appellant says was due from the late Mr Wood. Consequently, it is also premature in advance of the evidence being disclosed to conclude that the Appellant is unlikely to be able to fairly contest any allegations which go to the state of mind of the late Mr Wood and, in particular, whether he acted deliberately in making under declarations of his income or contest the presumption of continuity, if it be the case that HMRC have relied on that presumption in making the disputed assessments. Those are all matters that may be need to be taken into account when the FTT is giving further consideration to the application of the overriding objective and, if Article 6 (1) were to be engaged, how the requirements of that provision were to be satisfied.

54. Notwithstanding these comments, the question whether the appeal to the FTT would involve the determination of a criminal charge within Article 6 was fully argued. We consider that the answer to that question is clear and we will decide it, giving our reasons, so that the matter does not have to be considered again at a later stage in this case.

Discussion

55. Mr Lall's submissions can be summarised as follows:

(1) It is not disputed that the tax which is the subject of the disputed assessments is not classified as a matter which is criminal under the relevant UK tax legislation and therefore it is accepted that the first of the *Engel* criteria is not met.

(2) In relation to the second of the *Engel* criteria, the penalty provisions in s 95 TMA and the time limit provisions of s 36 (1A) (a) are of the same character. They should both be treated as provisions which by their nature are penal.

(3) The reason that s 36 (1A) (a) is penal in nature is because of the material risk that its application in this case to an appeal continued by a personal representative who will be unable to contest fairly the question as to whether the late Mr Wood's behaviour was deliberate or not will result in HMRC recovering more tax than due. Relying on *Jussila* and *King*, the risk of the assessment resulting in the recovery of more tax than was actually due makes these assessments criminal in nature for the purposes of Article 6, just as the penalties are criminal in nature for those purposes, notwithstanding the fact that it was not the intention of s 36(1A) to seek to recover more tax than is due. If HMRC satisfy the burden on them in relation to s 36 (1A) (a) then the burden shifts to the Appellant to demonstrate that the assessments are incorrect but where the relevant books and records are unlikely to be available because of the passage of time. This consequence exacerbates the position.

(4) Mr Lall made further detailed submissions in relation to the second of the *Engel* criteria as follows:

(a) The FTT was wrong to discount the material from the Consultation Document set out at [22] above. This material demonstrated that the declared objective of what is now s 36(1A) (a) was to deter non-compliant taxpayers, as compared to compliant taxpayers, as the former would suffer "significant disadvantages". The aim was to impose "a penalty which is effective in deterring future non-compliance" and remove disproportionate measures for negligent taxpayers. The provision therefore by its nature constitutes the exercise of state power which has the declared object to punish and deter.

(b) The "offence" which is criminal in nature for the purposes of Article 6 is HMRC's allegation that the late Mr Wood deliberately submitted incomplete returns.

(c) The FTT was wrong to hold that the disputed assessments "simply enable HMRC to recover from the Appellant that which Mr Wood should have paid in any event." Since the Disclosure Report, over 98% of the assessments is disputed as being over and above what was due and payable.

(d) *Charrington* is to be distinguished because in that case the court was able to satisfy itself on the evidence that Mr Charrington's claim that the amounts involved were not proceeds of crime lacked credibility.

(e) *O'Rorke* is to be distinguished because the process of transferring from the company primarily liable to the directors did not carry the risk of the personal liability of the directors being greater than the amount for which the company was primary liable.

(f) *Khan*, in common with this case, was concerned with discovery assessments under s 29 TMA. At [27] of that decision, the Special Commissioners entertained the possibility that discovery assessments may be subject to the protection of Article 6. Furthermore, in that case the

taxpayer did not seek to argue that what was sought to be recovered was more tax than was due. It would appear that the Special Commissioners appeared to recognise the criminal conduct may in limited circumstances be an ingredient in s 29 assessments where the appeal process does not allow the assessments to be fairly tested although they were not satisfied that the discovery assessments could not be fairly contested in that case. Mr Lall submits that on the facts of this case, the Appellant falls within those limited circumstances.

(5) In relation to the third of the *Engel* criteria, for the reasons set out above, the provision renders the Appellant liable to a penalty which by its nature and degree of severity belongs in the criminal sphere.

56. We are not persuaded by these submissions. We do not consider that any of the *Engel* criteria are satisfied in this case. We can state our reasons succinctly, as follows:

(1) it is not suggested that the first of the *Engel* criteria is satisfied;

(2) the second of the *Engel* criteria refers to "the nature of the provision";

(3) the third of the *Engel* criteria only arises where there is a "penalty";

(4) in this case, it is convenient to consider the second and third criteria together;

(5) s 36 (1A) TMA is one of a group of provisions dealing with discovery assessments;

(6) the purpose of a discovery assessment is to enable HMRC to recover the correct amount of tax due;

(7) it is no part of the purpose of these provisions to enable HMRC to recover more than the tax due;

(8) if there were no time limit on the power to raise a discovery assessment, that would not mean that a discovery assessment involved a criminal charge (although it might raise an issue as to legal certainty);

(9) there are, in fact, three time limits on the power to raise a discovery assessment;

(10) it could not be suggested that the ordinary time limit of 4 years or the time limit (for carelessness) of 6 years produces the result that a discovery assessment within those time limits involves a criminal charge;

(11) the fact that the pre-condition to the operation of the 20 year time limit is deliberate non-compliance does not change the nature of the discovery assessment;

(12) the fact that the consequences of deliberate non-compliance are more adverse than the consequences of careless non-compliance does not mean that those consequences have a criminal character or are penal;

(13) the reverse burden of proof on the taxpayer applies to every discovery assessment and does not produce the result that the discovery assessment involves a criminal charge or a penalty; and

(14) the combination of a 20 year time limit and a reverse burden of proof equally does not produce the result that there is a criminal charge or a penalty.

57. We will now deal with Mr Lall's submissions in more detail. We do not accept that the analogy that Mr Lall draws between s 36 (1A) (a) TMA and the penalty provisions of s 95 TMA nor his submission that because the penalties originally levied on Mr Wood were subsequently cancelled after his death then likewise HMRC should not be entitled to rely on s 36 (1A) (a). Although HMRC stated in its letter of 19 September 2013 that the penalties were discharged because Mr Wood would not have the right to a fair trial because of his death, the correct legal basis for cancelling penalties after the taxpayer has died is, as found by the ECtHR in the cases involving Swiss taxpayers referred to at [41] above, that it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act and inheritance of the guilt of the dead by his personal representative was not compatible with the presumption of innocence required by Article 6(2).We must therefore determine whether s 36 (1A) (a) is penal in nature by reference to the features of that provision alone.

58. In our view the authorities demonstrate that it is the character or nature of the legislative provision that is said to be of a penal nature, which is the key determining factor. The key issue is whether the provision can be regarded as imposing a punishment to deter offending by those to whom it is directed.

59. In our view s 36 (1A) (a) does not have that character or nature. We think a better analogy is that provided by s 32 of the Limitation Act 1980, subsection (1) of which provides, so far as is material:

> "….. Where in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;
>
> …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

60. It is clear that the nature of this provision is to provide for an extended limitation period where, among other things, the action is based upon the defendant's alleged fraud or deliberate concealment. We are not aware that it has ever been suggested that, where this extended time limit is relied on, the underlying action is to be characterised as being criminal in nature. In our view s 36 (1A) (a) TMA operates in a similar manner to s 32 Limitation Act 1980. It is a gateway through which the path to a discovery assessment can be opened; it extends the time limit for the making

of an assessment that otherwise would not be capable of being made because of the effluxion of time.

61. In common with the FTT and contrary to Mr Lall's submissions, we find the reasoning of *O'Rorke* is in point. The provision under consideration in that case was held to be one that simply enabled HMRC, upon proof of fraud or neglect on the part of an officer, to recover from him that which he or she could and should have procured his company to pay. Likewise, s 36 (1A) (a) is simply a provision which enables HMRC to recover from the taxpayer the correct amount of tax that he should have paid, provided HMRC can satisfy one of the conditions to its application, namely that it can demonstrate a loss of tax caused deliberately by the taxpayer.

62. Neither do we accept Mr Lall's analysis of the position in *Charrington*. We cannot see that s 36 can be characterised as an instance of the use of state power to condemn or punish an individual for wrongdoing. It is a mechanism to enable tax that may be due to be assessed. Nor does it involve any formal charge, conviction or penalty. We do not accept that the allegation of deliberate behaviour, which HMRC must prove to pass through the gateway, can be equated to a criminal charge as Mr Lall submits. It is properly characterised, as we have said, as a condition to be satisfied before the extended time limit can be applied.

63. In our view nothing that was said in *Khan* can assist the Appellant. The Special Commissioners' reasoning on which the decision was based, as set out at [26] of the decision and quoted at [36] above, was that s 29 TMA was engaged because the precondition of there having been "criminal conduct" had been satisfied. That precondition, as in this case, did not make the assessment process criminal in nature; the burden was on the taxpayer to displace it or pay up in the same way as any other taxpayer. The Special Commissioners gave no reasoning for its observation that criminal conduct was "possibly" an ingredient in relation to the s 29 conditions and that observation was not necessary for its decision. We therefore place no reliance on it and it appears to be inconsistent with the passage in *Hargreaves* that we refer to at [37] above.

64. As we have mentioned, the character or nature of the provision in question is the key issue. We do not believe that the passages in the Consultation Paper on which Mr Lall relies assist in this regard. Section 36 (1A)(a) clearly operates as an incentive for a taxpayer to submit his tax returns in a timely fashion and the extended time limit may act as a deterrence against non-compliance with that obligation, but we do not accept that that kind of deterrence can be construed as a punishment or coercion of the type that the authorities demonstrate is necessary to make a provision penal in nature. It may put the non-compliant taxpayer at a "significant disadvantage", particularly where he has not retained the necessary books and records and make it difficult for him to challenge a discovery assessment made many years after the event but that in our view cannot be characterised as a punishment. The use of the word "penalty" by HMRC at paragraph 2.4 of the Consultation Paper should be construed in that context and not in the sense of a financial penalty which can properly be regarded as a punishment. In the alternative, the reference to "a penalty" may simply be a reference to the separate provision which permits the imposition of a penalty: see s 95 TMA. In

view of our conclusions as to the meaning of the Consultation Document, it is not necessary to consider whether it is admissible as an aid to the interpretation of the statutory provisions.

65. Consequently, we see nothing in s 36 (1A) (a) that should give it anything more than the character of a provision which forms part of the procedure for the assessment of tax as opposed to being a provision which imposes a penalty or charge of the type referred to in the authorities.

66. Mr Lall in effect relies upon what he perceives as the likely consequence for the Appellant if the gateway is passed, which he contends the Appellant will find difficult to resist because of the difficulty of assessing the late Mr Wood's state of mind in his absence. He says that the consequence will be that the Appellant is at risk of having to pay more tax than is properly due because of the shifting of the burden of proof and the lack of books and records.

67. As we have indicated, it is not possible to make that assessment at this stage in the proceedings. In any event we do not think that possible consequences are relevant to the question as to whether the provision is penal in nature. As the authorities show, whether a provision is penal or not is determined by the nature of the relevant provision and Mr Lall accepts that it is not the purpose of s 36 (1A) (a) to recover more tax than was properly due.

68. The Appellant is in no different position to any other taxpayer in having the burden to displace an assessment which has been properly made. It may be difficult for any taxpayer who has not kept his books and records beyond the statutory period to displace a discovery assessment made long after the relevant period.

69. As the passage from *Sheldrake* quoted at [40] above demonstrates, reversing the burden of proof is not necessarily incompatible with Article 6; it is simply a question of ensuring that it is kept within reasonable limits. In our view there is nothing in principle objectionable to the taxpayer bearing the burden of demonstrating that the disputed assessments are incorrect. We cannot assess at this stage what evidence will be available to enable the Appellant to rebut the presumption, but the Appellant will have the opportunity to adduce evidence and the FTT will have full power to assess it. HMRC, in order to pass the gateway, will have to have demonstrated that there has been a loss of tax caused as a result of deliberate behaviour and in those circumstances it does not appear to us to be unreasonable that the burden should then shift to the Appellant to displace the presumption that the disputed assessments are accurate. In the absence of any other evidence it would be difficult for HMRC to prove that the assessments are correct. Further, the Appellant did not contend that the reverse burden of proof would infringe Article 6 (2).

70. The matters which concern Mr Lall are more relevant to the assessment which the FTT will still have to make in applying the overriding objective in all the circumstances of the case when hearing the substantive appeal. The impact of the burden on HMRC to prove both a loss of tax and deliberate behaviour on the part of the late Mr Wood should not be underestimated.

71. For these reasons we conclude that the provisions of s 36(1A) (a) TMA do not satisfy any of the *Engel* criteria. Accordingly, that provision is not penal in nature and does not engage Article 6 (1).

Conclusion

72. The result of the above conclusions is that the matter must be remitted to the FTT to progress the substantive hearing of the appeal. As we have emphasised above, the FTT must have regard to the question that it has properly left open, namely the application of the overriding objective in the particular circumstances of the case.

Disposition

73. The appeal is dismissed.

MR JUSTICE MORGAN **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 25 JULY 2016