TC02160

Appeal number: TC/2012/00236

INCOME TAX – Penalty – Section 93A Taxes Management Act 1970 – late submission of partnership return – appeal submitted by a partner other than the "representative partner" – whether Tribunal has jurisdiction to hear appeal – whether penalty invokes criminal head of Article 6.1 of European Convention on Human Rights – whether absence of direct right of appeal by the appellant denial of right to fair hearing – whether restrictions on right of appeal mean Tribunal is not a tribunal of "full jurisdiction" for the purposes of the Convention – whether Section 93A can be construed to give effect to Convention rights

FIRST-TIER TRIBUNAL
TAX CHAMBER

LINDA JARVIS **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 9 July 2012 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 16 August 2011 (with enclosures) and HMRC's Statement of Case submitted on 3 February 2012 with enclosures).

DECISION

Introduction

1. This is an appeal against the first fixed penalty imposed under Section 93A (2) Taxes Management Act 1970 ("TMA") and the second fixed penalty imposed under Section 93 A (4) TMA, by virtue of determinations made under Section 100 TMA, for the late filing of a partnership tax return for the year ending 5 April 2010. The appeal raises the question whether the Tribunal has jurisdiction to hear an appeal brought by a partner other than the representative partner.

The facts

2. On 6 April 2010 HMRC issued a tax return to the representative member of a partnership called Phoenix Litho ("the partnership"). The representative member was Mr Malcolm Jarvis. The filing date for the return was 31 October 2010, if a paper return was filed, or 31 January 2011 if the return was filed electronically.

3. The return was not submitted in time. Indeed, HMRC note that at the date of the filing of their Statement of Case (3 February 2012) the partnership return remained outstanding.

4. A first penalty notice under Section 93A (2) was issued to each partner (Mr Malcolm Jarvis and Mrs Linda Jarvis) on or after 15 February 2011. The penalty assessed on each partner was £100.

5. On 3 March 2011 HMRC received an appeal from Mrs Linda Jarvis against the imposition of her partnership penalty. HMRC's records record the receipt of this letter but HMRC were unable to supply a copy.

6. On 28 March 2011, HMRC replied by letter to Mrs Jarvis, which according to HMRC, asked Mrs Jarvis to clarify the identity of the nominated partner of the partnership. HMRC were unable to produce a copy of this letter. HMRC's understanding of the contents of this letter is based on the following entry in their electronic file:

> "09/10 PEN APPEAL RECD – ON BF FOR 30 DAYS AS UNCLEAR WHO IS NOMINATED PARTNER – LTR ISSD TO MRS L M JARVIS TO CLARIFY."

7. Mrs Jarvis replied on 11 April 2011. She noted the contents of HMRC's letter of 28 March 2011(which I assume to be the letter referred to in HMRC's electronic file). Mrs Jarvis continued:

> "I wish to appeal against the penalty imposed on me for the tax year return 2009/2010, since my tax return was completed online and the Partnership form sent to you on the due date.

> However, it is with regret that the partnership forms did not arrive at your office.
>
> This is clearly not my fault and I would sincerely question HM postal services in this matter who have failed to deliver the appropriate forms to your office on the due date after I clearly pay the postage the post office and even weighed the package so that there were no mistakes in send [sic] the form.
>
> Your advise [sic] in this matter is appreciated."

8. The letter was signed by Mrs Jarvis but made no reference to the question of the identity of the representative partner. If the description of the letter in HMRC's electronic file was correct I would have expected Mrs Jarvis address this issue and find it odd that she did not, assuming it had been clearly raised in HMRC's letter of 28 March. Even odder is the fact that the issue then seems to have been overlooked in all subsequent correspondence, including HMRC's internal review. The point was only raised again in HMRC's Statement of Case.

9. On 19 July 2011 HMRC issued an appeal decision letter giving their view of the appeal. HMRC offered a review of the penalty under Section 49A (2) (b) TMA 1970. As noted, this made no reference to the identity of the appellant or representative member and concentrated on whether Mrs Jarvis had a reasonable excuse for failing to submit the partnership return. In short, HMRC considered that, notwithstanding extra time had been allowed to submit the partnership's 2009 – 2010 tax return, no return had been submitted and Mrs Jarvis had not provided proof of postage. The letter was addressed to Mrs Jarvis and advised her of her appeal rights, but did not indicate that an appeal could only be brought by the representative partner.

10. A second penalty notice, under Section 93A(4), was issued to each partner (Mr and Mrs Jarvis) on or after 2 August 2011 for failure to submit the partnership's tax return for the tax year 2009 – 2010. The penalty for each partner was £100.

11. On 16 August 2011, Mrs Jarvis completed a form appealing against the penalty. Mrs Jarvis gave her full name but also noted that the representative partner of the partnership was her husband, Mr Jarvis. The amount of the penalty appealed against was noted to be £100. She stated, as a reason for the appeal, but she was "no longer a partner." She then added: "We notified you of this and the last penalty notice read 'No monies owed': – Malcolm Jarvis [Mr Jarvis] centres tax return on time!"

12. On 6 September 2011 HMRC wrote to Mrs Jarvis giving their view of her appeal. The letter made no reference to the issue of the representative partner. Instead, it focused on the question of "reasonable excuse". The letter stated:

> "As you have not provided the cessation date when your Partnership Business ceased on your previous returns, this is the reason why the Self Assessment Form was issued to you for 2009 – 2010. The [sic] no monies owed would have appeared on your Individual Text Return as there was no tax liability."

13. The letter went on, in standard form, to advise Mrs Jarvis of her appeal rights.

14. Mrs Jarvis requested a review of the decision on 20 September 2011. Under the heading "Why I do not accept HMRC's view" she stated: "I was not a partner at this time. We have already conveyed information to the HM Revenue & Customs on many occasions."

15. HMRC reviewed Mrs Jarvis's case and concluded that the decision notified in the letter of 6 September 2011 should be upheld. In their letter of 25 October 2011 HMRC, notifying Mrs Jarvis of the outcome of their review (the letter was addressed to Mrs Jarvis), HMRC stated:

> "My reasons for this are that the 2009/10 partnership self-assessment return is still outstanding. This return was issued as HMRC records show that you traded as a partnership in tax year 2009/10. A check of your 2009/10 individual Self Assessment tax return shows that you included partnership income and therefore the 2009/10 Partnership tax return is due."

16. The letter continued, in standard form, to advise Mrs Jarvis of her appeal rights but did not refer to the question of the identity of the representative partner. Mrs Jarvis's 2009 – 2010 individual self-assessment tax return was not included in the papers before the Tribunal.

17. On 22 November 2011 Mrs Jarvis appealed to the Tribunal against the imposition of penalties of £200 in respect of the late filing of the partnership's tax return. In the notice of appeal, Mrs Jarvis states:

> "We had advised HMRC that Mrs Jarvis was not a partner in a business with her husband Mr Malcolm Jarvis.
>
> Due to ill-health in 2009 she played no active part in the business and did not receive any monies from the business."

18. HMRC point out that the total penalties due by Mr and Mrs Jarvis amounted to £400 i.e. £200 each. It appears that Mrs Jarvis is simply appealing against penalties imposed on her.

19. In their Statement of Case, HMRC argued that there was no valid appeal before the Tribunal because the appeal had been bought by Mrs Jarvis who was not the representative partner. Mrs Jarvis has not replied to HMRC's Statement of Case.

20. There appears to be no dispute that Mr Jarvis was the representative partner for the purposes of Section 12AA TMA. In the documents before me, there is no indication that Mrs Jarvis is acting as an agent for Mr Jarvis.

The legislation

21. Section 93A TMA, which was in force during the tax year 2009 – 2010 but which has now been repealed, provided as follows:

> "93A Failure to make partnership return

(1) This section applies where, in the case of a trade, profession or business carried on by two or more persons in partnership—

(a) a partner (the representative partner) has been required by a notice served under or for the purposes of section 12AA (2) or (3) of this Act to deliver any return, and

(b) he or a successor of his fails to comply with the notice.

(2) Each relevant partner shall be liable to a penalty which shall be £100.

(3) …

(4) If—

(a) the failure by the representative partner or a successor of his to comply with the notice continues after the end of the period of six months beginning with the filing date, and

(b) no application is made under subsection (3) above before the end of that period,

each relevant partner shall be liable to a further penalty which shall be £100.

(5) …

(6) Where, in respect of the same failure to comply, penalties under subsection (2), (3) or (4) above are determined under section 100 of this Act as regards two or more relevant partners—

(a) no appeal against the determination of any of those penalties shall be brought otherwise than by the representative partner or a successor of his;

(b) any appeal by that partner or successor shall be a composite appeal against the determination of each of those penalties; and

(c) section 100B (3) of this Act shall apply as if that partner or successor were the person liable to each of those penalties.

(7) On an appeal against a determination under section 100 of this Act of a penalty under subsection (2) or (4) above that is notified to the tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the tribunal may—

(a) if it appears … that, throughout the period of default, the person for the time being required to deliver the return (whether the representative partner or a successor of his) had a reasonable excuse for not delivering it, set the determination aside; or

(b) if it does not so appear …, confirm the determination.

(7A) For the purposes of this section the filing date for a year of assessment (Year 1) in the case of a partnership which includes one or more individuals is—

(a) 31st January of Year 2, or

(b) …

(7B) …

(8) In this section—

"the filing date" means the day specified in the notice under section 12AA (2) or (3) of this Act;

"the period of default", in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered;

"relevant partner" means a person who was a partner at any time during the period in respect of which the return was required."

22. Section 100 TMA, so far as material, provides that:

"(1) … an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

(5) If it is discovered by an officer of the Board authorised by the Board for the purposes of this section that the amount of a penalty determined under this section is or has become insufficient the officer may make a determination in a further amount so that the penalty is set at the amount which, in his opinion, is correct or appropriate."

23. Section 100A, so far as material, provides:

"(2) A penalty determined under section 100 above shall be due and payable at the end of the period of thirty days beginning with the date of the issue of the notice of determination.

(3) A penalty determined under section 100 above shall for all purposes be treated as if it were tax charged in an assessment and due and payable."

Discussion

Section 93A Taxes Management Act 1970

24. HMRC resist this appeal on the sole basis that Mrs Jarvis is not the representative partner for the purposes of Section 93A TMA and that, therefore, no valid appeal is before the Tribunal. HMRC make no submissions in respect of "reasonable excuse" or in respect of the claim made by Mrs Jarvis that the partnership return had been posted to HMRC within the relevant time limit.

25. HMRC acknowledge that the decision letters of 19 July and 6 September 2011 and the review conclusion letter of 25 October 2011 all incorrectly accepted the appeal.

26. Section 93A is a somewhat unusual penalty provision. It imposes a penalty on each "relevant partner" (a person who was a partner at any time during the period in respect of which the return was required: Section 93A (8)) in respect of the failure by the representative partner to submit a partnership tax return; but it gives the right of appeal solely to the representative partner. Section 93A (6) (a) is quite explicit on this point. It states:

> "… [N]o appeal against the determination of any of those penalties shall be brought otherwise than by the representative partner or a successor of his [.]"

27. Mrs Jarvis, therefore, has no right of appeal in her own name against the penalty imposed upon her. She must rely on her husband, Mr Jarvis, acting as the representative partner, to bring the appeal in respect of the penalty imposed on her.

28. I have considered whether it would be possible to substitute Mr Jarvis for Mrs Jarvis under Rule 9 of the Tribunal's Rules. In my view, it would not be appropriate to do so because Mr Jarvis has not appealed.

29. I note that the provisions of Section 93A have been replaced, at least in this respect, by similar provisions in paragraph 25 Schedule 55 Finance Act 2009.

Whether the penalty under Section 93A is a criminal charge for the purposes of Article 6.1 of the European Convention on Human Rights

30. It is well established that, generally, tax disputes do not fall within the ambit of the civil head of Article 6.1 of the European Convention on Human Rights (right to a fair trial) ("the Convention"): *Ferrazini v Italy* [2001] STC 1314 and *Jussila v Finland* (2006) (A/73053/01 at [29]), a proposition which was recently confirmed by Simon J in *R (on the application of Totel Ltd) v The First Tier Tribunal & Anor* [2011] STC 1485 (at 1516 paragraph 131).

31. The *Jussila* case did, however, decide that the VAT surcharges in question (which concerned errors in VAT declarations) involved criminal charges for the purposes of Article 6 of the Convention. The European Court of Human Rights ("the Court") considered the three-fold criteria, sometimes referred to as the "Engel criteria", in determining whether the surcharges were criminal in nature.

32. First, it was necessary to determine whether the provision(s) defining the offence charged belonged, according to the legal system of the national state, to criminal law, disciplinary law or both concurrently. This criterion, however, provides no more than a starting point. The (more important) second and third conditions require a court to consider respectively the nature of the offence and, finally, the nature and degree of severity of the potential penalty the nature.

33. In *Jussila* the Court continued stating:

> "31. The second and third criteria are alternative and not necessarily cumulative. It is enough that the offence in question is by its nature to be regarded as criminal or that the offence renders the person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere (see *Ezeh* and *Connors*, cited above, § 86). The relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character (see *Öztürk v. Germany*, 21 February 1984, § 54, Series A no. 73; see also *Lutz v. Germany*, 25 August 1987, § 55, Series A no. 123). This does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Ezeh* and *Connors*, cited above, § 86, citing, inter alia, *Bendenoun*, cited above, § 47)."

34. The Court further observed [35]:

> "No established or authoritative basis has therefore emerged in the case-law for holding that the minor nature of the penalty, in taxation proceedings or otherwise, may be decisive in removing an offence, otherwise criminal by nature, from the scope of Article 6."

35. The Court considered it material that the surcharges in question were of application to taxpayers generally and not to a special class of persons [38]. Moreover, the surcharge was not intended to be pecuniary compensation for damage suffered but as a punishment to deter reoffending. The Court concluded [38]:

> "It may therefore be concluded that the surcharges were imposed by a rule whose purpose was deterrent and punitive. The Court considers that this establishes the criminal nature of the offence. The minor nature of the penalty renders this case different from *Janosevic* and *Bendenoun* as regards the third *Engel* criterion but does not remove the matter from the scope of Article 6. Hence, Article 6 applies under its criminal head notwithstanding the minor nature of the tax surcharge."

36. Applying these tests, I have come to the conclusion that the penalty imposed by Section 93A is such that the criminal head of Article 6.1 of the Convention is invoked. First, the penalty is civil in nature under domestic UK law, but as the Court in *Jussila* indicated, this is by no means determinative. Secondly, the purpose of the penalty is deterrent and punitive in nature. It is intended to deter taxpayers, trading in partnership, from submitting late partnership tax returns. It is not intended to compensate the UK government. The penalty is of general application to all persons trading in partnership. The relatively small size of the penalty is not, in my view, sufficient to deprive it of criminal characteristics for the purposes of Article 6.

Article 6.1 – whether appellant has been accorded the right to a fair hearing

37. Proceeding, therefore, on the basis that the penalty under Section 93A falls within the criminal head of Article 6.1, there are two main points that arise for consideration. First, has Mrs Jarvis been accorded the right to a fair hearing under the

terms of Section 93A? Secondly, does Mrs Jarvis have a right of appeal to a tribunal of full jurisdiction within the meaning of Article 6. If the answer two either of these two questions is in the negative then I must consider whether Section 93A can interpreted in a manner which gives effect to Mrs Jarvis's Convention rights.

38. As regards the first issue, Article 6 guarantees the right to a fair and public hearing by an independent and impartial tribunal established by law. This does not mean that, in all cases, an oral hearing is required (*Jussila* at [41]) and thus it is permissible for this Tribunal to hear relatively simple cases under the "default paper" procedure without a formal hearing. It does mean, however, that the person upon whom a penalty is imposed should have the right to have their case adjudicated upon by a tribunal. Therefore, in my view, Article 6.1 requires that a person who is subjected to a penalty pursuant to Section 93A should be entitled to appeal against that penalty.

39. As I have indicated above, Section 93A (6) explicitly reserves the right of appeal to the representative partner. Mrs Jarvis has no right of appeal under section 93A. I have considered whether, in accordance with Section 3 of The Human Rights Act 1998, I can read Section 93A in a way which is compatible with Convention rights. In my view, I cannot. The clear legislative intent of Section 93A (6) is to exclude partners other than the representative partner from having a right of appeal. To construe subsection (6) in a way which permitted Mrs Jarvis to have a right of appeal in respect of the penalties imposed upon her would require me not only to "go against the grain" of the legislation (see: *Ghaidan v Godin-Mendoza* [2004] 30 UKHL per Lord Nicholls at [33]) but to contradict the clear intention of Parliament.

Article 6.1 – whether the appellant has a right of appeal to a tribunal of "full jurisdiction"

40. Secondly, in considering the appellant's rights under Article 6.1 of the Convention, it is worth noting the restricted basis set out in section 93A(7) upon which this Tribunal can consider a penalty charged under Section 93A satisfies the right to a fair trial. Section 93A(7) effectively limits an appeal against a penalty charged under section 93A(2) or (4) to a consideration of whether there was a reasonable excuse for the representative partner failing to deliver the partnership return.

41. In *Umlauft v Austria* [1995] ECHR 41, the ECHR stated at [37]:

> "that decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6.1 of the Convention... *must be subject to control by a 'judicial body that has full jurisdiction'*."(emphasis added)

42. The decision in *Umlauft* was cited by the Court in the subsequent case *Silvester's Horeca Service v Belgium* 47650/99 [2004] ECHR 97. This decision and the subsequent recent decision in *Segame SA v France* (see below) have not, as far as I am aware, been considered by this Tribunal. For this reason and because the

Silvester's Horeca and *Segame SA* decisions are available only in French, I shall consider them in some detail.

43. The *Silvester's Horeca* decision involved a tax fine of around approximately 2,000,000 Belgian Francs. The taxpayer company had failed to establish certain deliveries or invoices existed, had prepared invoices that did not correspond to reality and had failed to keep certain evidence and documents required by the Belgian VAT Code The taxpayer appealed. The jurisdiction of the tribunal was limited to checking the existence of violations of the VAT code and the legality of tax penalties, but the tribunal had no jurisdiction to judge the appropriateness of the fine or grant a partial or total remission. The Court held that there was a breach of Article 6.1 because the applicant had not had access to a tribunal with full jurisdiction. The Court said:

> "27. Parmi les caractéristiques d'un organe judiciaire de pleine juridiction figure le pouvoir de réformer en tous points, en fait comme en droit, la décision entreprise, rendue par l'organe inférieur. Il doit notamment avoir compétence pour se pencher sur toutes les questions de fait et de droit pertinentes pour le litige dont il se trouve saisi (*Chevrol* v *France*, arrêt du 13 février 2003, § 77).

44. Thus, the Court is saying that a court of full jurisdiction must have the authority to correct or reverse ("le pouvoir de reformer") on all questions of fact and law. In addition, in deciding that the Belgian tribunal was not a court of full jurisdiction the Court observed [28] that the tribunal had jurisdiction only to consider the reality and legality of the fines:

> "La Cour doit constater qu'en l'espèce, la société requérante n'eut pas la possibilité de soumettre la décision prise à son encontre à un tel contrôle de pleine juridiction. Dans son arrêt rendu le 3 octobre 1996 suite à l'opposition à contrainte formée par la société requérante, la cour d'appel de Bruxelles estima en effet qu'elle était uniquement appelée à examiner la réalité des infractions au code de la TVA et à contrôler la légalité des amendes fiscales réclamées *sans être compétente pour apprécier l'opportunité ou accorder une remise complète ou partielle de celles-ci*." (emphasis added)

45. The Court concluded, therefore, that the Belgian tribunal was not a court of full jurisdiction because it did not have the authority either to evaluate the appropriateness ("apprécier l'opportunité") or to grant a partial or total reduction ("accorder une remise complète ou partielle") in the tax fine.

46. The *Silvester's Horeca* decision was considered by the Court in the recent case of *Segame SA v France* 4837/06 (another decision only available in French) in a decision delivered on 7 June 2012. In this case the taxpayer, as a result of a tax audit by the French tax authorities, received tax adjustments for certain prior years, including a penalty of 100% of the understated tax (in respect of works of art and antiques), although this penalty was subsequently reduced by French law to 25% during the course of the proceedings. The taxpayer argued that the administrative

tribunal which heard its appeal was not a court of full jurisdiction contrary to Article 6. The Court dismissed this argument. The Court noted:

> 56. La Cour relève que dans la présente affaire, la requérante a pu former devant le tribunal administratif un recours visant la décharge du rappel de taxe et des pénalités, et saisir ensuite la cour administrative d'appel et le Conseil d'État d'un appel et d'un pourvoi en cassation. Il s'agissait en l'espèce d'un recours de plein contentieux, dans le cadre duquel le juge administratif dispose de pouvoirs étendus : il apprécie tous les éléments de fait et de droit et peut non seulement annuler ou valider un acte administratif, mais également le réformer, voire substituer sa propre décision à celle de l'administration et se prononcer sur les droits de l'intéressé ; en matière fiscale, il peut décharger le contribuable des impôts et pénalités mis à sa charge ou en modifier le montant dans la limite de l'application de la loi, et en matière de pénalités, substituer un taux inférieur à un taux supérieur pour autant que la loi le prévoie (paragraphes 29-30 ci- dessus ; a contrario *Silvester's Horeca Service* précité, § 28).

47. In other words, the Court noted that the administrative tribunal had extensive powers: it was able to evaluate all questions of fact and law and was able not only to quash or ratify the action taken by the tax administration, but also to reverse and substitute its own decision for that of the tax administration and also to decide on the rights of the parties involved. The tribunal was able to discharge the taxes and penalties charged or modify the total amount charged within the limits provided by law; and as regards penalties, the tribunal could substitute a lower penalty rate for a higher rate (when multiple rates applied) depending on the taxpayer's behaviour [30]. The Court contrasted this with the position in of the Belgian tribunal in the *Silvester's Horeca* [28] as described in the passage quoted in paragraphs 37- 38 above.

48. In response to the taxpayer's argument that the administrative tribunal was not a court of full jurisdiction because it had no power to vary the tax penalty, in the absence of a statutory provision permitting it to do so, the court dismissed the argument stating [59]:

> " La Cour observe tout d'abord que la loi elle-même proportionne dans une certaine mesure l'amende à la gravité du comportement du contribuable, puisque celle-ci est fixée en pourcentage des droits éludés, dont en l'espèce la requérante a pu amplement discuter l'assiette (cf. mutatis mutandis *Valico S.r.l. c. Italie* (déc.), no 70074/01, CEDH 2006- III). La Cour admet par ailleurs, comme le souligne le Gouvernement, le caractère particulier du contentieux fiscal impliquant une exigence d'efficacité nécessaire pour préserver les intérêts de l'Etat et observe, en outre, que ce contentieux ne fait pas partie du noyau dur du droit pénal au sens de la Convention (cf. mutatis mutandis *Jussila c. Finlande* [GC], no 73053/01, § 43, CEDH 2006- XIII). Elle considère enfin que le taux de l'amende, fixé à 25% par l'ordonnance du 7 décembre 2005, n'apparaît pas disproportionné (*Malige* précité, § 49 ; a contrario et mutatis mutandis *Mamidakis c.*

> *Grèce*, no 35533/04, § 48, 11 janvier 2007 et *Grifhorst c. France*, no 28336/02, § 105, 26 février 2009)."

49. Thus, the Court noted that French tax law contained an element of proportionality because the penalty was a proportion of the unpaid tax (and the taxpayer was able fully to contest the amount of the substantive tax that was due). The Court also recognised the special character of tax disputes/actions by the tax authorities which involved a need for effectiveness in order to protect the interests of the state. The Court also observed that the litigation was not part of the core criminal law within the meaning of the Convention ("du noyau dur du droit pénal au sens de la Convention").The Court referred to *Jussila* [43] where the Court had said:

> "Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight....Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency…."

50. The Court also considered that the rate of the penalty (25%) was not disproportionate.

51. The Court has applied the same principles in *A Menarini Diagnostics s.r.l. v Italy* 43509/0843509/08 - Decision of 27 September 2011 (fines in respect of infringements of competition law) at [59] and in *Valico srl v. Italy* [2012] ECHR 1167 (fines in respect of infringements of planning law) where the Court said:

> "Therefore, in administrative proceedings, the obligation to comply with Article 6 of the Convention does not preclude a "penalty" being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements of Article 6 § 1 of the Convention must be subject to subsequent control by a judicial body that has full jurisdiction (see *Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria*, 23 October 1995, §§ 34, 37, 42, 39, 41 and 38 respectively, Series A nos. 328 A-C and 329 A-C). The characteristics of a judicial body with full jurisdiction include the power to quash in all respects, on questions of fact and law, the decision of the body below. It must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see *Chevrol v. France*, no. 49636/99, § 77, ECHR 2003-III, and *Silvester's Horeca Service v. Belgium*, no. 47650/99, § 27, 4 March 2004)."

52. This Tribunal must take account of relevant decisions of the ECHR: Section 2 Human Rights Act 1998. As the Court of Appeal stated in *Han v C & E Commissioners* [2001] EWCA Civ 1048 at [25]:

> "Since s.2(1) of the HRA requires the court or tribunal to take into account the Strasbourg case law of the European Court of Human Rights ("Strasbourg") when determining a question which has arisen in connection with a Convention right, that case law provides the starting point for the domestic court or tribunal's deliberations and the court or tribunal has a duty to consider such case law for the purposes of making its adjudication. It is not bound to follow such case law (which itself has no doctrine of precedent) but, if study reveals some clear principle, test or autonomous meaning consistently applied by Strasbourg and applicable to a Convention question arising before the English courts, then the court should not depart from it without strong reason."

53. In my view, the above cases establish a clear test which I should take into account. If a penalty falls within the criminal head of Article 6.1 the Convention requires that the taxpayer should have access to a tribunal of full jurisdiction. In *Segame* the Court appears to have accepted a limitation on the principle established in *Silvester's Horeca*. If domestic law provides for a penalty at a fixed rate, the fact that a tribunal does not have discretion to reduce the rate set by the national legislature does not, of itself, prevent the tribunal being a tribunal of full jurisdiction. Provided that, otherwise, the tribunal has the power to determine all questions of fact and law and can substitute its own decision for that of the tax administration, and is not limited to a purely supervisory role (eg if the tribunal can intervene only where the decision is "unreasonable" in the *Wednesbury* sense), it will be a tribunal of full jurisdiction for the purposes of Article 6.

54. I have concluded that, in respect of Section 93A, this Tribunal is not one of full jurisdiction for the purposes of Article 6 of the Convention. I have reached this conclusion for the following reasons.

55. Section 93A (7) expressly limits the jurisdiction of this Tribunal. First, Section 93A (7) disapplies Section 50(6) to (8) and Section 100B (2) TMA. This is significant because Section 50(6) to (8) set out the powers of the Tribunal in relation to appeals against assessments (it will be remembered that Section 100(A) TMA treats a penalty determined under Section 100 TMA "for all purposes" as if it were tax charge in an assessment and due and payable). Section 50(6) to (8), in general terms, allows the Tribunal to increase or decrease the amount assessed. By excluding Section 50(6) to (8) in the introductory wording of Section 93A (7), the draft of that provision clearly intended to remove the power of the Tribunal to increase or decrease a penalty imposed under Section 93A.

56. This is reinforced by the exclusion of Section 100B (2). For the tax year ended 5 April 2010 Section 100B (2), so far as material, read as follows:

> "Subject to section… 93A (7) of this Act on an appeal against the determination of a penalty under section 100 above section 50 (6) to (8) of this Act shall not apply but
>
> in the case of a penalty which is required to be of a particular amount, the First-tier tribunal may –

(i) if it appears to it that no penalty has been incurred, set the determination side,

(ii) if the amount determined appears to it to be correct, confirmed the determination, or

(iii) the amount determined appears to it to be incorrect, increase or reduce it to the correct amount…."

57. It is therefore clear that, in respect of a penalty imposed on the Section 93A, this Tribunal does not have full power to set the penalty aside or, if it appears incorrect, increase or reduce the penalty. Instead, Section 93A (7) makes it plain that this Tribunal's only role is either to consider whether there was "a reasonable excuse" for the representative partner not delivering a partnership return or, if no such excuse exists, to confirm the penalty determination. It will be noted that the reasonable excuse must be that of the representative partner, not that of the "relevant partner." The Tribunal, therefore, does not have full jurisdiction to determine all matters of fact and law relevant to the penalty determination and cannot substitute its own decision for that of HMRC. Accordingly, in relation to the penalty charged in the present appeal, this Tribunal is not a tribunal of full jurisdiction as required by Article 6.1 of the Convention.

58. In the light of the clear terms of Section 93A (7), and with some hesitation, I have doubts as to whether it is possible to construe that provision in a way which can give effect to the appellant's Convention rights to have access to a tribunal of full jurisdiction under Article 6.1. However, because I have already concluded that Mrs Jarvis has no right of appeal as a matter of domestic law, I shall refrain from expressing a concluded view on this point.

59. Finally, in the context of Article 6.1 generally, I note this Tribunal cannot make a formal declaration of incompatibility: Section 4 Human Rights Act 1998, in particular the definition of "court" in Section 4 (5).

Decision

60. For the reasons given above, the appellant has no right of appeal to this Tribunal. I cannot construe the relevant legislation in a way which is compatible with the appellant's rights under Article 6.1 of the Convention. Accordingly, I have no option but to strike out this appeal.

61. In the circumstances, therefore, it seems to me that the only way in which the appellant can have her case heard is to persuade her husband, the representative partner, to bring an appeal out of time under Section 93A(6) – (7) TMA. Whether a late appeal would be permitted will be a question for the Tribunal hearing that application, but no doubt that Tribunal will bear in mind that HMRC corresponded with Mrs Jarvis and managed to conduct an independent review of its decision without realising that Mrs Jarvis had no direct right of appeal. If HMRC made this mistake it is, perhaps, understandable that Mrs Jarvis made the same mistake. It would

also, in my view, be relevant that Section 93A does not give effect to Mrs Jarvis's rights under Article 6.1 of the Convention.

62. Finally, I have considered whether it would have been more appropriate for this appeal to have been dealt with at a full hearing. It does raise some difficult issues of law. However, bearing in mind that the penalties at stake amounted to £200 and the parties are content for the appeal to be dealt with as a default paper case pursuant to Rule 26 of this Tribunal's Rules, I concluded that it would be disproportionate to postpone the appeal in order for the issues to be dealt with at a full hearing. Accordingly, I concluded that the appeal could be dealt with fairly and justly as a default paper case.

63. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 1 August 2012