[2013] UKUT 0353 (TCC)

Appeal number: FTC/48/2012

INCOME TAX – PENALTY – assessment based on suppressed takings of restaurant business – negligent return – standard of proof in penalty proceedings – Article 6, European Convention on Human Rights – whether appellant's article 6 right to a public hearing within a reasonable time had been contravened – relevant period for assessing delay – whether delay had prejudiced appellant - whether First-tier Tribunal has power to reduce penalty on account of unreasonable delay – TMA 1970, s 100B – whether appellant had discharged the evidential burden to rebut the presumption under TMA, s 101 that the tax assessment was correct – whether on the evidence the First-tier Tribunal's findings as to suppressed takings were capable of being upset – determination of amount of penalty

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TAHIR IQBAL KHAWAJA **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE TIM HERRINGTON

Sitting in public at 45 Bedford Square, London WC1 on 16 May 2013

Tim Wheeler, representative, for the Appellant

Adam Tolley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the latest instalment of a long-running saga that stretches back as far as 1997. As we shall recount, there has since that time been considerable dispute between the parties on the theme of the declared profits of a restaurant business, "Sahib Restaurant", in Sheffield operated by a company, Sahib Restaurant Limited ("SRL").

2. We are concerned here with an appeal by the Appellant, Mr Khawaja, from the decision of the First-tier Tribunal ("FTT") which upheld in part a penalty determination made by HMRC pursuant to s 95(1)(a) of the Taxes Management Act 1970 ("TMA") on 17 November 2004. Mr Khawaja was given permission to appeal by the FTT; HMRC also cross-appeal in respect of one issue that the FTT decided against them.

3. The penalty determination was made on the basis that Mr Khawaja had negligently submitted incorrect tax returns for the six tax years 1993/94 to 1998/99 inclusive. The returns in question concerned Mr Khawaja's personal tax position, which, as we shall describe, has been determined to include undeclared earnings from the profits of SRL, as well as other income. The original amount of penalty determined was £41,332. The FTT, following a revision made in response to Mr Khawaja's application for permission to appeal, determined the penalty in respect of undeclared income derived from the profits of the restaurant business at £18,549.57.

Mr Khawaja's grounds of appeal

4. The grounds on which Mr Khawaja makes his appeal can be summarised as follows:

(1) *Standard of proof*. Mr Khawaja argues that the FTT applied the wrong standard of proof in using the civil standard of the balance of probabilities and not the criminal standard of beyond reasonable doubt.

(2) *Prejudice occasioned by delay*. Mr Khawaja submits that, having found that his entitlement under article 6.1 of the European Convention on Human Rights ("ECHR") to a public hearing within a reasonable time had been contravened, the FTT made an error of law in not finding that delay prejudicial to Mr Khawaja and as having prevented Mr Khawaja from having a fair hearing.

(3) *Reduction of penalty on account of unreasonable delay*. Mr Khawaja argues that the FTT was wrong to find that it had no statutory power to reflect the unreasonable delay it had determined had arisen in the proceedings.

(4) *Rebuttal of presumption*. Mr Khawaja says that the FTT were in error in finding that Mr Khawaja had not discharged the evidential burden to rebut the presumption that the tax on which the penalty was based was due from Mr Khawaja.

(5) *Suppressed takings*. Mr Khawaja submits that the FTT was in error in concluding that there were suppressed takings from the restaurant business of SRL.

(6) *Amount of penalty*. Finally, Mr Khawaja appeals against the amount of the penalty as determined by the FTT. That appeal is, with the permission of the FTT, brought under s 100B(3) TMA, under which the person liable to the penalty may (subject to permission being given), and in addition to the right of appeal on a point of law under s 11(2) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), appeal against the amount of the penalty.

HMRC's cross-appeal

5. HMRC cross-appeals against the FTT's finding on the issue of when time should start to run in determining whether a public hearing has, for the purposes of article 6.1 ECHR, taken place within a reasonable time, and whether as a consequence the FTT erred in finding the delay to have been unreasonable.

Jurisdiction of the Upper Tribunal

6. With the exception of the appeal under s 100B(3) TMA as to the amount of the penalty (ground (6)), the jurisdiction of this Tribunal on this appeal is confined to points of law: s 11 TCEA. Certain of Mr Khawaja's grounds relate to pure questions of law: that is the case in relation to grounds (1), (3) and (4) referred to above. HMRC's cross-appeal falls into the same category.

7. On the other hand, grounds (2) and (5) of Mr Khawaja's appeal are challenges to findings of fact made by the FTT. Such findings are not precluded from being errors of law, but in order to be found to be such it must be shown that the FTT made findings that were not open to it. The well-known test, derived from *Edwards v Bairstow* [1956] AC 15 (see per Viscount Simonds at p 29 and per Lord Radcliffe at p 36), is whether the decision in that respect was one that no reasonable tribunal, acting judicially and having properly instructed itself as to the law, could have reached.

Background

8. In consequence of an investigation commenced around 1997 by what was at that time the Inland Revenue (it was we understand a joint investigation with the then HM Customs & Excise), an assessment under s 419 of the Income and Corporation Taxes Act 1988 (loans to participators) was issued to SRL on 31 March 2000. That assessment was appealed on 3 April 2000. At a later stage this assessment was not proceeded with by the Revenue.

9. In correspondence in August and October 2000, the Revenue informed Mr Khawaja's then advisers that they were considering the application of regulation 42(3) of the Income Tax (Employments) Regulations 1993 so that the alleged under-declarations of the restaurant business would be treated as payments made to Mr Khawaja on account of remuneration, and thus assessable on him under Schedule E. Directions under that regulation were made, and Mr Khawaja appealed against

Revenue assessments for the years 1992/93 to 1995/96, and against amendments to his self-assessments for the years 1996/97 to 1998/99.

10. Mr Khawaja's appeal came before the general commissioners (a predecessor of the FTT). Following a three-day hearing from 25 June 2001, the general commissioners decided that Mr Khawaja had undeclared income deriving from the restaurant business in the amount of £28,032 for the tax year 1995/96, which when added to other undeclared income and emoluments, including benefits in kind, amounted to £41,000. That figure was then used as the basis for determinations in respect of earlier and later years, resulting in a total for the years in question of £291,000.

11. Mr Khawaja appealed under the then applicable procedure, by way of case stated, to the High Court. He sought to challenge the general commissioners' finding on *Edwards v Bairstow* grounds. Subject to a relatively minor revision in the finding as to the amount of undeclared income, the appeal (*Khawaja v Etty (Inspector of Taxes)* [2004] STC 669) was dismissed by Lawrence Collins J (as he then was). Each of the assessments was reduced by £5,000 on the basis that the general commissioners had made the mistake of taking into account in determining the income other than through SRL certain income that had in fact been declared. In consequence, the determination of the High Court was that Mr Khawaja had under-declared his income over the years in question in an aggregate amount of £256,000.

12. Mr Khawaja pursued an application for permission to appeal to the Court of Appeal. Permission was refused on the papers by Jonathan Parker LJ. A renewed application at an oral hearing was refused by Neuberger LJ (as he then was) on 7 April 2004.

13. Following the dismissal of this application for permission to appeal, the position had been reached whereby the assessments, including Mr Khawaja's amended self-assessments, could no longer be varied. Accordingly, under s 101 TMA, those assessments became "sufficient evidence", for the purpose of any penalty proceedings, that the amounts in respect of which tax was charged in the assessments arose or were received as stated in the assessments.

14. On 17 November 2004, pursuant to s 95(1)(a) TMA, HMRC issued the penalty determination on the basis that Mr Khawaja had negligently submitted incorrect returns, under s 8 TMA, for each of the years 1993/94 to 1998/99 inclusive. The penalties were calculated, pursuant to s 95(2) TMA, on the basis of 50% of the difference between the amount of tax originally paid by Mr Khawaja and the amount of tax which it had been determined should have been paid.

15. Mr Khawaja appealed against the penalty determination to the general commissioners. On 30 November 2005 those commissioners issued their decision, determining the penalties in reduced amounts for each of the years. The decision was as follows:

> "On the facts we are satisfied beyond reasonable doubt that there was negligent submission of incorrect returns for the years mentioned

> above in respect of property income but applying the same standard of proof we find that HM Revenue & Customs have failed to prove beyond reasonable doubt that there were understated profits."

Taking only the property income and benefits in kind, therefore, the aggregate penalty for the years in question was reduced to £6,000.

16. HMRC appealed the decision of the general commissioners on the ground that they had wrongly applied the criminal standard of proof. There was a long delay by the general commissioners, and their clerk, in preparing the stated case for the High Court. Neither of the parties to this appeal was responsible for that delay.

17. On 17 July 2008, in *Revenue and Customs Commissioners v Khawaja* [2008] STC 2880, HMRC's appeal was allowed. It was held by Mann J that the appropriate standard of proof for penalty proceedings under TMA was the civil, and not the criminal standard. Furthermore, article 6 ECHR did not affect that conclusion. In addition, Mr Khawaja's attempt to challenge the penalty of £6,000 in respect of under-declared property income was rejected.

18. By an Order sealed on 25 July 2008 the High Court remitted the matter to the general commissioners for reconsideration of Mr Khawaja's appeal as to penalties in relation to those matters which the general commissioners had found not to have been proved beyond reasonable doubt (namely the question of Mr Khawaja's under-declared income from the restaurant business) and the penalties properly payable in that respect, taking such account as appropriate of the penalties that had previously been determined (that is, the £6,000 in respect of under-declared property income and benefits in kind).

19. Through an administrative error, the Order was not served on Mr Khawaja until November 2008. On 1 December 2008 Mr Khawaja made an out-of-time application for permission to appeal the judgment of Mann J to the Court of Appeal. Permission was refused on the papers by Mummery LJ on 9 February 2009. Mr Khawaja renewed the application to an oral hearing, at which it was on 19 March 2009 refused by Moses LJ.

20. Following the reorganisation of the tribunal system with effect from 1 April 2009, the matter came into the jurisdiction of the FTT. As a consequence of the Order of the High Court, the FTT was required to consider that part of the penalty that remained in dispute, namely the penalty attributable to the income from the restaurant business, in the sum of £35,332. Directions were given by the FTT on 23 February 2010. A hearing was listed for 26 to 28 April 2011, but this was vacated on the application of Mr Khawaja, to which HMRC did not object. A re-listing for 7 to 8 November 2011 also had to be vacated, as a two-day hearing was considered insufficient. The hearing before the FTT finally took place between 6 and 9 February 2012; the FTT's decision was released on 8 March 2012. As we described earlier, the outcome was that the penalty in respect of undeclared income derived from profits of the restaurant business was determined in the revised amount of £18,549.57.

21. We should add, purely for completeness, that there have also been appeal proceedings before the VAT and Duties Tribunal (another predecessor of the FTT) in respect of the VAT liabilities of SRL in respect of the restaurant business and civil penalties for evasion of VAT. Those proceedings have themselves included an appeal to the High Court, and refusal of SRL's application for permission to appeal to the Court of Appeal. However, we do not regard those proceedings as material to our consideration of this appeal.

Standard of proof

22. With that background we now turn to the issues we briefly described earlier.

23. The first is the question of the appropriate standard of proof. This was, of course, as we have described, the principal issue before Mann J in the High Court proceedings from which this appeal was remitted, in the events that happened, to the FTT. It is instructive, therefore, to start with that judgment.

24. As the general commissioners had given no reason for their selection of the criminal standard of proof, Mann J considered the matter afresh. He dismissed the argument put forward by counsel for Mr Khawaja based on *Inland Revenue v Ruffle* (1979) SC 371, in the Outer House of the Court of Session, where Lord Jauncey had (obiter) described (at p 377) penalty proceedings in that case as "of a quasi-criminal nature" so that "proof of the facts resulting in liability to a penalty must be beyond reasonable doubt". Having reviewed other authorities, including *1st Indian Cavalry Club Limited v Customs and Excise Commissioners* [1998] STC 294, in the Inner House, which doubted *Ruffle*, and VAT penalty cases such as *Customs and Excise Commissioners v Han and another* [2001] STC 1188, in the Court of Appeal, where Potter LJ had (at [12]) referred to *1st Cavalry Club* in relation to the standard of proof in the VAT context, Mann J himself doubted whether force should be given to *Ruffle*.

25. In *Han*, as Mann J observed, the Court of Appeal had considered the impact of the Keith Report (1983, Cmnd 8822), by virtue of which the VAT penalty code had been introduced. Of particular note was the Report's findings in relation to the unsatisfactory position that obtained where the requirement that fraud had to be proved to the criminal standard would leave unpenalised understatements arising through demonstrable lack of care, but short of fraud, provable to that standard. At para 18.4.16 of the Report, the Committee contrasted the position under the "Inland Revenue offence code", allowing a "civil" form of investigation and settlement, and commented that there had been no consistent body of criticism "of the lower civil burden of proof in such cases as being unfair to the tax payer."

26. These considerations led Mann J to the conclusion that in penalty cases of this nature it is the civil standard of proof that applies. He went on to decide that the position had not been changed by the enactment of the Human Rights Act 1998, and the application of article 6 ECHR. He said (at [28]) that, although HMRC had accepted that the penalty proceedings were criminal proceedings for the purposes of article 6, and certain specific procedural safeguards would therefore apply, the standard of proof was not dealt with by article 6. As Mance LJ (as he then was) had

made clear in *Han* (at [88]), the classification of proceedings in Article 6 operates for the purposes of the ECHR only. It does not make the case criminal proceedings for all domestic purposes. Mann J held that article 6 did not automatically introduce the criminal standard of proof.

27. The FTT rightly recognised that it was bound by the judgment of Mann J. It was bound both as a matter of issue estoppel in these particular proceedings, unless an exception applied, and as a matter of precedent. As to the latter, we are not so bound, although we should depart from a decision of the High Court only in circumstances where another High Court judge would properly be able to do so. Thus, we would be able to depart from Mann J's conclusion only if we thought it was plainly wrong or if we considered ourselves bound by authority that would have bound Mann J. This is not an issue where the fact that this tribunal is a specialised tribunal would affect the propriety of our departing from Mann J's judgment.

28. There remains the question of issue estoppel. That may arise depending on our conclusions on the question of principle, and if we were to consider that as a result we should depart from the reasoning of Mann J. We shall accordingly turn first to that question of principle, and to the arguments of Mr Wheeler as to why the earlier judgment of Mann J in these proceedings should now be regarded as having reached the wrong conclusion.

29. The starting point, and there was no dispute on this, is that penalty proceedings of the nature at issue in this appeal are "criminal" for the purposes of article 6.2 ECHR, and that is the case notwithstanding that the penalties have been levied on the basis of negligence and not dishonesty (*King v Walden* [2001] STC 822; *Han*, per Potter LJ at [79]). Equally, there was no dispute but that penalty proceedings are civil proceedings under domestic law.

30. It will be helpful at this point if we set out the terms of article 6 ECHR. They are as follows:

> 6.1 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. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 6.2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 6.3 Everyone charged with a criminal offence has the following minimum rights:

> (a) to be informed promptly, and in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and the facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own 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.

31. Mr Wheeler placed considerable reliance on the decision of the Supreme Court in *Serious Organised Crime Agency v Gale and another* [2011] UKSC 49, which directly addressed an argument that, in the particular proceedings in question, the application of the civil standard of proof had contravened article 6 ECHR. *Gale* is obviously a more recent decision of high authority. Although it is not a case on the tax penalty regime, if the judgments were to give rise to doubt as to the conclusion reached by Mann J, that would be a factor in our decision on the question of principle.

32. The salient facts of *Gale* are straightforward. An interim receiver had been appointed under s 246 of the Proceeds of Crime Act 2002 ("POCA") to investigate and assemble evidence of unlawful conduct in relation to the defendants' financial affairs. On the basis of the receiver's report, SOCA brought civil recovery proceedings against the defendants. At first instance, the judge found, on a balance of probabilities, pursuant to the express provisions of s 241(3) POCA, that notwithstanding the first defendant's acquittal of drug trafficking charges in Portugal, property held by the defendants was derived from unlawful conduct in drug trafficking, money-laundering and tax evasion, and made a recovery order. The defendants appealed on the basis that the use of the civil standard of proof contravened article 6 ECHR.

33. The Supreme Court dismissed the appeal. It held that, since there was no procedural connection or link between the criminal proceedings which had led to the first defendant's acquittal in Portugal and the civil recovery proceedings in England, there was no requirement that the criminal standard had to be applied to proof of criminal conduct in the recovery proceedings. Accordingly, the proper standard in the recovery proceedings was the civil standard.

34. The decision in *Gale* is not therefore itself directly apt to the issue before us. But Mr Wheeler relies on certain observations made by the Justices in their judgments. Having considered those, however, we agree with Mr Tolley that there is nothing in *Gale* that can offer any assistance on the issue before us. *Gale* says

nothing about the question of the standard of proof in penalty proceedings of this nature. *Gale* was concerned with the question of the standard of proof in proceedings that relied on the proof of an activity that was criminal as a matter of domestic law; that is not the case for penalty proceedings of the nature which arise in this case.

35. That is the context in which the remarks of the Justices must be regarded. Thus, where Lord Phillips, in a passage cited by Mr Wheeler, referred at [39] to the cases in the European Court of Human Rights of *Butler v United Kingdom* (Reports of Judgments and Decisions 2002-IV, p 349) and *Webb v United Kingdom* (Application No 56054/00; unreported 10 February 2004), and said:

> "In each case the European Court of Human Rights rejected the contention that the proceedings involved a 'criminal charge' and resulted in the imposition of a penalty or punishment. It held that forfeiture was preventative and not a penal sanction. Accordingly it was permissible that, pursuant to section 43(3), the standard of proof required to justify forfeiture was that applicable to civil proceedings."

that cannot be taken to mean that, as Mr Wheeler urged upon us, in the different context of penalty proceedings, which do not involve the proof of anything that would be criminal in nature under domestic law, the converse necessarily applies, and that in such a case the criminal standard of proof must be applied. The true analysis, in our judgment, is that in the cases cited it was only the finding that the forfeiture proceedings were not criminal that prevented the criminal standard of proof from applying, because the underlying allegation was one of criminal activity according to domestic law; by contrast, in the case of tax penalty proceedings, there is no such criminal activity for domestic purposes. A similar analysis applies to the comments of Lord Phillips, at [40], regarding the cases of *Phillips v United Kingdom* (2001) 11 BHRC 280, and *van Offeren v The Netherlands* (Application No 19581/04; unreported 5 July 2005).

36. This theme is continued by Lord Phillips in referring to the judgment of the European Court of Human Rights in *Geerings v The Netherlands* (2007) 46 EHRR 1212. There the applicant had been charged with a number of specific offences of theft and handling stolen goods. His conviction on most of these was quashed on appeal on the ground that the evidence did not satisfy the criminal standard of proof. Nonetheless a confiscation order was sought in respect of the offences for which he had been acquitted. The Court declined to accept that, in such a case, confiscation could be based on proof of the offences to a lesser standard. The focus of the Court, however, was on the link between the civil confiscation proceedings and the criminal charges. That was the basis for the Court saying, at [47]:

> "If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with article 6.2 …"

Mr Wheeler's reliance on this passage cannot assist him in this very different context.

37. Mr Wheeler sought to contrast the confiscation proceedings at issue in *Geerings*, and in *Gale*, from the penalty proceedings in this case, on the ground that confiscation proceedings as such were civil proceedings for ECHR purposes, whereas tax penalty proceedings were criminal for those purposes. On this basis he sought to support his argument by reference to what Lord Phillips said at [44], when in discussing the *Geerings* case, he reasoned:

> "If confiscation proceedings do not involve a criminal charge, but are subject to the civil standard of proof, I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard."

For the reasons we have already given, we do not accept Mr Wheeler's argument. The context, in all the cases referred to by Lord Phillips, was on the link between proceedings that are criminal for domestic purposes, to which the criminal standard of proof applies, and those that are civil for those purposes. The European jurisprudence recognises that distinction, only requiring domestic civil proceedings to adopt the criminal standard of proof where there is a sufficient procedural link between the two. That offers no support for Mr Wheeler's submissions as regards discrete tax penalty proceedings.

38. The same distinction can be discerned in the further passage from Lord Phillips' judgment to which Mr Wheeler referred us, at [48] where, in referring to the House of Lords' decision in *R v Briggs-Price* [2009] AC 1026, he said:

> "… even if article 6.2 applied to the confiscation exercise, its requirement that the appellant's criminal behaviour should be established according to the criminal standard of proof had been satisfied."

That reference by Lord Phillips was to the factual position in *Briggs-Price*, where the trial judge had been satisfied on the criminal standard. It is not authority for the application of a criminal standard in the case of proceedings that are civil for domestic purposes, even if they are criminal within article 6.2. Lord Phillips was referring to the requirement, should article 6.2 have been applicable, in respect of the criminal behaviour of the person concerned – behaviour that would under domestic law have to be proved to the criminal standard – that such behaviour should be established to the criminal standard. That cannot be taken as authority that civil penalty proceedings – which do not involve criminal behaviour for domestic purposes – should be subject to the criminal standard of proof.

39. The distinction is even more clearly defined by Lord Phillips in *Briggs-Price* itself. In that case, in considering directly the meaning of article 6.2, his lordship said (at [24]):

> "Article 6(2) does not spell out the standard of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. It does, however, provide that he has to be proved guilty "according to law". This requirement will not be satisfied

> unless the defendant is proved to be guilty in accordance with the domestic law of the state concerned."

That in our judgment is decisive. The application of the civil standard of proof to penalty proceedings of the nature at issue in this appeal is in accordance with domestic law. There is no link with any conduct which is criminal in nature for domestic purposes, and to which the criminal standard ought properly to be applied. In those circumstances it is the civil standard which applies.

40. In saying this we have regard also to what might appear, at least at first sight, to be comments to a contrary effect by the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379. There, the Court considered the limits placed on contracting states in providing, within the criminal law, for presumptions of law and fact. Whilst holding that the Convention did not prohibit such presumptions in principle, the Court said (at [28]) that such presumptions had to be confined within reasonable limits, since otherwise the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance if the words "according to law" were construed exclusively with reference to domestic law.

41. That is not therefore a statement that the domestic law must be rejected in application of article 6.2. Even where that domestic law might be regarded as impinging on the presumption of innocence, it will not be deprived of effect if it remains within reasonable limits. The domestic law must not deprive the article 6.2 presumption of innocence of its substance. That is a factor in determining the extent to which the burden of proof might be reversed, or otherwise modified to the detriment of a defendant. It could in particular circumstances affect questions of the standard of proof, if the application of a particular standard would deprive the presumption of innocence of its substance. But the standard under our domestic law, namely on the balance of probability, would not, in our view, have such an effect.

42. Nor is this conclusion thrown into doubt by references, cited to us by Mr Wheeler, such as those of Lord Dyson in *Gale*, at [121], having regard to *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647, para 82, to the classification of proceedings under national law being only a starting point, the "essential nature of the proceedings" being of greater importance. That passage was directed at the application of article 6.2 to the proceedings in question – a matter which is not in dispute in this case – and not to the question of the appropriate standard of proof.

43. Mr Wheeler referred us also to *Barbera v Spain* (1989) 11 EHRR 360, and to the comments of the Court at paras 76 – 77 to the effect that, in criminal cases, the whole matter of the taking and presentation of evidence had to have regard to articles 6.2 and 6.3 of the ECHR, and in particular that article 6.2 embodies the presumption of innocence, and the fact that any doubt should benefit the accused. But that case adds nothing to the authorities we have already referred to on the question of the standard of proof; *Barbera* was itself concerned with criminal proceedings for domestic purposes, namely charges of murder, and the comments can only be of relevance in that context and not the very different one before us.

44. *R (McCann and others) v Crown Court at Manchester and another* [2003] 1 AC 787 concerned anti-social behaviour orders. The House of Lords held that such proceedings could not be classified as "criminal" for the purposes of article 6 ECHR, but that, given the seriousness of the matter involved, the court should be satisfied to the criminal standard of proof that a defendant had acted in an anti-social manner before an order could be made. Mr Wheeler referred us to what Lord Hope had said, at [43], on the question of the consequences of the classification of proceedings as criminal:

> "If proceedings under section 1 of the Crime and Disorder Act 1998 are to be classified as criminal proceedings for the purposes of article 6 of the Convention, all the normal rules of evidence which apply to a criminal prosecution in domestic law must be applied to them."

The context for this remark was the use of hearsay evidence, which, under domestic law would have been inadmissible in the proceedings were they to have been classified as criminal. The absence, in this passage, of any reference to the standard of proof is, to our minds, instructive. The standard of proof was in issue, but Lord Hope does not advert to it being a consequence of classification as criminal that the criminal standard of proof would necessarily follow, as a consequence of article 6.2. Nor, if Mr Wheeler were to be correct in submitting that Lord Hope's remarks at [43] must be read as including the standard of proof, could Lord Phillips have said what he did regarding the application of domestic law in *Briggs-Price*. *McCann* does not therefore assist Mr Khawaja.

45. We also find the references from the Green Paper issued by the European Commission on 26 April 2006: *The Presumption of Innocence* to be of no assistance in this context. That paper was directed to ascertaining whether the concept of the presumption of innocence was understood in the same way throughout the EU. The context of this enquiry was the need for cooperation between member states in criminal matters, including mutual recognition, thus requiring increasing compatibility of the different legal systems of the states. Amongst the issues was the proposal for a European Arrest Warrant. That was the context for both the summary offered by the Commission of the case law of the European Court of Human Rights, to which we have referred, namely that any doubt should benefit a person subject to a criminal charge, and the response of the UK government. The Green Paper adds nothing to what can be derived from the case law itself; the response focuses solely on matters that are criminal in nature for domestic purposes.

46. It follows that we reject Mr Khawaja's first ground of appeal. In our judgment, the FTT was correct to find that the applicable standard of proof (the FTT referred to "burden" at [19] but this can be taken to mean "standard") was that of the balance of probabilities.

47. In the circumstances, we need not consider the question of issue estoppel, which on our analysis does not arise. To do so would add nothing of substance to the finding of the FTT in that respect. Having regard to our decision on the effect of article 6 ECHR, and that *Gale* does not effect a change in the law in that respect in

relation to these proceedings, we would have been bound to agree with the FTT that there is no basis on which this case could be treated as an exception to issue estoppel.

48. We add, however, that we do not accept that article 6 ECHR can have any application to the question whether issue estoppel applies on the basis that this matter is a criminal matter for Convention purposes. Although Mr Wheeler referred us to *Director of Public Prosecutions v Humphreys* [1977] AC 1, in the Privy Council, and in particular to the remarks of Lord Hailsham at pp 40-41, referring to the analogous doctrine in criminal cases based on the prohibition of double jeopardy, it is clear that the basis for the conclusion that issue estoppel had no place in English criminal law was the nature of the domestic criminal law, and that it would not be applicable to a case that was civil under domestic law, but was classified as "criminal" for the purposes of article 6.

Article 6 ECHR: prejudice occasioned by delay

49. Under this heading we deal with both HMRC's cross appeal concerning the FTT's decision as to the relevant starting point in calculating any delay and whether the delay was unreasonable, and Mr Khawaja's second ground of appeal, namely that, having found there was an unreasonable delay, the FTT made an error of law in not finding that delay prejudicial to Mr Khawaja and as having prevented Mr Khawaja from having a fair hearing.

The starting point

50. This argument flows from the requirement, in article 6.1 ECHR, that in both civil and criminal proceedings a person is entitled to a hearing within a reasonable time. In respect of matters classified as "criminal" for Convention purposes, the reasonable time begins to run from the date there is a "charge" against the person. That means, according to *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1 (at para 73), the date when the person concerned was officially notified by the competent authority of an allegation that he had committed a criminal offence. As the Court in *Eckle* also noted, this meaning of "charge" corresponds to the test whether "the situation of the [suspect] has been "substantially affected".

51. This formulation of the test was considered in *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72, where (at [27]) Lord Bingham said that as a general rule the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him. The purpose of the reasonable time requirement, explained Lord Bingham, is to ensure that criminal proceedings, once initiated, are prosecuted without undue delay, and to preserve defendants from the trauma of awaiting trial for inordinate periods.

52. Mr Tolley referred us to *King v United Kingdom (No 2)* [2004] STC 911, in the European Court of Human Rights, where the commencement of the relevant period in assessing delay was considered in the context of the imposition of penalties. The UK government considered that time should run only from the time when the person concerned was served with notification of the penalties to be imposed; the individual

argued that it was from the moment that it was clear that penalties were envisaged; either the date of a settlement meeting or when a Hansard warning was given putting him on notice of the possibility of prosecution.

53. Having referred to *Eckle*, the Court (at p 921g-j) referred to the fact that in a case where a person's financial affairs are under investigation by the Revenue in order to assess whether any tax is owed, it always had to be considered a possibility that, in the event of dishonesty or neglect being disclosed, measures may be taken by way of imposing criminal penalties. An offer of settlement which included an element representing penalties was not considered by the Court as substantially affecting the position of the person concerned, even if there was a possible threat of penalty or prosecution procedures in the background. On the other hand, on the facts of *King*, the issuing of a Hansard warning was a clear and unequivocal indication that the person concerned was suspected of criminal misconduct. That amounted to formal notice that the person was at risk of serious consequences, even if in the event he was not charged with specific tax offences but was subject to a penalty procedure.

54. The FTT decided that time started to run in Mr Khawaja's case from 20 June 2000. That was the date of a meeting between Mr Khawaja and HMRC at which Mr Khawaja was interviewed about the restaurant takings. Concerns were expressed by HMRC as to the accuracy of the accounts. The FTT records the interviewing officer saying to Mr Khawaja:

> "… and there's a similar penalty regime to Customs and Excise in which abatements can be deal [sic] be given for such things as disclosure and co-operation and the gravity of the offence. Things work similarly, if it is decided or if it is agreed that there are additional takings on which tax arises then that tax is subject to penalties. Those penalties can be mitigated by reference to disclosure, co-operation and gravity."

The FTT records that the discussion then went into the way in which penalties could be mitigated, and Mr Khawaja was handed a copy of leaflet IR73 (Investigations. How settlements are negotiated).

55. The FTT decided that this was a clear and unequivocal statement that if additional tax was found to be due from him, that tax would be subject to penalties. The FTT placed reliance on the phrase "that tax *is* subject to penalties". The FTT took the view that this was the moment when Mr Khawaja's situation was "substantially affected"; from then on, the FTT reasoned, the risk of an assessment carried with it the concurrent likelihood of a penalty assessment.

56. We do not consider that this conclusion was one that was open to the FTT on a proper application of the law. From correspondence we have seen following the 20 June 2000 meeting, as well as from the fact that leaflet IR73 was handed to Mr Khawaja at that meeting, it is clear that the context of the remarks made was the encouragement of a process of negotiated settlement. The remarks of the interviewing officer which we have quoted must be considered in that context. Viewed in that way, we consider that the FTT placed too great a weight on the use of

the word "is". That cannot in our view, having regard to the context, be read as unequivocal or as substantially affecting Mr Khawaja's position. No assessments had at that stage been issued to Mr Khawaja. The remarks of the interviewing officer did no more than advise in general terms as to the basis of the penalty regime in the same way that such information could be obtained from published materials.

57. On this analysis, we consider that the meeting of 20 June 2000 has more in common with the settlement meeting in *King*, which the European Court of Human Rights held did not substantially affect Mr King's position, even though there was the possible threat of penalty or prosecution procedures in the background. That essentially was the position of the 20 June 2000 meeting, and we do not consider that the words used by the interviewing officer change the position. We find that Mr Khawaja's position was not substantially affected at that time.

58. The penalty assessments were raised on 17 November 2004. However, prior to that time the Inland Revenue had written to Mr Khawaja on 15 July 2004. In that letter the Revenue referred to the fact that the assessments had been finally determined, and invited Mr Khawaja to make an offer in respect of penalties. The Revenue set out its views on penalties as follows:

> "1. For each of the amounts shown as liable to a penalty … the offence is that of negligently submitting to the Inland Revenue incorrect personal returns of income. The relevant legislation is section 95[1c] Taxes Management Act 1970.
>
> 2. The maximum penalty exigible under the legislation is 100% of the difference between the tax chargeable on the correct amount of income and the tax chargeable on the income returned. [Section 95[2] Taxes Management Act 1970.]
>
> The maximum penalty in your case is therefore £85,009 [excluding pence]
>
> 3. As matters stand presently, the Revenue would be prepared to accept an offer in settlement which incorporated a penalty of 50% of the 'difference' and which was otherwise acceptable.
>
> 4. The mitigation of 50% from the maximum chargeable penalty is arrived at as follows:
>
> > *disclosure 5% [reflecting the extent to which irregularities were admitted]*
> > *cooperation 30% [reflecting the degree to which you assisted the Revenue in its enquiries]*
> > *size and gravity 15% [reflecting the seriousness of the offences]*"

59. In our judgment it was the letter of 15 July 2004 that contained the requisite clear and unequivocal statement as to Mr Khawaja's liability to penalties. Although he was at that stage given an opportunity to make an offer, it was clear that the offer had to be based on the level of penalty described by that letter. From that time, accordingly, and notwithstanding that it was only later that the penalty determination was made, Mr Khawaja's position was substantially affected.

60. We allow HMRC's cross-appeal in this respect.

Was the delay unreasonable?

61. On the other hand, we do not accept that this has the consequence that there was no breach of the "reasonable time" requirement. The FTT's decision was of course based on what we have found to have been the wrong starting point. Taking instead the starting point we have decided should apply, that eliminates delays in the period from June 2000 to July 2004, which included what the FTT found was a considerable delay in the legal process relating to the underlying tax assessments. But the most serious delays were in the period between January 2006 and February 2008, which was the length of time it took for the clerk to the general commissioners to state a case for the High Court. Although the clerk accepted personal responsibility, we agree with the FTT that as this was a delay in the judicial process, it is a delay that is attributable to the State. Taking all the factors into account, we consider that the delays in the relevant period remain unreasonable.

62. HMRC's cross-appeal in this respect is accordingly dismissed.

Was Mr Khawaja prejudiced by the delay?

63. Mr Wheeler argued that, having found that the delay was unreasonable, the FTT were in error in not finding that the delay had prejudiced Mr Khawaja and had prevented him from having a fair hearing.

64. The factors considered by the FTT in reaching their conclusion were as follows:

(1) Mr Khawaja lost the ability to have the hearing before the general commissioners.

(2) It was argued, as a consequence of (1), that the FTT was not in a position to take full account of the £6,000 penalty that had already been finally determined. The FTT said in this regard that the penalty had been adjusted in this respect in accordance with Mr Wheeler's calculation.

(3) It was argued that HMRC had had the opportunity to improve the presentation of its case. The FTT rejected this, as Mr Etty (who had presented HMRC's case before the general commissioners) was the only HMRC witness; in addition the FTT referred to the witnesses Mr Khawaja had called.

(4) The original till engineer (Mr Dobson) had been unable to give evidence to the FTT. The FTT heard instead from Mr Staniland who had reported to Mr Dobson, and who, the FTT remarked, had appeared to be a master of his subject and able to explain fully the workings of the till.

(5) The fact that the till was out of production and the FTT had been unable to see a working model.

(6) The effect of the lapse of time on Mr Khawaja's evidence. The FTT found in this respect that the matters that were the subject of the appeal would

have remained fresh in Mr Khawaja's mind, and that, on the basis of the evidence heard by the FTT, Mr Khawaja's memory was undimmed.

65. Mr Wheeler sought to criticise the FTT's reasoning. We do not consider that any of those criticisms can amount to an error of law on the part of the FTT. Mr Wheeler is essentially making the same submissions as failed to persuade the FTT. We put aside any question whether we would have come to the same conclusion; that is not the relevant consideration. In our view, the FTT considered the right issues in this regard and was entitled to reach the conclusion that it did.

66. We should refer to one particular point made before us, namely the remarks made by Moses LJ in refusing Mr Khawaja's application to appeal from Mann J's judgment in the penalty appeal. Lord Justice Moses made the point that the case was by that stage very stale, and expressed the hope that the Revenue would not seek to adduce fresh evidence. There was a dispute whether fresh evidence was in fact adduced, which we do not consider is necessary to resolve. Even if the FTT heard evidence from HMRC that had not been before the general commissioners, that would not have been the consequence of delay, but the consequence of the fact that the case had been remitted. It was in any event a factor taken into account by the FTT, and the FTT was entitled to reach the conclusion that it did.

Reduction of penalty for unreasonable delay

67. The FTT asked itself (at [32]) whether there was anything it could do in the light of its conclusion that there had been an unreasonable delay but not one that had prejudiced Mr Khawaja. The FTT rejected a submission by Mr Wheeler that the FTT could use its discretion under s 100B(2)(b)(iii) TMA. It held that its powers were limited by the statute, and that it did not have the power to reflect the delay by way of an adjustment to the penalty.

68. The relevant part of s 100B is as follows:

> "(2) On an appeal against the determination of a penalty under section 100 above …
>
> (b) … the First-tier Tribunal may –
>
> …
>
> (iii) if the amount determined appears to be excessive, reduce it to such amount (including nil) as it considers appropriate"

69. The reasoning of the FTT, supported on this appeal by Mr Tolley, was that the power of reduction arose only if the FTT considered that the *amount* of the penalty was incorrect. The FTT took that to relate to the calculation of the penalty itself and the factors giving rise to it. It could not, the FTT found, be reduced to take into account some totally extraneous and unlinked event.

70. We do not consider that the power of the FTT to adjust the penalty is constrained in the way the FTT found it to be. Part of the purpose of a penalty is to punish the conduct of the person concerned. Factors which go to the appropriate level

of punishment are not confined to matters of calculation, nor to the factors which HMRC decide are appropriate to take into account. If, as in this case, a breach of the reasonable time requirement is established after the event, then, as held by Lord Bingham in *Attorney General's Reference (No 2 of 2001)*, at [24], the appropriate remedy might be a public acknowledgement of the breach and a reduction in the penalty.

71. The FTT is not, accordingly, confined to a review of the arithmetic and the extent of the mitigation allowed by HMRC. The FTT is entitled, and indeed required, to consider all the material circumstances. The fact that the penalty is, as Mr Tolley urged upon us, tax-geared and not time-geared, does not affect that fundamental power of the FTT to do justice in the amount of the penalty if, acting judicially and taking account of all the relevant circumstances of the case, it regards the amount of the penalty as excessive. Nor do we accept that a reduction in the amount of the penalty to take account of this factor would be tantamount to damages; it would be a recognition that, in the events that have happened, the amount of the penalty is too great.

72. Furthermore, we accept, as Mr Wheeler submitted, that article 13 ECHR guarantees an effective remedy under national law for a breach of the reasonable time requirement under article 6.1 (*Kudla v Poland* (2002) 35 EHRR 11, at para 156). If there could be no reduction in the penalty, the tribunal would be unable to provide an effective remedy for such breach, and it is unclear if any other remedy would effectively be available to Mr Khawaja.

73. We allow Mr Khawaja's appeal on this ground. We shall consider later whether, in exercise of the same powers as the FTT has (s 100B(3B) TMA), we consider any adjustment to the amount of the penalty is required on this basis.

Rebuttal of presumption: evidential burden

74. It had been common ground before the FTT that the effect of s 101 TMA, which provides that any assessment that can no longer be varied by a tribunal, on appeal, or by the court, is sufficient evidence for the purpose of penalty proceedings of this nature, creates a rebuttable presumption as to the income charged by those assessments.

75. Before the FTT, part of Mr Khawaja's case was that there was no evidence that he was the sole beneficiary of any under-declared sales of the restaurant business, and that it was just as likely that any under-declared profits would have been shared equally between Mr Khawaja and his brother, Mr Din. The FTT found, at [65], that Mr Khawaja had not discharged the evidential burden of rebutting the presumption created by the decision of the general commissioners that the undisclosed profits had been received as income by Mr Khawaja.

76. The FTT reviewed the evidence, remarking that whilst it showed that Mr Din had a financial interest in the business, it did not go further than that. But the FTT was of the view that the mere fact that Mr Khawaja and Mr Din were equal

shareholders and directors did not necessarily imply an equal division of profits. It found that there was no more than a suggestion that Mr Din benefited from any undisclosed takings or that those amounts were ploughed back into the business.

77. Mr Wheeler submits that the FTT were in error in finding that Mr Khawaja had not discharged the evidential burden in this respect. He relies on *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264. That case, in the House of Lords, addressed the question whether, if the imposition of a burden of proof on a defendant in criminal proceedings infringed the presumption of innocence in article 6.2 ECHR, the relevant statute should be read down under the Human Rights Act 1998 so as to impose an evidential and not a legal burden on the defendant. Mr Wheeler referred us to the explanation offered by Lord Bingham at the outset of his opinion (at [1]) on the distinction between the evidential burden and the burden of proof:

> "An evidential burden is not a burden of proof. It is a burden of raising, on the evidence of the case, an issue as to the matter fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that the ground for exoneration does not avail the defendant."

78. We are concerned here, not with a provision that imposes a reverse burden of proof on a defendant, but with a statutory presumption that an assessment that can no longer be altered, on appeal or otherwise, is correct. It is, as Mr Tolley submitted, clear that the evidential burden this places upon a person in penalty proceedings cannot be discharged by merely raising the possibility that another person might have received part of the income. There must be sufficient evidence for the tribunal of fact to consider whether the presumption has been rebutted; a mere suggestion is not enough.

79. Mr Wheeler argued that there was evidence that Mr Din had habitually received significant wages and other remuneration from SRL. He argued that it was possible that SRL itself had retained the profits. Further, he submitted that Mr Etty for the HMRC had admitted in cross-examination that HMRC had failed to find any unaccounted bankings or expenditure or capital accretions of Mr Khawaja or SRL, and had not undertaken any investigation into Mr Din.

80. The weight to be attached to the evidence was a matter for the FTT. The FTT, at [60] to [65] reviewed that evidence in detail. It concluded by rejecting the submission that Mr Khawaja was not the sole beneficiary of the undisclosed takings. In our judgment the FTT applied the correct test, and was fully entitled to reach that conclusion on the evidence before it.

81. We dismiss this ground of Mr Khawaja's appeal.

Suppressed takings

82. The approach adopted by the FTT to the question of the under-declaration of profits was as follows. It first referred to the earlier findings of the general commissioners, on which HMRC relied. It set out extracts from the findings of the

general commissioners, in relation first to the finding that there was evidence of irregularity in the recording of meal sales, and secondly to the computation of sales and the consequent finding of an amount of under-declaration. Certain findings of fact by the general commissioners were also recorded.

83. The FTT found that the general commissioners had used the business economic exercises in evidence, and their own variation, to calculate the amount of suppressed takings, rather than to establish whether there had been a suppression. The FTT took the same approach.

84. Mr Wheeler submitted that this approach was an error of principle by the FTT. He argued that this approach restricted itself to the findings of the general commissioners and failed, either at all or at least adequately, to have proper regard to Mr Khawaja's arguments and to the expert evidence of Mr Ferner and the calculations produced by Mr Khawaja to demonstrate that there were no suppressed takings.

85. We do not consider the approach adopted by the FTT can be regarded as wrong in principle. In the light of the evidential presumption in relation to the decision of the general commissioners, the FTT was entitled to consider, as a preliminary matter, the circumstances in which the general commissioners had found that there was evidence of irregularity in the recording of meal sales. That depended on the actual facts, and not on any subsequent economic analysis. We accept that Mr Khawaja's case was that the calculations he had produced demonstrated that there had been no suppression; the FTT also accepted that that was his case (see [37]). If the FTT, when examining that evidence, which it did in considerable detail, had agreed with Mr Khawaja's calculations, then that is the finding it would have made when considering the question of quantum, and it would not have been deflected from that course by its finding that there was evidence of undisclosed takings.

86. The way in which the First-tier Tribunal approaches the evidence is largely a matter for that tribunal. This tribunal can only interfere if the approach displays an error of law, such as if the result of the approach is that the First-tier Tribunal has failed to take proper account of the evidence, and if as a consequence the decision of that tribunal is perverse. Whilst the FTT in this case could have adopted a different approach, for example by addressing a single question of whether there were undisclosed takings, rather than the two-stage approach it did adopt, it is not the case that the approach taken resulted in the expert evidence, business economic exercises or calculations being disregarded. There was no error of law in this respect by the FTT.

87. Mr Wheeler also criticised the specific findings of the FTT on the evidence it considered in relation to whether there was a suppression of takings. The findings in question related to (i) numbers of 'z' readings from the till; (ii) failure to keep a full set of meal bills; (iii) understatement of customer numbers, and inaccuracy of accounting records and company accounts; and (iv) the uncommercial nature of the delivery and invoicing of SRL's supplies by its suppliers.

88. None of these criticisms approach the level required to meet the *Edwards v Bairstow* test. The FTT considered the evidence. It analysed in detail (at [40] to [45]) the system of billing and the workings of the till, including in particular the evidence of Mr Khawaja himself and of Mr Staniland, the expert witness. It considered the witness statement of Mr Matlub as to the supplier's invoicing methods and Mr Khawaja's own evidence. The weight to be attached to that evidence was a matter for the FTT, and it was entitled on the evidence to come to the conclusion it reached.

89. The FTT then turned to consider the correct amount of sales, and accordingly the level of suppression, taking – as had the general commissioners – as a base period the tax year 1995/96. The general commissioners had based their own calculation on the amount of raw meat that had been purchased. Those figures were adopted by the parties as an appropriate starting point. Evidence was given on behalf of Mr Khawaja by Mr Ferner, an independent expert and consultant on food matters, specialising in meat. Having commented on the limitations the FTT considered there to have been in the approach adopted by Mr Ferner, in relying on test conditions and a small sample, the FTT adopted that evidence as its starting point. On that basis the FTT took as the first step in its analysis Mr Ferner's calculations of net weight of whole chickens, chicken breasts and other meat.

90. The next step taken by the FTT is the subject of criticism by Mr Wheeler. The FTT assumed that a whole chicken would represent 50% breast meat and 50% thigh. It needed to make such an assessment, because the evidence of Mr Ferner as to portion size depended on that classification. The FTT made its own assumption in this respect because, as it said in [56], it regarded the approach adopted by Mr Ferner, and by Mr Wheeler in his submissions, as flawed in that it had failed to take account of the fact that weights would vary for each cut of meat. Mr Wheeler submitted that this was an error, as it had led to the FTT finding a different average portion size from that which Mr Ferner had favoured in his unchallenged evidence in that respect. We do not accept that criticism. In our judgment the FTT was entitled to find a flaw in the approach taken by Mr Ferner. That flaw exposed a missing piece of the jigsaw which, in the absence of any evidence, the FTT were bound to estimate. There is nothing unreasonable in the approach taken by the FTT in this respect. There was nothing scientific about Mr Ferner's estimated average portion size, and the FTT was entitled to disregard it in favour of a more structured approach.

91. Having ascertained the total weights of chicken breasts, chicken thighs and other meats, the FTT applied those weights to Mr Ferner's average portion size. That gave an average weight per portion of 6.77 ozs. The FTT did not set out its calculation in detail, but there was a total weight of 7,378 lbs, or 118,048 ozs, producing (rounding down) 17,436 meals. Using Mr Khawaja's average value per total meal of £13.69, the VAT inclusive amount was £238,698; a VAT exclusive amount of £203,147. (The FTT's total was £203,158, which is no doubt explained by rounding, but we shall adopt our own calculation.)

92. Mr Wheeler submitted that the FTT's calculation fell into error at this stage because it omitted the element of sales attributable to buffet meals. He said that the buffet meals were on an "all you can eat" basis and that accordingly any calculation

of sales based on available meat and chicken yield portion size required adjustment to reflect the amount of chicken and other meat comprised in buffet meals. The FTT had found (at [54]) that there were no evidenced figures for buffet sales.

93. In making that finding it does appear to us that the FTT were in error. Mr Khawaja had produced in evidence calculations based on till receipts. Although those receipts were not a complete record, as there was, as the FTT found at [40], no system of taking copy or duplicate bills, this was nonetheless evidence which the FTT ought to have considered for the purpose of its own calculation. It is evident that an element of the sales was of buffet meals. Those meals were sold at £8.50 per meal, to which should be added £2.50 in respect of drinks (the same amount as was incorporated in Mr Khawaja's figure of £13.69 per meal). Although Mr Tolley argued that the FTT did not have sufficient information to factor in buffet meals, we consider that those meals ought properly to have been reflected in the calculations. This should not, on the other hand, be seen as a criticism of the FTT. As the FTT itself observed, at [55], it was faced with the difficult task of reconstructing the takings of a business with insufficient primary records on which any reliance could be placed. But given the evidence that part of the turnover was represented by buffet meals, we consider that factor should have been reflected in some way in the reconstructed figures.

94. We do not consider that it would be appropriate, at this stage in these long-running proceedings, to remit this question to the FTT. That in our view would not be in the interests of either of the parties, or in the interests of justice. We consider that the correct course is to adopt the evidence of Mr Khawaja as to the proportion of meals that were buffet meals, namely 6.64%, and to apply that to our amended version of the FTT's calculation. To do this we first deduct the buffet meals percentage from the total sales, inclusive of VAT. This gives a remaining figure (for non-buffet meals) of £222,848. To that figure there must be added £11 (that is £8.50, the price of the buffet meal, plus £2.50 for drinks) for each buffet meal. Applying the relevant percentage to the total number of meals gives 1,158 buffet meals, which in turn results in a total sales figure for buffet meals of £12,738. The total VAT inclusive sales figure therefore comes to £235,586, and the figure exclusive of VAT is £200,498.

95. On this basis, and comparing that figure with the declared sales for 1995/96 of £184,938, we find that there were undeclared takings for that year of £15,560.

96. Given that finding, the argument of Mr Wheeler to the effect that the FTT would have had to find that there was no suppression because during the investigation the Revenue had expressed the view that a difference of £5,000 or possibly £10,000 could be explained by further wastage falls away. We should say, however, that even if the figures had made that a relevant point, the argument would have been wholly misconceived. Statements of such a nature by HMRC during an investigation have no impact on the determination of the tribunal.

97. Having decided the level of suppression for the year 1995/96, the FTT turned to consider the position for the remaining years under appeal. In doing so it examined the approach that had been taken by the general commissioners and accepted by

Lawrence Collins J in the High Court, that is to adjust the figure downwards for earlier years and upwards for later years. It referred to the fact that no evidence had been produced to show that the approach taken had been incorrect and that no alternative figures to replace those used by the general commissioners had been produced. It then adopted a percentage approach, based on that of the general commissioners, so as to reflect its own different starting point in respect of 1995/96.

98. Mr Wheeler criticised the laddering approach as incompatible with article 6.2 ECHR. We do not agree. The presumption arising by virtue of s 101 TMA in relation to assessments that have become final does not deprive the presumption of innocence in article 6.2 of its substance. Mr Khawaja had, and availed himself of, rights to appeal in respect of those assessments. He had the opportunity to rebut the presumption, including by providing evidence in relation to years other than 1995/96. Absent a challenge to the determination of the general commissioners on that basis, it is not in our view open to Mr Khawaja to dispute those findings on the basis of article 6.2.

99. We apply the same laddering approach as was taken by the FTT, starting with our own figure for suppression in 1995/96 of £15,560. Adapting the table set out in [58] of the FTT decision, we arrive at the following figures (which omit 1992/93, as no penalty was claimed for that year):

Tax year	**Laddering percentage**	**Laddering applied to suppressed 1995/96 restaurant takings**
1993/94	51%	£7,935
1994/95	76%	£11,825
1995/96	100%	£15,560
1996/97	124%	£19,294
1997/98	149%	£23,184
1998/99	173%	£26,918

Amount of penalty

100. The FTT arrived at the amount of the penalty by first determining that the penalty would be abated by 60% to reflect an abatement of 5% for disclosure, 15% for quantum and gravity and 40% for cooperation. Before us Mr Wheeler argued that the penalty should be further abated to reflect the fact that any concealed takings would have been received by Mr Din as well as by Mr Khawaja. We have already rejected the submission that the FTT made any error in relation to that matter. Mr Khawaja's case that Mr Din had benefitted was properly rejected by the FTT. There was no question of an abatement on that account.

101. The effect of s 100B(3B) TMA, which confers on this tribunal the same powers as those of the FTT to determine the amount of the penalty, is that we are required to approach the question of the amount of the penalty afresh. We should nonetheless have regard to the basis upon which the FTT arrived at its conclusion. As the FTT set out, by virtue of s 95 TMA the maximum penalty is 100% of the difference between the amount of tax due on the return and the amount it would have been on a complete and accurate return. The minimum penalty is nil. We are content to accept the determination of the FTT in respect of disclosure and cooperation. The amount of the abatement for size and gravity, particularly in relation to size, does however, in the light both of the findings of the FTT and of our own findings, fall to be revisited.

102. The amount of suppressed takings for the year 1995/96 found by the FTT was £18,220. The corresponding amount arrived at by the general commissioners in respect of the same period was £28,032. When aggregated with other years using the laddering approach, that was a significant reduction, and sufficient, in our view, to have been reflected in a further penalty abatement. However, we do not consider that the further reduction on this account should be any more than 5%. A deficiency in the amount found by the FTT over the whole period (excluding 1992/93) of £122,652 remains a serious one. Turning to our own conclusion, the total we have found is £104,716. That is a reduction in the amount of the suppression on which the penalty was determined by the FTT, but we do not consider that it is a significant enough reduction to merit a further abatement on that account. The reduction in the amount of the suppressed takings will in any event be reflected in the amount of the penalty, and we think a commensurate reduction on that account is sufficient relief.

103. Our conclusion therefore is that the abatement in respect of the penalty should be increased to 65%. But that is before considering whether any reduction should be made in respect of the delay which, we have held, was unreasonable in the terms of article 6.1 ECHR. We have decided that this tribunal, as well as the FTT, has jurisdiction to reduce a penalty to reflect delay, if we consider that the penalty would otherwise be excessive. But before considering whether that would be the case, we must first calculate the amount of the penalty that would arise having regard to our conclusions.

104. We gratefully adopt the table employed by the FTT at [74] of its decision. That table set out the calculation of the tax based on assumed tax rates. Mr Wheeler argued that these should be adjusted to reflect lower rates of tax, but did not provide any evidence to support such a reduction. We therefore reject that argument and use the rates employed by the FTT.

Tax year	**Suppression (£)**	**Tax rate**	**Tax**	**35% penalty (£)**
1993/94	7,935	40%	3,174.00	1,110.90
	[2,052	25%	513.00]	

	[9,773	40%	3,909.20]	
1994/95	11,825		4,422.20	1,547.77
	[4,124	25%	1,031.00]	
	[11,436	40%	4,574.40]	
1995/96	15,560		5,605.40	1,961.81
	[8,671	24%	2,081.04]	
	[10,623	40%	4,249.20]	
1996/97	19,294		6,330.24	2,215.58
	[2,194	23%	504.62]	
	[20,990	40%	8,396.00]	
1997/98	23,184		8,900.62	3,115.21
1998/99	26,918	40%	10,767.20	3,768.52
Totals	104,716			13,719.79

105. Before any reduction for delay, the penalty would be £13,719.79. We consider that a penalty in this amount would be excessive, as it would fail to reflect the breach of Mr Khawaja's article 6.1 right to a hearing within a reasonable time. On the other hand, although that delay was unreasonable, it was not prejudicial to Mr Khawaja, and the interests of justice would not in our view be served by a substantial reduction. We therefore fix that reduction at 10%, giving a final determination of the penalty of £12,347.81. In setting the penalty in this amount in respect of the under-declared profits of SRL, we should also make it clear that we have taken into account the existing determined penalty of £6,000 in respect of other under-declared income.

Decision

106. On the grounds of appeal on points of law, we allow Mr Khawaja's appeal to the extent of (i) the jurisdiction of the FTT under s 100B TMA to reduce a penalty on account of a breach of an appellant's rights to a hearing within a reasonable time under article 6.1 ECHR; and (ii) the failure by the FTT to take account of buffet meals in its calculation of the amount of the suppressed takings. Otherwise, Mr Khawaja's appeal on those grounds is dismissed.

107. We allow HMRC's cross-appeal on the date that the FTT should have taken as the starting point in considering whether there had been an unreasonable delay for article 6.1 purposes, but dismiss it on the issue of the unreasonableness of the delay.

108. Pursuant to s 100B(b)(ii) and (3B) TMA we find that the amount of the penalty determined is excessive, and we have reduced it to £12,347.81.

ROGER BERNER
TIM HERRINGTON

UPPER TRIBUNAL JUDGES

RELEASE DATE: 12 August 2013