TC04875

Appeal numbers:
TC/2014/02334; TC/2014/02338;TC/2014/02341; TC/2014/02344
TC/2014/02346;TC/2014/02348; TC/2014/02351; TC/2014/02352
TC/2014/02353; TC/2014/02354;TC/2014/02355; TC/2014/02357
TC/2014/02359;TC/2014/04767; TC/2014/02603

INCOME TAX – CORPORATION TAX – preliminary hearing on matters of law – COP9 letter issued to Mr Budhdeo ("Mr B") – contractual disclosure offered and refused – whether FTT has jurisdiction to close a "COP9 enquiry" – no –whether HMRC using SA and CT enquiries and Sch 36 Notices to obtain information to allow them to decide whether to prosecute – whether Mr B has Article 6 right not to self-incriminate – yes – whether companies have right not to self-incriminate in reliance on Mr B's right – no - whether Mr B can refuse to respond to Sch 36 Notices in reliance on that right – no, having considered* Funke v France; Saunders v UK; JB v Switzerland; Allen v UK *and other ECtHR authorities – whether the Civil Evidence Act and/or the common law changes that answer – no — similar questions about SA and CT enquiries – relevance of answers when Tribunal decides appeals against Sch 36 Notices and related penalties and applications to close enquiries – whether Police and Criminal Evidence Act (PACE) relevant to the above matters in the context of the Tribunal proceedings – no – application for disclosure of HMRC's information underpinning COP9 letter refused – directions given for substantive hearing of appeals and applications in issue

FIRST-TIER TRIBUNAL
TAX CHAMBER

GOLD NUTS LIMITED **Appellants**
VENTURE PHARMACIES LIMITED
CHEMISTREE HOMECARE LIMITED
CHEMISTREE LIMITED
BLACKBAY VENTURES LIMITED
ZANREX LIMITED
CORONA PROPERTIES LIMITED
BRONZE NUTS LIMITED
VERTEX PROPERTIES LIMITED
R SQUARE PROPERTIES LIMITED
LEYTON ORIENT DISPENSARY LIMITED

DISPENSARY HOLDINGS LIMITED
ENVIROPLEX LIMITED
NOVISCOM LIMITED
SHAMIR PRAVIN BUDHDEO

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice, Strand, London on 13 and 14 October 2015.

Mr Budhdeo in person; Mr James Onalaja of Counsel for all other appellants other than Chemistree Homecare Limited, which was not represented

Mr Michael Jones, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. Mr Budhdeo is both an appellant and a director of the appellant companies ("the Companies"). In this decision, Mr Budhdeo and the Companies taken together are referred to as "the Appellants."

2. On 6 December 2013, HM Revenue & Customs ("HMRC") wrote to Mr Budhdeo informing him that they were enquiring into his affairs under Code of Practice 9 ("the COP9 letter"). Mr Budhdeo was provided with the booklet which sets out that Code of Practice ("the COP9 Booklet"), which has the subheading: "HMRC investigations where we suspect tax fraud."

3. The COP9 Booklet informed Mr Budhdeo that he had a time-limited opportunity to sign a "contractual disclosure facility" ("CDF") admitting he had been involved in tax fraud and agreeing to make a full disclosure. Paragraph 2.3 of the COP9 Booklet said "this is the only way that you can be certain that we will not carry out a criminal investigation into the tax frauds we suspect."

4. In their submissions, the parties used the phrase "the COP9 enquiry" to mean HMRC's investigation as to whether or not Mr Budhdeo should be charged with tax fraud, and this decision uses the same term.

5. On 10 December 2013 Mr Budhdeo replied to the COP9 letter. He refused to accept the CDF, saying "I unequivocally and resolutely deny any tax fraud…I have not committed tax fraud and I will not admit to something I have not done."

6. HMRC also:

   (1) opened enquiries under Finance Act 1998, Schedule 18, paragraph 24 ("Sch 18") into some of the Companies' corporation tax ("CT") returns.

   (2) opened enquiries into Mr Budhdeo's 2011-12 and 2012-13 Self Assessment ("SA") tax returns under Taxes Management Act 1970 ("TMA") s 9A;

   (3) issued Notices under Finance Act 2008, Schedule 36 ("Sch 36 Notices") to some of the Appellants, including Mr Budhdeo; and

   (4) issued penalties under Finance Act 2008, Schedule 36, Part 7 ("Sch 36 penalties") to some of the Appellants.

7. Mr Budhdeo applied to the First-tier Tribunal ("FTT"), asking it to order the closure of the COP9 enquiry and the SA enquiries; he also appealed against the Sch 36 Notice to provide documents and information, and the related penalty.

8. Various of the Companies:

   (1) applied to the First-tier Tribunal ("FTT") to close the enquiries into their CT returns;

   (2) appealed against the Sch 36 Notices; and

(3) appealed against the Sch 36 penalties.

9. In this decision, the appeals against the Sch 36 Notices and against certain of the Sch 36 penalties, together with the applications to close the CT and SA enquiries are called "the Appeals and Applications."

10. A hearing of the Appeals and Applications took place on 3 February 2015 at which certain preliminary matters were decided ("the February 2015 hearing"). The decision was published under reference [2015] UKFTT 432(TC) ("the First Decision").

11. The following issues were separated out to be considered and decided at a further preliminary hearing:

(1) whether the FTT had the jurisdiction to close a COP9 enquiry, and if so, whether the COP9 enquiry into Mr Budhdeo should be closed.

(2) whether HMRC was using its civil enquiry and information powers to obtain information for the purposes of a possible criminal prosecution of Mr Budhdeo, and if so, whether this was compatible with:

(a) the provisions of the Police and Criminal Evidence Act 1984 ("PACE"); and/or

(b) Article 6 of the European Convention on Human Rights ("the Convention"); and

(3) if HMRC was using its civil powers to obtain information for the purposes of a possible criminal prosecution of Mr Budhdeo, what approach the FTT should take to the Appeals and Applications.

12. This purpose of this hearing was to hear and decide those issues. In the light of the parties' submissions, the first issue remains the same, but second and third issues have been clarified and reformulated. The issues are as follows:

(1) whether the FTT has the jurisdiction to close a COP9 enquiry, and if so, whether the FTT should direct the closure of the enquiry;

(2) whether HMRC was using its Sch 36 and SA/CT enquiry powers to obtain information for the purposes of a possible criminal prosecution of Mr Budhdeo;

(3) whether Article 6 of the Convention was engaged following HMRC's COP9 enquiry letter and Mr Budhdeo's refusal to sign the CDF;

(4) whether the Civil Evidence Act 1968 ("CEA"), s 14 or the common law privilege against self-incrimination is/are relevant to the matters listed at (3);

(5) if the answer to questions (3) and/or (4) is yes, is that relevant to, and/or determinative of:

(a) Mr Budhdeo's appeal against the Sch 36 Notice;

(b) the Companies' appeals against the Sch 36 Notices;

(c) the appeals against the Sch 36 penalty notices;

(d) the SA and CT closure notice applications; and

(6) whether any of the provisions of PACE were engaged following Mr Budhdeo's refusal to sign the CDF, and if so, whether this was relevant to, and/or determinative of, the substantive issues before the FTT.

13. The purpose of this hearing was to decide those issues of law. However, as HMRC accepted that they were continuing to consider whether or not to prosecute Mr Budhdeo for tax fraud, I make the single agreed finding of fact that the investigation which gave rise to the COP9 letter is still ongoing.

14. For the reasons given in the main body of this decision, I decided the issues set out at §12 above as follows:

(1) The FTT has no jurisdiction to close a COP9 enquiry.

(2) HMRC accepted that if HMRC's dominant purpose in issuing the Sch 36 Notices and conducting the CT and SA enquiries is to obtain information to decide whether to prosecute Mr Budhdeo, it would be acting *ultra vires* and so illegally. However, Mr Jones submitted that this is not HMRC's dominant purpose, and that will be demonstrated by the evidence at the substantive hearing. This issue will therefore be decided at that hearing.

(3) Article 6 of the Convention is engaged so as to give Mr Budhdeo the right against self-incrimination.

(4) However, Mr Budhdeo's Article 6 right against self-incrimination:

(a) does not allow him to refuse respond to Sch 36 Notices;

(b) does not permit the Tribunal at the substantive hearing to strike down the Notices on the basis that compliance with the Notices would breach that privilege;

(c) does not extend to the Companies;

(d) does not provide the Appellants with a reasonable excuse for non-compliance with the Sch 36 Notices, so as to afford them relief from the Sch 36 penalties;

(e) does not allow the Appellants to refuse to respond to enquiries raised as part of the SA and CT enquiries commenced by HMRC; and

(f) does not allow the FTT to close those enquiries on the basis of Mr Budhdeo's right not to self-incriminate.

(5) Neither the CEA s 14 nor the common law privilege against self-incrimination changes the answers set out at (4)(a) to (f).

(6) Two provisions of PACE were put forward as potentially relevant:

(a) section 78, which allows the court to refuse to allow evidence to be admitted in criminal proceedings if it would be unfair to admit it. If Mr Budhdeo were to be prosecuted for fraud, the judge at the criminal trial may refuse to admit evidence given in response to SA enquiries or Sch 36

Notices, because of the element of compulsion. However, that is not a matter for the FTT, but for the judge at any such criminal trial.

(b) section 67(9), which obliges those charged with investigating offences to "have regard to" the relevant provisions of any of the Codes of Practice published under PACE. The FTT has no jurisdiction to decide whether there has been any breach of a Code, or to provide any remedy.

15. The Appeals and Applications will now be listed for a substantive hearing. This will consider the detail of each appeal and application in the light of the above findings. Directions have been issued at the same time as this decision notice.

Other matters

16. Before turning to the issues which this hearing had been listed to consider, I first set out a number of other matters.

Chemistree Homecare Limited

17. One of the Appellants is Chemistree Homecare Limited ("CHL"). At the beginning of the second day of the hearing, Mr Jones informed me that CHL had gone into liquidation. Mr Budhdeo said he understood that the liquidator knew about the hearing and was content for it to continue in his absence, but would check this after the hearing. My understanding from these exchanges was that the liquidators were aware of the hearing and were willing to be represented by Mr Onalaja.

18. Mr Budhdeo also confirmed that the FTT had not been informed of the liquidation by him or by any other of the Appellants. Mr Onalaja apologised for not having alerted the FTT to the liquidation.

19. During the month after the hearing, no further information was provided to the FTT in relation to CHL. On 13 November 2015 the FTT identified the liquidators, Mr Shinners and Mr Spicer of Smith and Williamson LLP, from the Companies House website and wrote to them.

20. On 25 November 2015, DAC Beachcroft LLP, solicitors for the liquidators, replied, saying that CHL had gone into administration on 12 March 2015; that Mr Shinners and Mr Spicer had been appointed as administrators, and had subsequently become its liquidators. The letter went on to say that not only were the liquidators unaware of this hearing, they were also unaware that CHL had an appeal and application before the Tribunal and they are now making contact with HMRC to decide "whether to continue to be involved."

21. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides as follows:

> **"Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal–
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

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

22. On the facts as I understood them to be at the hearing, Rule 33 was satisfied because the liquidators were aware of the hearing and had consented that it proceed. I found that it was in the interests of justice for the hearing to continue.

23. I now know that the liquidators were not aware of the hearing. However, as the FTT had not been informed of the appointment of the liquidators, it had made "reasonable efforts" to notify CHL of the hearing by informing its appointed representative in accordance with Rule 11. Given that I was only told about the liquidation on the second day of a two day hearing involving thirteen other companies and Mr Budhdeo, it was clearly in the interests of justice for the hearing to continue.

24. However, the attention of the liquidators is drawn to Rule 38 of the Tribunal Rules, which, so far as relevant to this issue, provides:

> **"Setting aside a decision which disposes of proceedings**
>
> (1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if–
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are--
>
> (a)-(c) … or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

25. It would be open to the liquidators to apply to the Tribunal for this decision to be set aside in so far as it applies to CHL, and the Tribunal would then consider that application. As this decision deals only with certain preliminary issues, the liquidators may think that unnecessary, but it is of course a matter for them.

The Companies' representative

26. On the first day of the hearing I was informed that Mr Onalaja had been instructed to represent all the Companies at this hearing. That information is now treated as amended in relation to CHL, as set out in the previous paragraphs.

27. Separate written submissions were received in advance from Noviscom Limited, Leyton Orient Dispensary Limited and Dispensary Holdings Limited. In this decision, I have called these the "Noviscom" submissions.

28. Mr Onalaja was not representing Mr Budhdeo, who was a litigant in person and made his own submissions.

Article 8

29. Shortly before the end of the first day of the hearing, Mr Budhdeo submitted that his rights under Article 8 of the Convention had been infringed. There had been no previous mention of any alleged infringement of Article 8 at the February 2015 hearing or in any of the written submissions.

30. Mr Jones said that as this issue had never previously been raised, he had not come prepared to deal with the point. Moreover, there was no specificity as to how Article 8 was allegedly engaged.

31. All parties agreed that it was inappropriate to deal with Article 8 arguments at this hearing. Mr Budhdeo said he would want to put forward Article 8 arguments at the substantive hearing. This is addressed in the directions issued at the same time as this decision.

The Disclosure Application

32. On 7 July 2015, Mr Budhdeo made an application to the FTT, asking that HMRC be directed to disclose certain information relating to the issuance of the COP9 letter and the opening of the SA enquiries ("the Disclosure Application").

33. The Disclosure Application had been refused on the papers by another judge, but Mr Budhdeo was given permission to renew the Disclosure Application at this hearing.

34. The parties agreed that their submissions on the Disclosure Application should be dealt with after the issues set out above, and I have taken the same approach in writing this decision. I refused the Disclosure Application for the reasons set out at §309ff.

Post-hearing submissions

35. On 23 October 2015 Mr Onalaja sent in post-hearing submissions, which addressed (a) whether Mr Budhdeo had a right not to self-incriminate and (b) whether that right impacted on the Companies. The first paragraph of his further submissions said they were provided "further to the Tribunal's indication of a willingness to consider further written submissions and authorities on the interlocutory matters in issue."

36. My own notes of the hearing record that I had indicated that further submissions would be directed on the issue of self-incrimination if this were found to be appropriate in the course of making the decision in the case. No such direction had been given.

37. However, I accepted that there might have been some misunderstanding, and on 30 October 2015 issued directions allowing HMRC to respond to Mr Onalaja's submissions and allowing the Appellants to reply to HMRC's response.

38. On 13 November 2015 I received further written submissions from Mr Budhdeo. These made no reference to my directions of 30 October 2015 or to Mr

Onalaja's submissions. Unlike the latter, they did not address self-incrimination, which had been identified during the hearing as an issue possibly requiring further submissions. Instead, they range over all the issues raised at the hearing, and extend to some 19 pages of text. Mr Budhdeo asked that these points be addressed "via written submissions or at a supplementary interlocutory hearing."

39. I have not considered Mr Budhdeo's further submissions in coming to this decision. All parties were fully aware of the issues which were to be addressed at this hearing and they provided skeleton arguments in accordance with directions. The purpose of a hearing is to allow the parties to expand and explain those arguments. Further submissions on limited and specific issues are occasionally required, but this is exceptional. As a matter of normal practice, the FTT does not permit the parties to continue to argue their case after the hearing, because this risks an endless ping-pong of debate and prevents the Tribunal reaching a timely decision.

40. It follows that I refuse to direct (a) that HMRC should respond to Mr Budhdeo's further submissions, or (b) that there should be a supplementary interlocutory hearing on essentially the same issues as those decided by this hearing.

Jurisdiction over closure of COP9 enquires

Mr Budhdeo's submissions

41. Mr Budhdeo said that FA 1998, Sch 18, para 33 gave the FTT the power to direct the closure of CT enquiries and that TMA s 28A(4) gives the FTT the same power in relation to SA enquiries. He accepted that there was no explicit equivalent power in relation to COP9 enquiries. However, by analogy with those CT and SA powers, he submitted that the FTT could also direct that a COP9 enquiry be closed. The Noviscom submissions reiterated this point.

42. Mr Budhdeo submitted that the power to direct closure of a COP9 enquiry did not reside only in the Administrative Court (part of the Queen's Bench Division of the High Court) following an action for judicial review, as HMRC had submitted. He said that this would be:

> "against the intention of the statute which was to create efficiency, access and expertise in matters. It also fails the test to be fair, handled quickly. The piecemeal approach advocated by the HMRC would seem to be against the intention of the legislation."

43. He relied on the decision *Oxfam v HMRC* [2009] EWHC 3078(Ch) ("*Oxfam*"), in which Sales J considered the FTT's jurisdiction in relation to Value Added Tax Act ("VATA") s 83. Mr Budhdeo drew attention in particular to the following passage, at [4] of *Oxfam*:

> "As I explain below, Oxfam's claim based upon public law principles and the doctrine of legitimate expectation could properly have been raised in its appeal to the tribunal. The benefit of the tribunal having jurisdiction to hear such claims is that the unattractive, costly and potentially time-consuming proliferation of applications to different bodies (the tribunal and the High Court) can be avoided, and the tribunal is in a position to consider all relevant points bearing on the

> same issue (namely, whether input tax could be reclaimed by the taxpayer) at one hearing, and to give a single ruling which completely determines that issue."

44. Mr Budhdeo also relied on [76] of that judgment, where Sales J said that although VATA s 83 did not "confer any general supervisory jurisdiction on the tribunal," nevertheless:

> "it seems to me to be a *non sequitur* to say that the tribunal has no power to apply public law principles if they are relevant to an appeal against…a decision of HMRC which falls within the terms of one of the headings of jurisdiction set out in s 83…"

45. Mr Budhdeo recognised that in *Hok v HMRC* [2012] UKUT (TC) ("*Hok*") at [41], the Upper Tribunal ("UT") had said that "there is no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction."

46. However, he submitted that *Hok* was wrongly decided, because the UT in that case had relied on the following dictum of Lord Lane in *C&E Commrs v JH Corbitt (Numismatists)* [1980] STC 23:

> "If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."

47. Mr Budhdeo said that Lord Lane was here referring to the powers of the VAT tribunal given by FA 1972. However, that tribunal has been superseded by the FTT, a body established under the Tribunal, Courts and Enforcement Act 2007 ("TCEA"). The Tribunal should therefore not "fetter the FTT's jurisdiction" by following *Hok*.

48. Mr Budhdeo added that the wider jurisdictional approach in *Oxfam* was consistent with the purposes of the tribunal system introduced by the TCEA, namely to be "self-sufficient and entirely competent to deal with issues of law in its specialist sphere." He relied in particular on TCEA s 2, which requires that the Senior President of Tribunals must, when carrying out his functions, have regard to the need for proceedings before tribunals to be handled fairly quickly and efficiently, saying:

> "That purpose cannot be served where appeals are turned down for failure to comply with (expensive) legal distinctions, particularly if (as *Oxfam* suggests) arguments of a public law nature could be raised in courts outside the tribunal system, but not in the tribunals themselves."

49. He also relied on Lord Lowry's words in *R (oao TC Coombs) v CIR* [1991] 2 AC 283 ("*Coombs*") as summarised by Simler J at [15] of *R (oao Derrin Bros) v HMRC* [2014] EWHC 1152 (Admin) ("*Derrin*"):

> "the Tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers.

> Parliament designated the officer as the decision-maker and the Tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the Tribunal in particular."

50. This analysis was, he said, consistent with Rule 2 of the Tribunal Rules, which require the FTT to give effect to the overriding objective and to take necessary steps "to avoid the unnecessary formality and seek flexibility in the proceedings."

51. Mr Budhdeo also cited an article published in the magazine *Tax Adviser* in May 2013. This said that EU jurisprudence has independently developed the doctrine of legitimate expectation and effectiveness/equivalence and these could lead to public law arguments being fully admitted to the jurisdiction of the FTT. However, he did not set out any legitimate expectation or explain how the principles of effectiveness/equivalence might apply to his case. I have therefore taken it that the purpose of his submission is to provide general support for his argument that the FTT has a public law jurisdiction.

52. Finally, Mr Budhdeo submitted that if this matter was outside the jurisdiction of the FTT, this should have been drawn to his attention before the hearing, and/or the FTT should have used its power under Rule 5(3)(k) to transfer the proceedings elsewhere.

Mr Onalaja's submissions

53. Like Mr Budhdeo, Mr Onalaja accepted that no statutory provision gave the FTT jurisdiction to close a COP9 enquiry.

54. However, he said that HMRC's powers also derive from statute, and those provisions allow it to conduct certain specific enquires. Mr Onalaja listed the following: enquiries under TMA s 9A (SA returns); TMA s 12AC (partnership returns); TMA Sch 1A (claims by taxpayers); FA 2008, Sch 18, paras 24 and 25 (CT returns); Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") Sch 5 para 46 (Enterprise Management Incentives) as well as powers to open enquiries in relation to Land Transaction tax and stamp duty land tax.

55. He submitted that a COP9 enquiry is either "a term used by HMRC for an enquiry they are empowered to conduct into an individual's tax position under TMA s 9A", or in the alternative "a term for an amalgamation of enquiries in which HMRC are empowered to conduct via the [above-listed] statutory provisions." Just as the FTT has jurisdiction to close those specified enquiries, it also has "the jurisdiction to close an amalgamation of the said enquires irrespective of the term given to them by HMRC."

Mr Jones's submissions

56. Mr Jones said that HMRC's powers to carry out a COP9 enquiry derive from its statutory responsibility for the collection and management of taxes, as provided for by TMA s 1 and the Commissioners for Revenue and Customs Act ("CRCA"), s 5.

57. TMA s 1 reads:

> **"Responsibility for certain taxes**
>
> The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of:
>
> (a) income tax,
>
> (b) corporation tax, and
>
> (c) capital gains tax."

58. CRCA s 5 reads:

> **"Commissioners' initial functions**
>
> (1) The Commissioners shall be responsible for
>
> (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section,
>
> (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section…
>
> (2) The Commissioners shall also have all the other functions which before the commencement of this section vested in
>
> (a) the Commissioners of Inland Revenue (or in a Commissioner), or
>
> (b) the Commissioners of Customs and Excise (or in a Commissioner).
>
> …
>
> (4) In this Act 'revenue' includes taxes, duties and national insurance contributions."

59. Mr Jones said that the FTT is a creature of statute, and as the appellants had accepted, no statutory provision gives it the power to supervise a COP9 enquiry or to order that it be closed. Supervision of HMRC's general powers rests with the Administrative Court.

60. He relied on *Hok*, where the UT had found that the FTT had no inherent judicial review powers, and on *HMRC v Noor* [2013] UKUT 071 (TCC) ("*Noor*") in which the UT had disagreed with Sales J's analysis in *Oxfam.*

Discussion

61. As Mr Budhdeo said, the FTT was established under the TCEA. Section 3(1) of that Act reads:

> "There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act."

62. The FTT is therefore a creature of statute. That means its powers must derive, and can only derive, from statutory provisions. In *Oxfam,* the relevant provision was VATA s 83(1)(c), which reads:

> "(1) ...an appeal shall lie to the tribunal with respect to any of the following matters–
>
> ...
>
> (c) the amount of any input tax which may be credited to a person..."

63. Sales J found at [63] that the wording of VATA s 83 was "wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer" and so could include public law arguments about legitimate expectation. In that context he said at [70]:

> "there is a clear public benefit in construing s 83 by reference to its ordinary and natural meaning which strongly supports that construction. It is desirable for the tribunal to hear all matters relevant to determination of a question under s 83 (here, the amount of input tax to be credited to a taxpayer) because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one thing the HMRC and taxpayer are interested in (in this case, the amount of input tax to be recovered) are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s 83."

64. In other words, Sales J considered a specific provision – VATA s 83(1)(c) – and found that it was broad enough to give the FTT certain wider powers.

65. That is not the Appellants' position. It is common ground that no statutory provision gives the FTT power to close a COP9 enquiry. Mr Budhdeo (and the Noviscom submissions) said it was possible to find such a power "by analogy." They cited no authority for this submission, which runs entirely counter to the fundamental requirement that the FTT's powers must have their source in specific statutory provisions.

66. It is also true, as Mr Jones says, that in *Noor* at [74] the UT described itself as "troubled" by the reliance placed by Sales J on the "public benefit" which would result if the FTT could hear all matters relevant to determination of a question under VATA s 83. At [77] of *Noor,* the UT sets out six reasons why it disagreed with Sales J, one of which was that the TCEA expressly gives the UT a very limited judicial review jurisdiction and "it is simply inconceivable" that Parliament would have contemplated conferring on the FTT the breadth of power suggested by Sales J.

67. In *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713, a decision not cited to us, the Court of Appeal considered *Oxfam.* Patten LJ, giving the judgment of the Court, said at [141] that "we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition" and at [143], echoing *Noor,* says "that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear." In other words,

the TCEA gives explicit judicial review powers to the UT. Patten J continues by saying "there are no similar provisions in the case of the FtT."

68. Although Mr Budhdeo is right that Lord Lane in *Corbitt* was referring to the VAT Tribunal and not to the FTT, the principles Lord Lane set out have not been displaced by the TCEA. That would only be the position if that Act had given the FTT a broader public law jurisdiction, which is not the case.

69. Mr Budhdeo's reliance on *Derrin* and *Coombs* is also misplaced. Neither is authority for a finding that the FTT has a general supervisory power over HMRC's "intrusive powers." *Derrin* is a case about Sch 36 Notices, and *Coombs* is a decision about Notices issued under TMA s 20, precursors to Sch 36 Notices. Parliament gave the FTT explicit powers to supervise certain aspects of the issuance of Sch 36 Notices; it does not follow that the FTT has any a general power to supervise the exercise of HMRC's other "intrusive powers," including how they carry out a COP9 enquiry.

70. Mr Budhdeo also seeks to rely on the Tribunal Rules and on the requirement in the TCEA that tribunal proceedings be handled fairly, quickly and efficiently. But both apply only to appeals and applications over which the FTT has jurisdiction. The TCEA does not give the FTT the type of public law jurisdiction for which Mr Budhdeo contends, and the Rules cannot confer jurisdiction; they only explain how the Tribunal's jurisdiction is to be exercised.

71. The powers of the Inland Revenue were considered by the House of Lords in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 at a time when the 1890 Act was still in force. At page 265 Lord Wilberforce said:

> "The Commissioners of Inland Revenue are a statutory body. Their duties are, relevantly, defined in the Inland Revenue Regulation Act 1890 and the Taxes Management Act 1970. Section 1 of the 1890 Act authorises the appointment of commissioners 'for the collection and management of inland revenue' and confers on the commissioners 'all necessary powers for carrying into execution every Act of Parliament relating to inland revenue'. By s 13 the commissioners must 'collect and cause to be collected every part of inland revenue and all money under their care and management and keep distinct accounts thereof'."

72. By virtue of CRCA s 5, the powers given to the Inland Revenue under the 1890 Act now vest in HMRC. CRCA s 52 repeals earlier legislation including that set out in Sch 5 to the Act. Amongst the statutes repealed is the 1890 Act.

73. Mr Jones is therefore entirely correct in his submission that HMRC are carrying out the COP9 enquiry under those powers and under those in TMA s 1.

74. HMRC are not relying on some amalgam of specific statutory enquiry powers, as suggested by Mr Onalaja. Those specific powers each have a particular purpose, and cannot be added together to create some wider jurisdiction.

75. Mr Onalaja also suggested that a COP9 enquiry was simply a name given to an s 9A enquiry, but this is clearly not the case. The opening paragraphs of the COP9 Booklet state that it covers "all irregularities" in the recipient's tax affairs, see [14] of the First Decision, and that in relation to Mr Budhdeo it covered "all entities over which he is able to exercise control", see [16] of that decision.

76. HMRC's Fraud Civil Investigation Manual says at FCIM101030 that COP9 covers "all of the taxes administered by HMRC…providing a single procedure to deal with the full range of tax irregularities that may be identified in any single entity" with the exception of tax credits and customs/international trade civil investigations.

77. As a result of the foregoing, I find that the FTT has no jurisdiction to close the COP9 enquiry. The only way to challenge that enquiry is by judicial review at the Administrative Court.

78. Mr Budhdeo asks why, if that is the case, the FTT has not directed that the case be moved to that Court under Rule 5(3)(k). So far as relevant, Rule 5 reads:

> "(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction–
>
> …
>
> (k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started–
>
> (i) the Tribunal no longer has jurisdiction in relation to the proceedings; or
>
> (ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case…"

79. It is thus clear that Rule 5(3)(k) refers only to transfers between tribunals, and does not extend to transfers to other courts. Moreover, the Rule is "subject to the provisions of the 2007 Act," namely the TCEA. That Act includes specific provisions relating to transfers between the UT and the High Court, and *vice versa*, see TCEA s 18(3) and 19. But it does not allow the FTT to transfer cases to the Administrative Court.

Decision

80. As is clear from the foregoing, the FTT has no jurisdiction to close the COP9 enquiry into Mr Budhdeo.

Whether HMRC were using their civil powers to obtain information to allow them to decide whether to prosecute Mr Budhdeo.

The parties' submissions

81. The Appellants' position was that HMRC were improperly using its civil powers to obtain information which would then allow it to decide whether to prosecute Mr Budhdeo.

82. Mr Onalaja said that TMA s 9A allows HMRC to enquire into a SA return and "anything contained in the return or required to be contained in the return." The CT enquiry powers are similar, see FA 1998, Sch 18, paras 24-25. He submitted that:

> "Therefore HMRC's civil enquiry powers are to be used by HMRC to facilitate the collection and management of taxes. They are not intended for the purpose of securing evidence from taxpayers to be used in criminal prosecutions of the said taxpayers."

83. He went on to say that a Sch 36 Notice is to be used to obtain a document or information "reasonably required" for the purposes of checking a person's tax position. If HMRC were to use its statutory enquiry powers "for a purpose that went beyond the specific purpose for which the powers were provided in the relevant Acts, this would amount to an abuse of power."

84. He also relied on *R v Crown Court at Southwark, ex p Bowles* [1998] AC 641 at p.651, where Lord Hutton, with whom the other Law Lords agreed, approved the formulation of the test set out in *Wade & Forsyth on Administrative Law*, 7th ed (1994) at p.436:

> "Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is *ultra vires*."

85. Mr Jones accepted that if the Sch 36 Notices had been issued with "the dominant purpose of furthering a criminal investigation," then HMRC "couldn't use those powers in that way," and he said that the same was true of HMRC's powers to carry out SA and CT enquiries.

86. However, he went on to say that once information had been properly obtained, it can then be used for other purposes. CRCA s 17, which is headed "Use of information," opens as follows:

> "(1) Information acquired by the Revenue and Customs in connection with a function may be used by them in connection with any other function.

> (2) Subsection (1) is subject to any provision which restricts or prohibits the use of information and which is contained in
>
> (a) this Act,
>
> (b) any other enactment, or
>
> (c) an international or other agreement to which the United Kingdom or Her Majesty's Government is party."

87. Mr Jones said that when the HMRC witnesses give evidence at the substantive hearing, it will be clear that the dominant purpose of the SA and CT enquiries, and of the Sch 36 Notices, is to enquire into Mr Budhdeo's SA returns and the Companies' CT returns; it is not to obtain information to allow a decision to be made on whether or not HMRC has sufficient evidence to prosecute Mr Budhdeo.

88. He referred in particular to Mr Douglass's witness evidence. Mr Douglass is the HMRC officer responsible for the CT enquiries. His witness statement concludes by saying that one of the reasons why closure notices should not be granted is that "the enquiries into these companies are integral to the COP9 enquiry on Mr Shamir Budhdeo."

89. At the February 2015 hearing, the Tribunal observed that this was consistent with Mr Budhdeo's submissions as to the purpose of the CT enquiries. Mr Jones said that although a COP9 enquiry is only instigated where fraud is suspected, it remains a civil investigation, and Mr Douglass' reference to "the COP9 enquiry" should not be taken to be synonymous with a possible future criminal prosecution.

Discussion

90. Taking the last point first, and for the avoidance of doubt, I confirm that the February 2015 hearing simply sought to identify certain key issues of law needing resolution. Findings of primary facts, and of inferences to be drawn from those facts, which take into account the witness evidence, are matters for the substantive hearing.

91. In relation to HMRC's Sch 36, SA and CT enquiry powers, all parties agree that if HMRC is using those enquiries for the dominant purpose of obtain information sufficient to allow it to decide whether or not to prosecute Mr Budhdeo for fraud, that is *ultra vires.* As this point is not in dispute I have not considered it further. HMRC's dominant purpose will be a matter for evidence at the substantive hearing.

The scope of Article 6

92. Article 6 reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but 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 to the extent strictly necessary in the

opinion of the court in special circumstances where publicity would prejudice the interests of justice.

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

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

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

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

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

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

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

Whether the case engages Mr Budhdeo's "civil rights and obligations"

93. Mr Budhdeo submitted that the European Court of Human Rights ("EctHR") interpreted "civil rights and obligations" in Article 6(1) broadly. He relied on *Delcourt v Belgium* (App. 2689/65) [1970] ("*Delcourt*") where the ECtHR said at [25]:

> "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision."

94. He said that the House of Lords had accepted this in *R (oao Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions ex p Holdings & Barnes Plc* [2001] UKHL 23 *("Alconbury")* where Lord Clyde said at [150] that:

> "It is clear that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature. It applies then to the various exercises of discretion which are raised in the present appeals. But, while the scope of the article extends to cover such discretionary decisions, the particular character of such decisions cannot be disregarded."

95. Mr Onalaja accepted that the ECtHR had held in *Ferrazzini v Italy* [2001] (App. 44759/98) STC 1314 ("*Ferrazzini*") at [29] that tax disputes fall outside the scope of civil rights and obligations, but said that a different approach applied in "hybrid"

cases, being those where there is a link between tax proceedings and other civil proceedings. He gave as an example the case of *National and Provincial Building Society v UK* [1997] STC 1466 ("*N&P*"). He said that it was a matter for this Tribunal to decide whether this was a hybrid case, so that Article 6 applied.

96. Mr Jones said that *Ferrazzini* should be followed. The ECtHR had held at [29] that:

> "…tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant… It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

97. I agree with Mr Jones that *Ferrazzini* is decisive, as the Court of Appeal recently reiterated, see the leading judgment of Vos LJ at [68] in *R (oao APVCO 19) v HMT* [2015] EWCA Civ 648. Both Black LJ and Floyd LJ concurred on this point.

98. The cases cited by Mr Budhdeo did not involve tax disputes. *Delcourt* concerned a criminal charge and the issue in *Alconbury* was whether Article 6 applied to administrative decisions taken by the Secretary of State.

99. Mr Onalaja asked me to decide whether there were any hybrid issues here. Clearly, there are not. In *N&P* the appellant had a private law claim for restitution of tax wrongly paid to HMRC; that gave the company a civil right to repayment. There is no similar issue in this case.

100. I find that none of the issues before the Tribunal involve the determination of Mr Budhdeo's civil rights and obligations.

Whether Mr Budhdeo has been charged with a criminal offence

101. In relation to whether Mr Budhdeo had been charged with a criminal offence, the following points were common ground:

(1) if Mr Budhdeo were to be prosecuted for a criminal offence, he would have the protection of Article 6;

(2) if HMRC imposed a civil penalty for the fraudulent evasion of tax, that too would be a "criminal offence" for Article 6 purposes, because the term has an autonomous meaning under human rights law and the domestic classification is not determinative, see *Engel v. Netherlands (No. 1)* (1976) (App 5100/71); *Han & Yau v HMRC* [2001] EWCA Civ 1048; *R(oao McCann) v Kensington & Chelsea LBC* [2002] UKHL 39 and *Glantz v Finland* [2014] (App 37394/11) STC 2263;

(3) the point at which a person becomes entitled to the protection given by Article 6 was when he was "charged" with a criminal offence, and this was when his position was "substantially affected," see *Eckle v Germany* [1982] (App 8130/78) ("*Eckle*") or "at the earliest time at which a person is officially alerted of the likelihood of criminal proceedings against him" *per* Lord

Bingham in *Attorney General Reference (No.2 of 2001)* [2004] 2 AC 72 ("*AG Ref 2001*") at [27].

Submissions

102. The dispute between the Appellants and HMRC was whether, as Mr Onalaja submitted, the sending of the COP9 letter to Mr Budhdeo and his refusal of the CDF meant he had been "charged" with a criminal offence for Article 6 purposes, because this was "the earliest time" he had been "officially alerted of the likelihood of criminal proceedings against him." Mr Onalaja also relied on *King v UK (No 2)* [2004] (App 13881/02) STC 911 ("*King*"), where the ECtHR decided that "the issuing of a Hansard warning was a clear and unequivocal indication that the person was being investigated for a criminal offence."

103. Mr Jones made the opposite submission, saying "something more than the mere commencement of a COP 9 investigation is required" to engage Article 6. He relied on *Khawaja v HMRC* [2013] UKUT 353 (TCC) ("*Khawaja*") in which, he said, "it was held that the moment of 'charge' occurred when the Commissioners indicated that the assessments had been finally determined and Mr Khawaja was invited to accept an offer of a penalty of 50%."

The authorities

104. In *Eckle* at [73] the EctHR said that:

> "'Charge', for the purposes of Article 6(1), may be defined as:
>
> > 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'
>
> a definition that also corresponds to the test whether 'the situation of the [suspect] has been substantially affected' (see the…*Deweer* judgment, p. 24, para. 46)."

105. The reference to the *Deweer* judgment is to *Deweer v Belgium* [1980] (App 6903/75). At [44] the ECtHR said:

> "…the prominent place held in a democratic society by the right to a fair trial…prompts the Court to prefer a 'substantive', rather than a 'formal', conception of the 'charge' contemplated by Article 6(1). The Court is compelled to look behind the appearances and investigate the realities of the procedure in question."

106. In *King* the ECtHR found that the an offer of settlement by HMRC which included both unpaid taxes and a surcharge element, even with the possible threat of penalty or prosecution procedures in the background, was insufficient substantially to affect Mr King's position. But it continued:

> "…the issuing of the Hansard warning, which the government admit is only generally done in serious fraud cases, was a clear and unequivocal indication to the applicant that he was suspected of criminal misconduct. Even though he was not in fact formally charged with specific tax offences as such but subject to a penalty procedure, the

> applicant may claim to have been put on formal notice that he was at risk of serious consequences."

107. The taxpayer in *Khawaja* had been in settlement negotiations with HMRC during which the HMRC officer had referred to penalties. The UT (Judges Berner and Herrington) decided at [56]-[57] that the facts were aligned with the first (settlement) scenario discussed in *King* and could be distinguished from the second scenario, namely the issuance of a Hansard warning.

The wording of the COP9 Booklet

108. The "Introduction" section of the COP9 Booklet opens as follows:

> "We issue this Code of Practice in selected cases where we suspect tax fraud. In many cases we carry out criminal investigations of suspected fraud with a view to prosecution. But under this Code, we offer you instead the chance to make a full disclosure under a contractual arrangement called a Contractual Disclosure Facility (CDF). You have 60 days to respond. If you make a full disclosure of all tax frauds and irregularities, we will not pursue a criminal investigation with a view to prosecution."

109. At paragraph 2.3 the COP9 Booklet says:

> "In exchange for your full disclosure of all irregularities we will not pursue a criminal investigation into the conduct you disclose."

110. At paragraph 2.4 it says:

> "In a case that we think is suitable to be dealt with under a CDF we will make a formal offer. Our offer and your acceptance of it, within 60 days, create the contractual arrangement between us. This gives you the assurance that you will not be criminally investigated for the irregularities in your tax affairs that you have disclosed under the terms of the CDF."

111. Paragraph 2.7 is headed "Rejection route" and includes the following passages:

> "You should only choose the rejection route if you genuinely believe that you have not brought about a loss of tax through your deliberate conduct. If you sign the Rejection Letter, HMRC will start its own investigation which can be a criminal investigation…
>
> If we decide to proceed with a civil investigation in response to your rejection of our offer we reserve the right to escalate the case to a criminal investigation at a later date if we consider it is appropriate…
>
> If you have brought about a loss of tax through your deliberate conduct but you deny it, this may result in a criminal investigation. This may lead to prosecution, or significantly higher civil financial penalties, and the potential publication of your details."

112. Part 3 is headed "criminal investigation and COP9" and begins:

> "The following section gives a summary of when we could start a criminal investigation with a view to prosecution.

> 3.1 Rejection
>
> If you choose to reject an offer made under the CDF then we are not bound by any CDF terms. We may start a criminal investigation into any tax fraud we suspect you might have been involved in."

Discussion

113. I begin by recalling, as all parties accepted, that "criminal offence" has an autonomous meaning for the purposes of Article 6, and extends to the imposition of civil penalties for the fraudulent evasion of tax, as all parties accepted, see §101(2).

114. The COP9 letter and Booklet were clearly "official" as they came from HMRC, and they are not general guidance, but specifically focused on Mr Budhdeo. He is told that HMRC "suspect tax fraud" and "in many cases" they investigate with a view to prosecution. If he rejects the CDF "HMRC will start its own investigation which can be a criminal investigation."

115. It is true that the COP9 Booklet tells the recipient that prosecution or the imposition of a civil evasion penalty does not always follow a refusal to sign. But Lord Bingham's formulation does not refer to certainty; it speaks of the *likelihood* of a criminal prosecution, and *Deweer* requires courts to prefer a "substantive" rather than a "formal" approach. With the benefit of that guidance, I must decide whether the person refusing the CDF has been told that prosecution is "likely" or only that it is "possible."

116. The COP9 Booklet has a minatory tone. It includes explicit warnings to a recipient who is considering whether to refuse co-operation, and the substance of those warnings is the threat of prosecution or the imposition of civil evasion penalties. I find that the person who refuses the CDF is meant to understand that there is now a likelihood of prosecution or civil penalties. It follows that I agree with Mr Onalaja that Mr Budhdeo has been "charged" with a criminal offence within the meaning of Article 6.

117. The recipient of the CDF is therefore in the same position as the person to whom a Hansard warning was issued. To borrow the wording used by ECtHR in *King*, Mr Budhdeo has received "a clear and unequivocal indication…that he was suspected of criminal misconduct" and was "put on formal notice that he was at risk of serious consequences."

118. While Mr Jones is right to say that the UT in *Khawaja* came to a different conclusion, the facts of that case were entirely different. The parties had been involved in settlement negotiations; there was no Hansard warning or CDF offer.

119. I conclude by noting that, although HMRC's position before this Tribunal was that Article 6 was not engaged, the COP9 Booklet takes a different position. Paragraph 9.2 is headed "Code of Practice 9 (COP9) and the Human Right Act (HRA)" and reads:

> "The protection of the HRA will continue to apply to you, regardless of whether any investigation into your tax affairs under COP9 is a civil one or becomes a criminal one."

120. Since the recipient of the COP9 Booklet has been told that "if you sign the Rejection Letter, HMRC will start its own investigation which can be a criminal investigation," the Booklet itself accepts that the CDF offer engages Article 6.

Which (if any) Article 6 rights are relevant to the issues before the FTT

121. In their skeleton arguments, Mr Budhdeo and Mr Onalaja put forward the following Article 6 rights as having been breached: (a) the right to a fair hearing; (b) the right to be informed of the case against him (c) the right to be presumed innocent until proved guilty and (d) the right not to self-incriminate.

122. At the hearing the focus was almost entirely on the right not to self-incriminate. I first deal briefly with the other three.

The right to a fair hearing

123. Mr Budhdeo submitted that his Article 6 right to a fair hearing had been breached by the CDF. As I understand his argument, it went as follows:

(1) HMRC did not have sufficient evidence of fraud, but still offered him the CDF.

(2) A CDF is "Contractual Disclosure Facility," and a contract requires consideration.

(3) The purported consideration was that Mr Budhdeo would not be prosecuted, but HMRC's lack of evidence meant there was no consideration in his case.

(4) As a result the so-called contract was invalid, amounting rather to "coercion" and "entrapment."

(5) As a result, Mr Budhdeo's Article 6 rights were breached, because:

> "I am left with no choice even though I have not committed fraud I would be criminally prosecuted as I refused to complete the CDF, thereby breaching my fundamental Human Rights to bring my case forward."

124. This argument is not relevant to any of the issues before the FTT, as it deals only with the CDF and possible criminal proceedings. Moreover (a) as Mr Budhdeo did not sign the CDF there was no contract in any event; and (b) if he is subsequently prosecuted, he will be able to defend his position in the criminal court, so there is no breach of his right to a fair hearing.

The right to know the case against him

125. Mr Budhdeo said that he had a right to know the case against him, and that HMRC should provide him with information about the reasons for the opening of the COP9 enquiry. This was the purpose of the Disclosure Application.

126. I have dealt with that Application and the related arguments at the end of this decision. At this stage it is sufficient to say that Mr Budhdeo is asking for details of the possible criminal case against him. However, the issues the Tribunal will address at the substantive hearing are the Sch 36 Notices and penalties and the closure notice applications. None of Mr Budhdeo's submissions link to any of these issues. I find that none of the information sought under the Disclosure Application is relevant to any of those issues, and I explain this conclusion at §309ff.

The right to be presumed innocent

127. Mr Budhdeo's submission on this issue is closely related to the points he made in relation to a fair hearing. He said that, by issuing the COP9 letter and the CDF, HMRC was "seeking a guilty plea without evidence" in breach of his Article 6(2) right to be presumed innocent until proved guilty according to the law.

128. This submission also relates entirely to the COP9 letter and the CDF and there is no link with the issues before the FTT.

The right not to self-incriminate

129. The parties accepted that a person charged with a criminal offence had the right not to self-incriminate, even though there is no reference to that right in the words of Article 6.

130. That is plainly correct, see for example ***R v Mushtaq*** [2005] UKHL 25, where Lord Rodger said at [53] that this right was to be implied into Article 6(1); see also ***Saunders v UK*** [1996] (App 19817/91) ("***Saunders***") at [68], where the ECtHR said:

> "Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."

131. The next question is whether that right is relevant to the Sch 36 Notices, the Sch 36 penalties and/or the closure notice applications, and I deal with these in the next parts of this decision. I begin with the issuance to Mr Budhdeo of a Sch 36 Notice to provide documents, and go on to consider the requirement to provide information.

Self-incrimination and Sch 36 Notices issued to Mr Budhdeo: documents

132. The Appellants submitted that the issuance of Sch 36 Notices to Mr Budhdeo was a breach of his rights under Article 6(1), because he was required to provide documents which could then be used by HMRC to decide whether or not to prosecute him.

133. Mr Jones relied on ***Saunders,*** where the EctHR said at [69]:

> "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused

> through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

134. This is entirely clear: the right not to self-incriminate does not allow a person to refuse to provide material "which has an existence independent of the will of the suspect." Such material must encompass documents.

135. However, the ECtHR decision was not unanimous. Judge Martens (joined by Judge Kuris) wrote a dissenting judgment. He preferred the earlier decision of *Funke v France* [1993] (App 10828/84) ("*Funke*"). Mr Funke had been convicted for his failure to produce bank statements demanded by the customs authorities, and the ECtHR found that there was a breach of his right not to self-incriminate. Judge Martens said at [12] of his dissenting judgment in *Saunders*:

> "…It is, however, at least open to doubt whether the Court in paragraph 69 of its present judgment has not - implicitly, without saying so openly, let alone without adducing cogent reasons for doing so - overruled *Funke*… the second sentence [of paragraph 69] seems to imply that - contrary to *Funke* - the privilege does not comprise the power to refuse to hand over incriminating documents nor that to prevent the use of such documents, obtained under compulsion, in criminal proceedings. I confess that I fail to see any other possible construction of paragraph 69 so that I presume that the above interpretation is correct."

136. Later UK decisions consider this conflict in the ECtHR case law. In *R v Hertfordshire County Council, ex p Green Environmental Industries Ltd* [2000] 2 AC 412 ("*Green*") at page 424 Lord Hoffman gave the leading judgment, with which the other law lords concurred. He criticised *Funke,* saying that there were "obscurities" in its reasoning and noting that ECtHR in *Saunders* did not regard it as casting doubt on its conclusions.

137. The conflict was subsequently considered in detail by the Court of Appeal in *A-G's Ref (No. 7 of 2000)* [2001] 1 WLR 1879 ("*A-G's Ref No 7*"). The Court noted Lord Hoffman's comments in *Green* and also that the ECtHR had unanimously followed [69] of *Saunders* in *L v UK* [1999] (App no 34222/96), an admissibility decision. Rose LJ, delivering the court's judgment, said at [60] that:

> "If and in so far as there is a difference of view in the European Court of justice between *Funke's* case 16 EHRR 297 on the one hand and *Saunders's* case 23 EHRR 313 and *L v United Kingdom* [2000] 2 FLR 322 on the other, the approach in the *Saunders* and *L* cases commends itself to this court."

138. I therefore agree with Mr Jones that *Saunders* should be followed, so that requiring a person to provide documents by a Sch 36 Notice does not breach Mr Budhdeo's right not to self-incriminate.

Self-incrimination and Sch 36 Notices issued to Mr Budhdeo: information

The Appellants' submissions

139. Mr Onalaja relied on two cases, *JB v Switzerland* [2001] (App 31827/96), discussed at §175 below, and *Saunders*. Mr Onalaja said that the position of JB and Mr Saunders was comparable to that of Mr Budhdeo, who is being required to provide potentially incriminating information "whilst simultaneously being told that he faces the possibility of a criminal prosecution for fraud." In order fairly to consider his arguments, it is necessary to set out what happened in *Saunders*.

140. Mr Saunders was the chairman and chief executive of Guinness plc. In early 1986, Guinness was competing with The Distillers Company plc to take over Argyll Group. Guinness won the battle by virtue of an illegal share-ramping operation. Later that year, the Secretary of State for the Department of Trade and Industry ("the DTI") appointed inspectors to investigate the takeover, using the powers at s 432 of Companies Act 1985. Refusal to answer the inspectors' questions was punishable by a fine or a prison sentence of up to two years.

141. Mr Saunders was interviewed nine times. Seven of the interviews took place before he was charged with a criminal offences and two were carried out afterwards. Transcripts of all nine interviews were passed to the Crown Prosecution Service ("CPS"). The two which took place after he was charged were ruled inadmissible by the trial judge under PACE s 78 (discussed at §285 below); the other seven were ruled admissible and were relied on by the prosecution at his trial. In 1990 Mr Saunders received a five year sentence (later halved on appeal) for fraud, false accounting and theft.

142. Meanwhile, in July 1988, he had applied to the ECtHR, claiming that his Convention rights had been breached. The ECtHR found at [67] that the investigation by the inspectors was not the determination of a criminal charge, so the only issue was the use made of the interviews at the subsequent trial. The UK government accepted that Mr Saunders had been under a compulsion to give evidence, because of the penalties which could arise were he to refused to answer. However, it submitted that:

(1) it was in the public interest that the prosecuting authorities should be able to rely on the answers given in response to the inspectors' questions; and

(2) there were appropriate safeguards: the inspectors were independent and subject to judicial supervision; Mr Saunders was entitled to be legally represented at the interviews; he was provided with a transcript of his responses which he could correct or expand, and PACE s 78 gave the trial judge the right to exclude the interview evidence at trial if he thought it would be unfair to admit it.

143. The ECtHR did not accept those submissions, saying at [74] that:

> "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings…Moreover the fact that statements were made by the applicant prior to his being charged does

> not prevent their later use in criminal proceedings from constituting an infringement of the right."

144. The Court went on to say at [75] that the various procedural safeguards put forward by the UK government "cannot provide a defence in the present case since they did not operate to prevent the use of the statements in the subsequent criminal proceedings." At [76] it concluded that Mr Saunders' right not to incriminate himself had been infringed.

145. Mr Onalaja argued that Mr Budhdeo was in a similar position: if he provides the information, this could be used against him at a criminal trial. The existence of a public interest in collecting taxes was not sufficient, and PACE s 78 did not guarantee that the information would be ruled inadmissible at trial, any more than it had in Mr Saunders' case.

Mr Jones's submissions

146. Mr Jones relied on ***R v Allen*** [2001] UKHL 45 ("***Allen***"). Mr Allen had been convicted of thirteen counts of cheating the public revenue, and sentenced to seven years' imprisonment for each count, to run concurrently. Count 11 was that he had provided HMRC with a "false, misleading and deceptive" schedule of assets in response to a Notice issued under TMA s 20(1), the forerunner of the Sch 36 Notices at issue in this case. One of Mr Allen's grounds of appeal was that his right against self-incrimination had been breached because he had been compelled to provide that information under threat of penalty.

147. After *Allen* had been heard by the House of Lords, but before judgment was handed down, the House held in a separate judgment, ***R v Lambert*** [2001] UKHL 37 that where a conviction had taken place before the Human Rights Act 1998 ("HRA") came into force, an individual's Convention rights could not make an otherwise safe conviction unsafe. As a result, Mr Allen's Article 6 arguments fell away; his appeal was dismissed.

148. However, Lord Hutton, giving the only judgment in the case (with which the other law lords agreed) said that as the point had been fully argued and because it was a point of general public importance, he would give his opinion. At [29] he said:

> "the present case is one which relates to the obligation of a citizen to pay taxes and to his duty not to cheat the Revenue. It is self-evident that the payment of taxes, fixed by the legislature, is essential for the functioning of any democratic state. It is also self-evident that to ensure the due payment of taxes the state must have power to require its citizens to inform it of the amount of their annual income, and to have sanctions available to enforce the provision of that information."

149. Lord Hutton then set out both TMA s 20 and s 93 (which provides for the charging of penalties if a person failed to provide an SA return). He also recited the notice on the front of the SA tax return, which requires the recipient to provide details of his income and gains, and warns of penalties for false information. At [30] he said:

> "It is clearly permissible for a state to enact such provisions and there could be no substance in an argument that there is a violation of art 6(1) if the Revenue prosecuted a citizen for cheating the revenue by furnishing a standard tax return containing false information. Similarly in the present case, viewed against the background that the state, for the purpose of collecting tax, is entitled to require a citizen to inform it of his income and to enforce penalties for failure to do so, the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination."

150. Mr Jones said that this passage "fairly and squarely" rebuts the Appellants' submissions that being required to provide information by way of a Sch 36 Notice is a breach of Mr Budhdeo's privilege against self-incrimination.

Structure of discussion

151. There is a considerable body of case law relating to the use of arguably coercive measures to obtain information. Some is from the ECtHR; others are UK judgments which discuss that case law. Many cross-refer and rely on other decisions, including those cited by the parties.

152. In deciding how to approach these cases I found the ECtHR analysis in ***Weh v Austria*** [2004] (App 38544/97) ("***Weh***") to be helpful. In ***Weh*** the ECtHR said:

> "41. A perusal of the Court's case-law shows that there are two types of cases in which it found violations of the right to silence and the privilege against self-incrimination.
>
> 42. First, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or - in other words - in respect of an offence with which that person has been 'charged' within the autonomous meaning of art 6(1) (see ***Funke*** para 44; ***Heaney and McGuinness*** paras 55-59; ***JB***, paras 66-71…).
>
> 43. Second, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (***Saunders*** para 67, ***IJL v UK*** [2000] ECHR 29522/95 at para 82-83)."

153. The first type of case is therefore one where the information is compulsorily obtained ***after*** the person has been charged with a criminal offence, and the second is where information obtained ***before*** the person is charged is then used in subsequent criminal proceedings.

154. The next part of my decision considers these two types of cases, but in reverse order, so I begin by considering the second category – cases concerning the use of incriminating information compulsorily obtained before a person has been charged.

The second type of case

155. The leading case here is ***Saunders.*** As already noted at §142, the ECtHR found at [67] that the investigation by the DTI inspectors itself did not constitute the

determination of a criminal charge. As the ECtHR later said in *Shannon v UK* [2005] (App 6563/03) ("*Shannon*") at [45]:

> "…it has not been suggested in *Saunders* that the procedure whereby the applicant was requested to answer questions on his company and financial affairs, with a possible penalty of up to two years' imprisonment, in itself raised an issue under art 6(1)."

156. Other individuals involved in the takeover of Distillers were also investigated by the DTI inspectors, and brought similar complaints to the ECtHR. In *IJL and Others v UK* [2000] (App 29522/95 and others) ("*IJL*") the ECtHR reiterated its decision in *Saunders,* see [83] and said at [100]:

> "The Court considers that whether or not information obtained under compulsory powers by such a body [the DTI] violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial. It is the applicants' view that, at the interview stage, the inspectors were in effect determining a 'criminal charge' within the meaning of Article 6 § 1 and on that account the guarantees laid down in Article 6 should have been applied to them. The Court does not accept that submission and refers in this connection to the nature and purpose of investigations conducted by DTI inspectors."

157. *Saunders* was also followed in *Allen v UK* [2002] (App 76574/01) ("*Allen v UK*"). Having lost his appeal against conviction (see §147), Mr Allen applied to the ECtHR. The ECtHR said:

> "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not *per se* prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs (see the above mentioned *Saunders* judgment, where the procedure whereby the applicant was required to answer the questions of the Department of Trade Inspectors was not in issue). In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under Article 6 §1, even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it."

158. This echoes the words of Lord Hutton at [30] of *Allen*, cited §149 above, that "the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination."

159. A similar position was taken in *Weh* at [45], referring to *Saunders, IJL* and *Allen v UK.*

160. Where there has been no criminal charge the position is clear: a person cannot refuse to answer questions on the basis that he might thereby incriminate himself. Article 6 is only engaged if there is a subsequent prosecution. The defendant can then challenge the use of any such information on the basis that it would be unfair to rely on it.

161. However, since I have found that Mr Budhdeo has already been "charged" within the meaning of Article 6, it is the first type of case which requires more detailed consideration.

The first type of case

162. The first type of case is one where a person has already been charged. In ***Weh,*** the ECtHR lists three decisions which fall under this heading, ***Funke, JB*** and ***Heaney and McGuinness*** [2000] (App 34720/97), see the extract at §152. I also consider two other relevant cases which were decided after ***Weh,*** being ***Shannon v UK*** [2005] (App 6563/03) and ***Marttinen v Finland*** [2009] (App 19235/03).

163. As already discussed at §135, the first of these case, ***Funke***, was not about information, but about documents and therefore does not belong in this category. This can be clearly seen from [34] of the judgment, where the ECtHR set out Mr Funke's application (emphasis added):

> "Mr Funke applied to the Commission on 13 February 1984, raising several complaints. He claimed that his criminal conviction *for refusal to produce the documents requested by the customs* had violated his right to a fair trial (Article 6(1) of the Convention) and disregarded the principle of presumption of innocence (Article 6(2)); that his case had not been heard within a reasonable time (Article 6(1)); and that the search and seizures effected at his home by customs officers had infringed his right to respect for his private and family life, his home and his correspondence (Article 8)."

164. The second is ***Heaney and McGuinness.*** The applicants had been arrested near the site of a bombing in Northern Ireland. They were given the usual caution, but then told that they were required to account for their movements around the time of the bombing under the Offences against the State Act 1939, s 52. Failure to respond to questions put under s 52 was punishable by six months in prison. The applicants were sentenced under that provision for refusing to provide the information demanded.

165. The ECtHR found that as the applicants had been "charged with a criminal offence" it followed from ***Funke*** that they had the right not to answer the questions put under s 52, see [48]-[49]. The other case cited, ***Murray v UK*** [1996] (App 18731/91) was about a different issue, namely whether it was a breach of Article 6 to draw adverse inferences at the criminal trial from a person's silence under questioning. The only case relied on in relation to the provision of information was ***Funke.***

166. The third is *Shannon.* In April 1998 Mr Shannon had been charged with false accounting and conspiracy to defraud. In June, he was served with a notice requiring him to attend a police station to answer questions put by a financial investigator. The investigation was into whether any person had benefitted from the theft or false accounting. Mr Shannon refused to answer and was convicted of the offence of "failing without reasonable excuse to comply with the financial investigator's requirement to answer questions or otherwise furnish information." The Court of Appeal in Northern Ireland (Carswell LCJ, Campbell LJ and Kerr J) decided in *Brockbank v Shannon* [2002] NICA 50 that Article 6(1) was relevant only to the use of information at a subsequent criminal trial.

167. The ECtHR, however, disagreed. They followed the *Weh* formulation of dividing the authorities into two types of case, before finding that Mr Shannon's position was an example of the first type because he:

> "had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged." (see [38])

168. The ECtHR decided that Mr Shannon's application should therefore be decided consistently with *Funke* and *Heaney and McGuinness.* The Court subsequently came to a similar conclusion in the later case of *Marttinen,* relying on *Shannon* and *Heaney and McGuinness.*

169. The above analysis shows that all these later decisions rest essentially on *Funke.* That was the only case relied on in *Heaney and McGuinness*; later judgments then followed both *Funke* and *Heaney and McGuinness.* In none of these decisions was there any separate analysis, justification or reasons for the principle that, once charged, a person has a right to refuse to provide information in response to questions. Of course, if information obtained under coercion is later relied on at trial, this is likely to breach the right against self-incrimination, see *Saunders.* But that is a wholly different matter.

170. My obligations in relation to ECtHR case law are set out in HRA, s 2, which is headed "Interpretation of Convention rights." So far as relevant to this decision, reads:

> "(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any–
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights…
>
> whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

171. I must therefore take into account the ECtHR decisions in *Funke, Heaney and McGuinness*, *Shannon* and *Marttinen.* But all these judgments rest on *Funke,* which

was not a case about information, but about documents. Moreover, as already noted at §136, *Funke* was criticised by Lord Hoffman in *Green* as continuing "obscurities" in its reasoning and being inconsistent with *Saunders.*

172. In *Manchester CC v Pinnock* [2010] UKSC 45, Lord Neuberger, giving the judgment of the Court, said at [48]:

> "As Lord Mance pointed out in *Doherty v Birmingham City Council* [2009] 1 All ER 653 at [126], s 2 of the HRA 1998 requires our courts to 'take into account' ECHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

173. Although a "constant line of decisions" state that, once charged, a person has the right not to provide information which might incriminate him, they all rest on a case with different facts and a different *ratio.* I thus respectfully find that these later judgments do "overlook or misunderstand some argument or point of principle" and should not be followed.

174. The other possibly relevant case, included in this category by the ECtHR in *Weh,* is *JB,* to which I now turn. This is the only remaining ECtHR authority for the Appellants' proposition that Mr Budhdeo's human rights would be breached were he to be required to provide information by way of a Sch 36 Notice, now he has been "charged" within the meaning of Article 6.

JB v Switzerland

175. The facts in *JB* as set out in the judgment can be summarised as follows:

(1) The Swiss tax authorities had received third-party information that JB had investments which had not been disclosed in his tax returns;

(2) On 11 December 1987, the Swiss tax authorities commenced tax evasion proceedings against JB and required him to provide all the documents relating to those investments. He did not comply.

(3) On several subsequent occasions, he was asked to "explain the source of the invested income" but did not respond;

(4) he was fined a total 5,000 Swiss francs ("CHF") because he had refused to respond;

(5) the case was settled for CHF 21,625.95; the settlement was reduced to take into account the penalties already paid.

176. Some five months before the settlement, JB had applied to the ECtHR. His application is set out at [3] of the judgment (emphasis added):

> "The applicant alleged that the proceedings in which he was involved were unfair and contrary to Article 6 § 1 of the Convention in that he *was obliged to submit documents* which could have incriminated him."

177. It is thus clear that JB's application related only to documents, and that the references to "information" in the decision must refer to information contained within those documents and not to the provision of free-standing information.

178. This is made clear by [66] of the judgment, where the ECtHR decided that there had been a breach of Article 6 because (again, emphases added):

> "…the authorities were attempting to *compel the applicant to submit documents* which would have provided information as to his income with a view to the assessment of his taxes. Indeed, according to the Federal Court's judgment of 7 July 1995, it was in particular important for the authorities to know whether or not the applicant had obtained any income which had not been taxed. While it is not for the Court to speculate as to what the nature of such information would have been, the applicant could not exclude that, *if it transpired from these documents* that he had received additional income which had not been taxed, *he might be charged with the offence of tax evasion*."

179. There are two difficulties. First, in concluding that a person has the right not to submit documents, *JB* runs directly counter to *Saunders,* which has been accepted as authoritative by numerous ECtHR judgments and by the UK courts. Oddly, the Court does consider *Saunders* at [68], saying:

> "The Court notes that in its judgment of 7 July 1995 the Federal Court referred to various provisions in criminal law obliging a person to act in a particular way so as to enable the authorities to obtain his conviction, for instance the obligation to install a tachograph in lorries, or to submit to a blood or a urine test. In the Court's opinion, however, the present case does not involve material of this nature which, like that considered in *Saunders*, has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person (see *Saunders*, cited above, pp. 2064-65, § 69)."

180. I am unable to understand the basis for the apparent distinction being made here. JB's application related to the demand that he submit "all the documents which he had concerning these companies," see [10] of the judgment. Those documents self-evidently had "an existence independent of the person concerned."

181. The second difficulty is evident from the final phrase of [66] set out above: "if it transpired from these documents that he had received additional income which had not been taxed, *he might be charged with the offence of tax evasion.*"

182. The ECtHR therefore did not decide this case on the basis that JB *had* been charged with tax evasion, but on the much more extensive ground that a person could refuse to provide information which *might* cause him to be "charged with the offence of tax evasion." I accept, of course, that JB had been charged with tax evasion, so it was not simply a hypothetical possibility. But the *ratio* of the case is much wider and does not depend on him having been charged.

183. That wider *ratio* cannot be reconciled with *Allen v UK,* where the ECtHR said:

> "…the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities."

184. It also runs counter to *Saunders,* where the ECtHR found that there was no privilege at the stage when questions were asked by the DTI inspectors, even though the answers might incriminate Mr Saunders. Article 6 was engaged only at the point where the prosecuting authorities sought to use that evidence in subsequent criminal proceedings.

185. To summarise the above:

(1) JB's application did not concern the provision of information, but documents, so is not relevant when seeking to establish the scope of the right not to self-incriminate in the context of providing information;

(2) its decision on documents cannot be reconciled with *Saunders*;

(3) its *ratio* widens the scope of the right against self-incrimination so as to cover the possibility of a future criminal charge, and that too is inconsistent with other ECtHR authorities.

186. As stated earlier in this judgment, HRA s 2 requires me to "take into account" any relevant ECtHR decision. I must therefore take *JB* into account. But I must also take into account the same Court's judgments in *Saunders, IJL, Allen v UK* and *Weh*. The weight of authority is clear. Moreover, Saunders has been followed and endorsed by the House of Lords in *Green* and most recently by the Supreme Court in *Beghal v DPP* [2015] UKSC 49 ("*Beghal*"), a case to which I later return.

187. If the *ratio* of *JB* were correct, a person would have the right not to refuse to respond to Sch 36 information notices if he "could not exclude" the possibility that his answers might lead to a subsequent criminal charge. As the ECtHR said in *Allen v UK,* that is clearly wrong. I respectfully decline to place reliance on *JB.*

Conclusions in relation to first and second types of case

188. From the analysis of the cases set out in the immediately preceding sections of this decision, I find that:

(1) where there has been no criminal charge Article 6 is not engaged, and a person cannot refuse to answer questions on the basis that he might thereby incriminate himself. It is a matter for the judge at the time of any subsequent prosecution to decide whether evidence given under compulsion should be excluded.

(2) Where there has been a criminal charge, none of *Funke, Heaney and McGuinness, Shannon* or *Marttinen* provides authority for the proposition that a person has an Article 6 right not to self-incriminate. The last three of these cases all rest on *Funke,* a case which concerned documents not information and which was criticised in *Green.*

(3) The case of *JB* is about documents, not information, so is not relevant to this question. Further, its *ratio* is in conflict with the mainstream of ECtHR case law and I respectfully decline to follow it.

The "Jalloh" *approach*

189. The analysis of the case law set out in *Weh* is not the only attempt to structure the ECtHR authorities on self-incrimination. In *Jalloh v Germany* [2006] (App 54810/00) at [101] the ECtHR said:

> "In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put."

190. One of the cases relied on by the ECtHR in *Jalloh* when coming to this formulation was *Saunders*. As noted at §142, the UK government had accepted that he was under compulsion and the ECtHR found the safeguards available to protect Mr Saunders to be inadequate, given the use made of the material at trial.

191. Another was *Heaney and McGuinness* where the ECtHR considered the degree of compulsion (the six month sentence of imprisonment), the safeguards which the Irish government said existed and whether or not the material could be used in a later criminal trial.

192. The *Jalloh* approach was also followed in the later case of *O'Halloran and Francis v UK* [2007] (Apps 15809/02 and 25624/02).

193. It is therefore right for me to consider whether the *Jalloh* approach leads to a different conclusion from the *Weh* formulation in Mr Budhdeo's case.

194. I first consider the nature and degree of compulsion. Mr Budhdeo is subject to a fixed penalty of £300 issued for failure to comply with a Sch 36 Notice. In establishing "the degree of compulsion" it is, however, relevant to consider not only the sums actually charged, but the possible penalties, see *Saunders*. If Mr Budhdeo continues to refuse to comply with the Sch 36 Notice, he could be subjected to a daily penalty of £60 a day under Sch 36, para 40; if he remains non-compliant, HMRC are able to apply to the FTT for a penalty of up to £1,000 per day under Sch 36, para 49A and/or to the Upper Tribunal for a tax-related penalty under Sch 36, para 50. In *Tager v HMRC* [2015] UKUT 40 the UT imposed a penalty of £75,000 under that provision. If Mr Budhdeo continues to refuse to provide information, he therefore risks significant financial costs, but (unlike *Saunders* or *Heaney and McGuinness*) there is no possibility of a prison sentence.

195. In relation to safeguards, CRCA s 17 allows officers of HMRC who receive information given by Mr Budhdeo under the Sch 36 Notice to pass it to other officers, who may ask the Crown Prosecution Service to prosecute him. The main protection available to Mr Budhdeo is that the judge in a subsequent criminal trial may rule that it would be a breach of PACE s 78 to rely on the evidence gathered in that way.

196. Mr Onalaja has pointed out PACE did not protect Mr *Saunders,* given that seven of the nine interview transcripts were admitted in evidence. However, in *Beghal* Lord Hughes said at [66] (in a passage with which three of the other four law lords agreed) that following *Saunders* "any use in a criminal prosecution of answers obtained under compulsion of law will be a breach of the right to a fair trial" and PACE s 78 must be exercised to exclude it.

197. The Court of Appeal took the same approach in *R v K* [2010] EWCA Crim 1640, where the defendant had disclosed financial information in ancillary relief proceedings which indicated he had under-declared his tax liabilities. An informer subsequently provided that information to HMRC, who charged "K" (the husband) with cheating the public revenue. The Court ruled that the information had been obtained under compulsion and reliance on it would deprive the husband of the fair trial to which he was entitled under Article 6. It "must therefore be excluded" under PACE s 78, see [43] of the judgment.

198. It is therefore clear that the level of safeguard has increased since *Saunders,* bearing in mind in particular the Supreme Court's clear direction in *Beghal* about the application of PACE s 78.

199. The third element in the *Jalloh* approach is "the use to which any material so obtained is put." Read together with the protection of PACE s 78, it follows that it is too soon to know whether Mr Budhdeo's Article 6 right against self-incrimination will be breached. As the ECtHR said in *IJL* at [100]:

> "…whether or not information obtained under compulsory powers by such a body violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial."

200. From the foregoing, I find that the *Jalloh* approach to the Article 6 right against self-incrimination leads to the same conclusion as the *Weh* formulation: Mr Budhdeo does not have the right to refuse to provide information required by Sch 36.

The Privy Council in "Brown v Stott"

201. I have also briefly considered *Brown v Stott* [2001] 2 WLR 817 at p. 836, in which all the members of the Privy Council concluded that the rights not to incriminate oneself was not absolute, see the judgments of Lord Bingham at p.836, Lord Steyn at pp.841 and 844, Lord Hope at p.853, Lord Clyde at p.859, and the Rt Hon Ian Kirkwood, at p.862.

202. Lord Bingham, in a speech relied on in *Allen* at [30] said at p.704:

> "The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for...The court has also recognised the need for a fair balance between the general interest of

> the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52."

203. *Brown v Stott* was later approved and followed by the Court of Appeal in *R v Kearns* [2002] 1 WLR 2815, see [29].

204. I have found that Mr Budhdeo does not have an Article 6 right to refuse to respond to a Sch 36 Notice, but that if HMRC seek to rely on that material in a criminal trial, the judge must consider PACE s 78 in the light of the guidance given in *Beghal*. That conclusion is in accordance with the "need for a fair balance between the general interest of the community and the personal rights of the individual" as required by *Brown v Stott.* It pays proper regard to the right of the state, in the interests of the community, to require citizens to provide information about his income. But it allows evidence gathered unfairly to be excluded from a subsequent criminal trial.

TMA s 105

205. Finally, I deal with TMA s 105, which was discussed in the hearing. It reads:

> "(1) Statements made or documents produced by or on behalf of a person shall not be inadmissible in any such proceedings as are mentioned in subsection (2) below by reason only that it has been drawn to his attention—
>
> (a) that where serious tax fraud has been committed the Board may accept a money settlement and that the Board will accept such a settlement, and will not pursue a criminal prosecution, if he makes a full confession of all tax irregularities, or
>
> (b) that the extent to which he is helpful and volunteers information is a factor that will be taken into account in determining the amount of any penalty,
>
> And that he was or may have been induced thereby to make the statements or produce the documents.
>
> (2) The proceedings mentioned in subsection (1) above are—
>
> (a) any criminal proceedings against the person in question for any form of fraudulent conduct in connection with or in relation to tax, and
>
> (b) any proceedings against him for the recovery of any [tax due from him, and
>
> (c) any proceedings for a penalty or on appeal against the determination of a penalty."

206. In essence, TMA s 105 provides that where a person gives information following an undertaking from HMRC (for instance, by way of the CDF or the earlier Hansard procedure) that it will not prosecute that person, the information provided will not be inadmissible in a subsequent criminal proceedings "for that reason only."

207. These are not our facts: Mr Budhdeo has refused the CDF and so TMA s 105 is not relevant.

Conclusions on self-incrimination and Mr Budhdeo's Sch 36 Notice: information

208. I have considered the two categories of ECtHR case set out in *Weh,* as well as the *Jalloh* approach and the decision of the Privy Council in *Brown v Stott.* I find that, although Mr Budhdeo has been "charged" with a criminal offence so that Article 6 is engaged, he cannot rely on that Article so as to refuse to provide information required by a Sch 36 Notice.

Self-incrimination, the Civil Evidence Act and the common law

209. In his further submissions, Mr Onalaja sought to extend the scope of the issues considered in this decision beyond Article 6. He said that the CEA s 14 "partly reflects the right to claim privilege against self-incrimination under Article 6 ECHR" and that I should have regard to that provision when coming to my decision, and should also take into account the common law on self-incrimination.

210. While I accept of course that there is a substantial degree of overlap between the right not to self-incriminate under human rights law and that arising under the common law and the CEA, they are not identical. Moreover, no argument was put forward at the February 2015 or October 2015 hearings about either the CEA or the common law. Nevertheless, given the importance of the issue to the Appellants in general and Mr Budhdeo in particular, I decided that it was right to admit these arguments and I allowed HMRC to respond.

The CEA

211. CEA s 14 (so far as relevant to this issue) reads as follows:

> **"14 Privilege against incrimination of self or spouse or civil partner**
>
> (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty–
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse or civil partner of that person to proceedings for any such criminal offence or for the recovery of any such penalty."

212. Mr Onalaja said that if Mr Budhdeo were required to provide documents and/or information by a Sch 36 Notice, this would "tend to expose" him to proceedings for a criminal offence, and that the CEA s 14 protected him.

213. In response, Mr Jones said that the section:

> "…refers to a right to refuse to provide information and documents in legal proceedings; it is not a right to refuse to comply with an information request made pursuant to statute."

214. I agree with Mr Jones that the section only applies to "proceedings," so it has no direct application to Sch 36 Notices issued by HMRC.

215. I further find that it does not apply to proceedings before the FTT. This can be seen from the long title of the CEA, which begins "An Act to amend the law of evidence in relation to civil proceedings…" taken together with Rule 15(2)(a) of the Tribunal Rules, which provides that the FTT may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom."

216. A tribunal may of course decide that it would not be in accordance with the overriding objective to allow HMRC's counsel to ask questions with the object of eliciting evidence which would tend to expose that person to criminal prosecution, but that would be a matter for the tribunal. It is nothing to do with the CEA.

The common law

217. Mr Onalaja put forward numerous common law authorities on the privilege against self-incrimination, which he said showed that the common law therefore protected Mr Budhdeo from having to respond to the Sch 36 Notices.

218. Mr Jones said that this submission should be rejected as "taken to its logical conclusion [it] would appear to emasculate the provisions relating to taxpayer notices in Schedule 36, FA 2008."

219. I accept, of course, that there is a common law privilege against self-incrimination. But it is trite law that (a) statute takes precedence over the common law, and (b) whether a statute applies is a matter of construction in the light of the particular facts. The question I have to decide is whether the Sch 36 Notice provisions have ousted that common law privilege.

220. I found guidance in two judgments. The first is *Bishopsgate Investment Management Ltd v Maxwell* [1992] 2 All ER 856 ("*Bishopsgate*") at p.867, a decision of the Court of Appeal. Dillon LJ, giving the leading judgment with which Mann and Stuart-Smith LJJ concurred, first considered two decisions which concerned the investigatory powers conferred on the Bank of England by the Banking Act 1987: *In re London United Investments Plc* [1992] 2 All ER 842 and *Bank of England v. Riley* [1992] 1 All ER 769, before saying:

> "The essence of both decisions is that if Parliament, in the public interest, sets up by statute special investigatory procedures to find out if the affairs of a company have been conducted fraudulently, with the possibility of special remedies in the light of an inspector's report, or to find out if there have been infringements of certain sections of the Banking Act 1987 which have been enacted for the protection of members of the public who make deposits, Parliament cannot have intended that anyone questioned under those procedures should be entitled to rely on the privilege against self-incrimination, since that

> would stultify the procedures and prevent them achieving their obvious purpose."

221. The second is *Green,* which I have already considered at §136 in the relation to *Funke*. Lord Hoffman said at p.420 that the reasoning in *Bishopsgate* was applicable to the exercise of powers under s 71(2) of the Environmental Protection Act 1990 ("EPA"). That subsection allowed a waste regulation authority to issue a notice requiring "any person to furnish such information specified in the notice as the...authority...reasonably considers ... it needs" for the purposes of its functions. He went on to say:

> "Those powers have been conferred not merely for the purpose of enabling the authorities to obtain evidence against offenders but for the broad public purpose of protecting the public health and the environment. Such information is often required urgently and the policy of the statute would be frustrated if the persons who knew most about the extent of the health or environmental hazard were entitled to refuse to provide any information on the ground that their answers might tend to incriminate them."

222. I therefore need to decide whether allowing a person to rely on the privilege against self-incrimination "stultify the [Sch 36] procedures and prevent them achieving their obvious purpose" as Dillon J put it in *Bishopsgate.* Or, to put it another way, would "the policy of the statute" be frustrated, to use Lord Hoffman's words in *Green?*

223. In answering these questions, I take into account the test to be applied before a person has the common law right against self-incrimination, as set out many years ago by Cockburn J in *R v Boyes* [1861] 1 B& S 311 at p.330 and accepted as authoritative:

> "the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things – not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency."

224. If Mr Onalaja's submissions were correct, a person could refuse to comply with a Sch 36 Notice on the basis that his compliance carried the real and appreciable danger of prosecution. For example, a person who received a Notice to disclose all his bank accounts, or all his properties, might have a legitimate fear that disclosure would lead to criminal proceedings.

225. In my judgment it would frustrate the statutory purpose of Sch 36 Notices if a person could refuse to comply with a Notice on that basis. Or, to use the *Bishopsgate* formulation, it would stultify the statutory procedures and prevent them achieving their obvious purpose of allowing HMRC to obtain information about a person's tax position.

226. I therefore find that common law privilege does not apply to prevent a person from being required to comply with a Sch 36 Notice.

The consequences for the substantive hearing

227. The purpose of the October 2015 hearing was to consider certain issues of law in the context of the substantive matters before the FTT. Mr Budhdeo has asked that the Tribunal strike out his Sch 36 Notice on the basis that his Article 6(1) right not to self-incriminate had been infringed; Mr Onalaja has subsequently added the CEA and common law submissions.

228. I have found that Mr Budhdeo cannot rely on Article 6, the CEA or the common law in order to refuse to provide either documents or information required under a Sch 36 Notice.

229. It follows that the Tribunal at the substantive hearing cannot strike out the Sch 36 Notice issued to Mr Budhdeo on the basis that it breaches his right not to self-incriminate, whether under Article 6, the CEA or the common law.

Self-incrimination and Sch 36 Notices issued to the Companies

230. The majority of the Sch 36 Notices have been issued to the Companies. Mr Onalaja submitted that the Companies could not be required to disclose information or documents following the receipt of a Sch 36 Notice "if to do so will deprive Mr Budhdeo of a right to claim privilege against self-incrimination which would otherwise be available to him."

231. Since I have found that Mr Budhdeo cannot rely on Article 6, the CEA or the common law in order to refuse to provide either documents or information required under a Sch 36 Notice, this issue falls away. However, as I received full submissions on the point, and in case this goes further, I set them out here together with my findings. The latter are of course are only relevant were I to be wrong in my decision in relation to Mr Budhdeo.

232. Mr Onalaja relied on three cases to support his arguments. In response, Mr Jones considered the same three judgments, together with a fourth case, and came to the opposite conclusion. Because the law has developed over time, I have set out these four cases in chronological order, together with the parties' submissions and my analysis.

RTZ v Westinghouse

233. In *Rio Tinto Zinc v Westinghouse Uranium Contract* [1978] AC 547 ("*Westinghouse*") at pp.651-2 Lord Fraser referred to a submission made by Mr. Rokison, Counsel for Rio Tinto Zinc ("RTZ"):

> "An interesting submission was made by Mr. Rokison on a question that would have arisen if your Lordships had held that the witnesses have no privilege but that the RTZ companies have privilege. In such an event the privilege of the companies could be rendered useless if its directors and officers could be compelled to give evidence incriminating the company. Mr. Rokison submitted that the privilege of a company, which would allow it to refuse to answer written interrogatories by the hand of its proper officer, should apply also to oral evidence by its directors and officers if such evidence might tend

> to incriminate the company. The submission is unsupported by authority but it has much logical force and if it had been relevant to do so I would have wished to consider it more carefully."

234. In the same case, Lord Wilberforce observed (at p.617) that although this point raised "novel and interesting contentions," it was unnecessary and therefore, inappropriate, to decide them. Viscount Dilhorne (at p.632) also expressed no opinion on this "interesting argument," save to observe that "it renders a company's privilege of little value if it can be got round in that way." Lord Keith made no comment (see pp.653ff).

235. In contrast, Lord Diplock was highly critical of Mr Rokinson's suggestion, saying at pp.637-8 that:

> "At common law, as declared in section 14(1) of the Civil Evidence Act 1968, the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary. It is not for your Lordships to manufacture for the purposes of this instant case a new privilege hitherto unknown to the law."

236. Mr Onalaja said that Lord Diplock was here "dissenting from the majority of the house on this point," but I do not agree. All the comments on this issue were *obiter;* of other four law lords, two of indicated that they might support Mr Rokinson's argument, Lord Wilberforce was neutral and Lord Keith silent. The case is therefore not an authority on the point.

Sonangol

237. In *Sociedade Nacional de Combustiveis de Angola v Lundqvist* [1991] 2 QB 310 ("*Sonangol*") Sonangol claimed $88m from Mr Lundqvist and three other defendants, who had allegedly been acting in concert to defraud Sonangol. The fourth defendant was a Liberian company controlled and managed by Mr Lundqvist, called SL Oil Executive Services ("SLOES").

238. Sonangol obtained an order requiring Mr Lundqvist and SLOES to make and file an affidavit "giving details of the value and whereabouts of all his [sic] assets, property, money and goods wherever situated." Mr Lundqvist and SLOES appealed, seeking to rely, *inter alia*, on the privilege against self-incrimination. It was submitted that if SLOES was compelled to disclose its assets, this might increase Mr Lundqvist's exposure to criminal proceedings.

239. The case came before the Court of Appeal (Sir Nicholas Browne-Wilkinson VC, Staughton and Beldam LJJ). Staughton LJ said at p.333:

> "the order that is challenged in this appeal requires S.L.O.E.S. to answer by Mr. Lundqvist as to the value and whereabouts of his assets. Even if 'his' is altered to 'their' (or 'its'), I consider that Mr. Lundqvist is entitled to claim privilege if he can show that compliance with that order would tend to incriminate him. In reaching that conclusion I do not think that I am departing from what Lord Diplock said in *In re*

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 2) [1978] A.C. 547, 637."

240. He went on to conclude (at p.325) that the claim to privilege was upheld in relation to both Mr Lundqvist and SLOES, finding that it was "distinctly probable" that the value of his overseas assets would be a link in the chain of proof in relation to the criminal charge of fraud.

241. Although Beldam LJ agreed with Staughton LJ that Mr Lundqvist was protected by the privilege, he said at p.336 that "the privilege claimed is a privilege against self-incrimination and does not in my judgment extend in the case of a company to incrimination of its office holders." He went on to cite Lord Diplock's words from *Westinghouse,* set out at §235 above, before saying: "I would therefore reject the claim to privilege made on behalf of the fourth defendant on this ground." Sir Nicholas Browne-Wilkinson VC concurred with Beldam J.

242. Mr Onalaja submitted that I should follow the decision of Staughton J, saying it was "persuasive" and that (as I understand his submission), the Companies could therefore rely on the privilege against self-incrimination if to do otherwise would risk incriminating Mr Budhdeo.

243. Mr Jones said that the judgment of Beldam LJ establishes as a matter of authority "that companies are not entitled to claim privilege on the ground that disclosure risks incriminating their office-holders or controlling shareholders."

244. I found Staughton J's judgment difficult to follow: on the one hand, he stated that he was not departing from Lord Diplock's view in *Westinghouse,* but nevertheless went on to allow SLOES to claim privilege. In any event, the position is put beyond doubt by Beldam LJ's judgment, with which Sir Nicholas Browne-Wilkinson VC concurred, so it is the decision of the majority.

245. I therefore agree with Mr Jones that *Sonangol* provides Court of Appeal authority for the proposition that the privilege against self-incrimination is "restricted to the incrimination of the person claiming it and not anyone else" as Lord Diplock put it in *Westinghouse.*

Tate Access Floors

246. The case of *Tate Access Floors v Boswell* [1991] 2 WLR 304 ("*Tate*"), a decision of the High Court, follows the same approach and is relied on by Mr Jones. The claimant sought to recover money stated to have been fraudulently removed from its UK subsidiary, Tate Access Floors Ltd, by Mr Boswell and ten other defendants, some of which were companies owned by the individual defendants. Sir Nicholas Browne-Wilkinson said, at pp.318-9:

> "The privilege is what it says it is: a privilege against self-incrimination. Even if it were possible to argue that a company which is the mere alter ego of an individual faced with the risk of prosecution should not be required to give discovery which might aid such prosecution, the foundation of such argument must be that the company

> is in fact the mere alter ego of the individual who is at risk…In order for a person to show that he has any privilege at all, the burden must be on him to show that he is being asked to incriminate himself: he has no privilege against incrimination by a third party and must prove that the company is his creature.
>
> Even if, contrary to my view, the individual defendants are entitled to put forward the claim to privilege on the basis that the defendant companies are their creatures, in my judgment they are still not entitled to object to the discovery against the company defendants. The privilege can only be claimed by the person who is likely to be incriminated: see *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (No. 2)* [1978] A.C. 547, 637 per Lord Diplock. If people choose to conduct their affairs through the medium of corporations, they are taking advantage of the fact that in law those corporations are separate legal entities, whose property and actions are in law not the property or actions of their incorporators or controlling shareholders. In my judgment controlling shareholders cannot, for all purposes beneficial to them, insist on the separate identity of such corporations but then be heard to say the contrary when discovery is sought against such corporations. This conclusion is supported by the fact that in the *Sonangol* case [1991] 2 W.L.R. 280, discovery was ordered against a company who was the mere creature of Mr. Lundqvist, notwithstanding the risk that this might incriminate Mr. Lundqvist. Moreover, I was not referred to, nor have I found, any authority which supports the proposition advanced by the individual defendants."

247. Although not referred to by Mr Jones in his submissions, this judgment was subsequently upheld after careful examination by the Court of Appeal the following year in *Bishopsgate,* see in particular Dillon J at p.882.

Kensington

248. Mr Onalaja submitted that the more recent Court of Appeal decision *Kensington International Ltd v Republic of Congo* [2008]1 WLR 1144 ("*Kensington*") should be followed. I have taken this as a submission that it should be preferred to the other Court of Appeal cases considered above.

249. When the case came before the High Court under reference [2007] EWHC 1632 (Comm), it was argued that employees of a company could not be required to produce information which might incriminate their employers, as this would defeat the latter's privilege by the back door.

250. Mr Jones says that the issue in *Kensington* is the "the obverse" of the facts in this case. Here, the Companies are required to provide information and/or documents about their own CT position; they may additionally or in the alternative be required to provide information and/or documents about Mr Budhdeo under third party notices. Mr Budhdeo is not being required to provide information about his employer.

251. Mr Jones is therefore correct that *Kensington* has no application because it is the obverse of our facts. In any event, Gross J at first instance declined to decide this

issue, although finding it "interesting" and the Court of Appeal did the same, see [73] *per* Moore-Blick J, with whom Carnwath LJ and May LJ both agreed.

Self-incrimination and the Sch 36 Notices issued to the Companies: conclusion

252. *Sonangol* and *Tate* are both binding on me, and establish the principle that a company cannot claim privilege against self-incrimination on the grounds that provision of the information or documents might incriminate a director, officer, shareholder or other employee of the company.

The consequences for the substantive hearing

253. It follows that, at the substantive hearing, the Tribunal cannot allow the Companies' appeals against the Sch 36 Notices on the basis that they have a right to rely on Mr Budhdeo's privilege against self-incrimination.

254. There may of course be other reasons why the Tribunal might allow those appeals; that will be a matter to be decided at that hearing.

Self-incrimination and Sch 36 penalties

255. The penalties before the Tribunal at the substantive hearing are:

(1) a fixed penalty of £300 issued to Mr Budhdeo on 7 May 2014; and

(2) a fixed penalty of £300 issued to Noviscom on 1 July 2014.

256. Mr Budhdeo and the Companies are therefore unable to rely on Mr Budhdeo's Article 6 right not to self-incriminate in order not to comply with a Sch 36 Notice, and they cannot succeed in their appeals against those Notices by seeking to rely on that privilege. What, though, of penalties charged for failure to comply?

257. The Appellants submit that the penalties themselves were criminal under the autonomous meaning given to the term under the Convention. On that basis, even if they did not succeed in their arguments in relation to the Sch 36 Notices themselves, they should succeed on the penalties.

258. I found this a difficult argument. The penalties only arise because there has been a failure to comply with the Sch 36 Notices. Sch 36, para 45 provides that a person is not liable to a penalty for failing to comply with a Sch 36 Notice if he has a "reasonable excuse" for that failure.

259. As the Appellants cannot refuse to comply with the Notices by relying on Mr Budhdeo's privilege for the reasons set out above, it follows that the privilege cannot provide them with a reasonable excuse so as to eliminate the penalty. Whether or not the penalty is itself "criminal" within the meaning of Article 6 makes no difference.

260. However, as both parties made submissions on whether the penalties were criminal in nature, I have considered that point.

Submissions

261. Mr Onalaja relied on *Pipe v HMRC* [2008] STC 1911 ("*Pipe*"), in which Henderson J found that fixed daily penalties of up to £60 a day for failure to deliver a tax return were criminal for the purposes of Article 6.

262. Mr Jones disagreed, relying in particular on *Sharkey v HMRC* [2006] EWHC 300 (Ch) ("*Sharkey*"). Mr Sharkey had received a £50 fixed penalty for refusing to comply with a Notice issued under TMA s 19A to produce certain documents, and argued that Article 6 was engaged. Etherton J rejected that submission, finding at [37] that although there was "an element of punishment" in the fixed penalty, its primary purpose was to procure the production of the documents.

263. The Special Commissioner had already found as facts that in Mr Sharkey's case there was "no evidence that any prosecution was being considered or that any penalties involving criminal proceedings within art 6(1) were contemplated there is no enquiry into any criminal conduct on the part of the taxpayer," and the penalties were therefore "wholly independent of any prosecution, or intended prosecution or enquiry into dishonest or criminal conduct," see [35]-[36] of the decision.

264. Mr Jones said that only small fixed penalties have been levied on the Appellants for failure to respond to the Sch 36 Notices. They are essentially the same as those levied on Mr Sharkey under TMA s 19A, a precursor provision to the powers now in Sch 36.

265. The Appellants' position was that as HMRC were contemplating Mr Budhdeo's prosecution, the factual matrix was different to that in Sharkey.

Whether the penalties were criminal in nature: discussion

266. It is clear that *Sharkey* is authority for the proposition that small fixed penalties, the primary purpose of which is to procure the production of documents rather than to punish and deter, do not engage Article 6 where there is no evidence that any prosecution is being contemplated.

267. However, as the Appellants point out, those are not our facts: HMRC have accepted that they are contemplating Mr Budhdeo's prosecution.

268. More generally, both UK and ECtHR case law clearly establishes that even small penalties are criminal if their purpose is to punish and deter, see my discussion in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 0095 (TC) at [52]ff. In *Pipe,* albeit *obiter*, Henderson J distinguished daily penalties of up to £60 a day from the fixed penalty in *Sharkey,* because the daily penalties were not simply "an administrative means of securing the production of returns" but had a substantial deterrent element.

269. I find that the penalty charged on Mr Budhdeo does engage Article 6, because prosecution is being contemplated. But what are the consequences for Mr Budhdeo? I have already found that he has the right not to self-incriminate, but also decided this does not allow him to refuse to respond to the Sch 36 Notices. If the penalties are themselves criminal in nature, the position is unchanged: Mr Budhdeo is not thereby

afforded the right not to respond to the Notices. All it means is that Article 6 applies to the penalty proceedings, so that, for instance, the burden of proof is on HMRC, see *King v Walden* [2001] STC 822 at [71].

270. What of the small fixed penalty imposed on Noviscom? Does it engage Article 6, because Mr Budhdeo, its director, may be prosecuted? This might be arguable if the prosecution in question was that of the companies together with that of Mr Budhdeo, *qua* director, but those are not our facts: HMRC are only considering a prosecution of Mr Budhdeo. I therefore follow *Sharkey* and find that the £300 penalty levied on Noviscom does not engage Article 6.

271. Were I to be considering daily penalties, I would find that they also engage Article 6, for the reasons given by Henderson J in *Pipe*. However, that finding would not allow the recipients to refuse to provide information and documents requested by the Sch 36 Notices. Instead, the position is the same as set out at §269 above in relation to Mr Budhdeo.

The penalties at the substantive hearing

272. From the foregoing it follows that, at the substantive hearing, the Tribunal cannot allow Appellants' appeals against the penalties on the basis that they have a right to rely on Mr Budhdeo's privilege against self-incrimination.

273. There may of course be other reasons why the Tribunal might allow those appeals; that will be a matter to be decided at that hearing.

Self-incrimination and applications for closure of SA/CT enquiries

274. TMA s 8(1) says that a person may be required to make and deliver an SA return "for the purpose of establishing the amounts in which [he] is chargeable to income tax and capital gains tax for a year of assessment…" As already set out at §148, Lord Hutton said in *Allen* at [29]:

> "It is also self-evident that to ensure the due payment of taxes the state must have power to require its citizens to inform it of the amount of their annual income."

275. TMA s 9A gives HMRC the power to enquire into that return, within certain time limits which are not in issue here.

276. The similar provisions relating to companies are at FA 1998, Sch 18, paras 3 and 24-26.

Self-incrimination and the refusal to answer questions

277. The Appellants submitted that the privilege against self-incrimination means they do not have to answer the questions asked by HMRC as part of these SA/CT enquiries, and they have applied to the FTT to close the enquiries on that basis.

278. Although Article 6 does give Mr Budhdeo that privilege, I have already found that it does not allow him to refuse to provide the information or documents required under the Sch 36 Notices. For the same reasons, he cannot rely on that privilege so as

to refuse to respond to the questions asked by HMRC as part of the SA enquiries into his returns.

279. The Companies have not sought to argue that they have any self-incrimination privilege in their own right. Instead, they rely Mr Budhdeo's privilege, but I have decided against them on this point. It follows that they cannot rely on Mr Budhdeo's privilege (even if Mr Budhdeo could rely on it, which I have found is not the case).

Consequences for the closure notice applications

280. TMA s 28A(4) allows a taxpayer whose SA return is under enquiry, to "apply to the tribunal for a direction requiring [HMRC] to issue a closure notice within a specified period." TMA s 28A(6) provides that "the tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing a closure notice within a specified period."

281. It is well-established that the effect of TMA s 28A(6) is to place on HMRC the burden of showing that the enquiry should continue, see most recently *Michael v HMRC* [2015] UKFTT 0577(TC) at [4] (Judge Sinfield and Ms O'Neil).

282. At the substantive hearing it will therefore be for HMRC to show that there are reasonable grounds to continue the SA enquiries into Mr Budhdeo. However, the effect of my decision is that the Tribunal cannot find that the enquiries should be closed because of Mr Budhdeo's privilege against self-incrimination.

283. The similar CT provisions are at FA 1998, Sch 18, para 33 and the legal position is the same. The burden will be on HMRC at the substantive hearing to show that the enquiries into the Companies should not be closed, but the Tribunal cannot decide to close the enquiries on the basis of Mr Budhdeo's privilege against self-incrimination.

Are any provisions of PACE engaged?

284. The Appellants submitted that PACE s 78 and s 67(9) were applicable to the issues before the Tribunal, namely the Sch 36 Notices, the associated penalties and the closure notice applications.

PACE s 78: unfair evidence

285. PACE s 78 sits within Part VIII of that Act; that Part is headed "Evidence in criminal proceedings – general." The section reads:

> **"Exclusion of unfair evidence**
>
> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

286. Mr Budhdeo said that the use of evidence given under the "coercion" of the COP9 letter would fall within PACE s 78, and (as I understand his submission), the section could also extend to evidence collected by HMRC under its SA and CT enquiry powers and in consequence of the Sch 36 Notices.

287. Mr Jones said that PACE s 78 would only fall to be considered if there was a subsequent criminal prosecution of Mr Budhdeo. It was not relevant to the exercise of the FTT's powers to direct the closure of an SA or CT enquiry, or to allow an appeal against a Sch 36 Notice or penalty.

288. I agree with Mr Jones that this section is not relevant to the tasks before the Tribunal in the substantive proceedings. If there is a criminal trial, and if the prosecution places reliance on evidence given by Mr Budhdeo or the Companies as a result of HMRC's enquiries or Sch 36 Notices, it will be for the judge in that criminal court to decide whether to exclude that evidence.

289. It is possible that PACE s 78 would also be relevant were HMRC to levy a civil penalty for fraud, but that would be a matter for the Tribunal in any resultant appeal proceedings.

PACE Code C

290. PACE s 66 mandates the Secretary of State to issue "Codes of Practice." Section 66(1)(b) provides for the issuance of a Code in connection with "the detention, treatment, questioning and identification of persons by police officers."

291. That Code is known as "Code C," and is frequently amended, with new versions coming into effect from July 2012, October 2013 and June 2014, but no party suggested that any of the amendments were relevant to the broad brush issues I had to consider.

292. Code C includes stipulations about issuing cautions, and provides that when a person is interviewed under caution he should be informed of the nature of the offence for which he is being investigated, see paragraphs 10 and 11.1A of the Code.

293. PACE s 67(9) provides that "persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code."

294. Both Mr Budhdeo and Mr Onalaja said that, as HMRC was investigating whether or not to charge Mr Budhdeo with a criminal offence, namely fraud, HMRC was bound by Code C. They said that Mr Budhdeo had been interviewed by HMRC without the requirements of the Code having been followed: he had not been cautioned and the basis for the case against him had not been explained.

295. Mr Budhdeo submitted that this failure should be taken into account by the Tribunal when deciding whether to allow his appeals against the Sch 36 Notice and related penalty. He said that the Tribunal should either:

(1) allow those appeals; or

(2) stay the appeals until the earlier of:

(a) the conclusion of any criminal proceedings; or, in the alternative

(b) HMRC's decision not to prosecute.

296. Mr Jones submitted that whether or not there had been a breach of Code C was a matter for the judge at the criminal court were there to be a prosecution. It was not relevant to the issues before the Tribunal.

PACE Code C: discussion and decision

297. The Tribunal has three tasks to perform at the substantive hearing. The first is to decide whether or not to allow the appeals against the Sch 36 Notices, the second is to decide whether to allow the appeals against the penalties for refusing to comply with those Notices, and the third is to decide whether to direct that HMRC close the SA and CT enquiries.

298. In relation to the first, the Tribunal must allow the appeal if the information/documents are not reasonably required. The issues of whether HMRC were required to comply with Code C, and (if they were so required) any failures to comply with that Code, are not relevant to the Tribunal's decision as to whether the information and/or documents required by the Notice are reasonably required.

299. In relation to the second, the position is the same: any failure by HMRC to comply with Code C is irrelevant to whether or not the Appellants have a reasonable excuse for failing to comply with the Notices.

300. In relation to the third, if HMRC demonstrate, at the substantive hearing, that there are reasonable grounds to continue their enquiries, the Tribunal will direct that they continue. How HMRC conducted their COP9 interviews is again irrelevant to that decision.

301. I therefore agree with Mr Jones that whether or not there has been a breach of Code C is not relevant to the decisions to be made at the substantive hearing. If HMRC decides to prosecute Mr Budhdeo, he can make any relevant submissions in relation to PACE at the criminal court.

The Disclosure Application

302. On 7 July 2015 Mr Budhdeo applied to the FTT for a direction under Rule 5(2)(d) of the Tribunal Rules. The relevant part of that Rule reads:

> "**Case management powers**
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a)-(c) …

(*d*) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;…"

303. The Disclosure Application asked that the FTT direct HMRC to provide the following:

(1) a copy of the information which "HMRC claimed to possess based on which the COP9 was issued" ("Item 1");

(2) confirmation that Ms Murphy, the HMRC officer who issued the COP9 letter, was authorised to do so ("Item 2");

(3) confirmation that the issuance of the COP9 letter was approved by the HMRC Authorising Officer ("Item 3"); and

(4) a copy of the "registration report" submitted to the Authorising Officer ("Item 4"). HMRC's Fraud Civil Investigation Manual, at FCIM102060 requires that this report include "the extent of evidence of suspected evasion and the estimated arrears."

304. In a subsequent letter, dated 15 September 2015, Mr Budhdeo submitted that the Disclosure Application was "essentially intertwined" with the matters to be heard in this hearing, and so should be granted in advance of the hearing. He said that the lack of disclosure was a "direct violation of my rights to a fair trial" under Article 6 of the Convention, which applies not only to the court proceedings, but "also to the stages which both precede and follow" those proceedings. The right to a fair hearing means that the parties must have knowledge of "all evidence adduced or observations filed," whether the proceedings are civil or criminal.

305. He also submitted that the FTT is "required by statute to conduct itself within the framework of the Human Rights Act." If the FTT has no power to force disclosure, then it is "unable to conduct a fair trial" and so should refer the matter to the ECtHR for directions or to the Lord Chancellor's Office for guidance.

306. On 29 September 2015, the Disclosure Application was refused by another judge on the papers. The judge said that the purpose of this preliminary hearing was to determine matters of law, and the requested disclosure was irrelevant. However, permission was given to Mr Budhdeo to renew the Disclosure Application at this hearing, and he did so.

307. In addition to the matters raised in his written submissions, Mr Budhdeo said that the requested disclosure would allow the FTT to see if the enquiries and Sch 36 Notices were "meritorious" or not. In response, Mr Jones said that none of the requested material was relevant to the Appeals and Applications and that there was no basis for granting disclosure.

308. Although Mr Budhdeo renewed the Disclosure Application at the end of the hearing, and I have dealt with it at the end of my decision, I nevertheless considered whether or not to allow the requested disclosure before making my decision on these

preliminary issues. This is because I was mindful of Mr Budhdeo's submission that the information and documents he was requesting were relevant to those matters.

The Disclosure Application: discussion

309. Rule 5 gives the FTT the power to direct that documents or information be provided "in relation to the conduct of disposal of the proceedings." Rule 16(1)(b) allows the FTT to:

> "order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings."

310. Thus, I can only direct that documents and/or information be provided by HMRC if they are relevant to the issues to be decided at this hearing or the substantive hearing.

311. Like the judge who decided the Disclosure Application on the papers, I find that the documents and information requested are not relevant to the issues of law to be decided at this hearing. The reasons why HMRC opened the COP9 enquiry, and whether they followed the proper processes, are questions of fact; the purpose of this hearing is solely to decide questions of law.

312. I went on to consider whether disclosure should be directed before the substantive hearing. In relation to Item 2, Mr Budhdeo acknowledged at the hearing that disclosure is no longer required, because Ms Murphy's witness statement, prepared for that substantive hearing but already filed and served, states that she had the necessary authority.

313. In relation to Item 3, confirmation that the COP9 letter was properly authorised has no relevance to the issues before the Tribunal.

314. Items 1 and 4 are arguably linked. Item 1 asks for the reasons why the COP9 letter was sent, and Item 4 for the report Ms Murphy submitted to the authorising officer to obtain approval for issuing that letter, which includes details of the suspected evasion.

315. The first issue before the Tribunal at the substantive hearing is whether or not to allow the appeals against the Sch 36 Notices on the basis that the information and/or documents included within those Notices were not "reasonably required" by the HMRC officer and so are not in accordance with the statutory provisions. This will be for the Tribunal to decide on the basis of the evidence. Items 1 and 4 are not relevant to those decisions.

316. The second issue before the Tribunal is the penalties charged for failing to comply with the Sch 36 Notices, and whether the Appellants have a reasonable excuse for those failures. I cannot see any basis on which the Appellants would be able successfully to argue that they had a reasonable excuse for non-compliance based on the reasons why HMRC opened the COP9 enquiry.

317. The third issue is the closure notices. Mr Budhdeo submitted that "in resisting the closure application, the HMRC should provide the FTT all its evidence in support of the appeal but has failed to do so." But, as I have said, the burden in a closure notice application hearing is on HMRC to show that there are "reasonable grounds for not issuing a closure notice within a specified period." In other words, it is for HMRC to provide their grounds for resisting a closure direction and a matter for them as to what grounds they choose to put forward.

318. In coming to these conclusions, I also note that apart from the single reference to HMRC being required to provide the evidence to support their case on closure notices, Mr Budhdeo did not explain why any of the Items are relevant to the issues which will be before the Tribunal at the substantive hearing.

319. He did however make several general submissions, one of which was that a failure to direct disclosure would be a breach of his rights under Article 6. I have found at §113ff that Article 6 is engaged, because Mr Budhdeo has been officially alerted to "the likelihood of criminal proceedings against him." However, the substantive hearing of the Appeals and Applications is not in any sense "a stage" of those putative criminal proceedings. If there are such criminal proceedings, Mr Budhdeo will have the right to disclosure of the evidence relied on by the prosecution.

320. Mr Budhdeo also referred to Article 6 applying "whether the proceedings are civil or criminal." I have already found, following *Ferrazzini,* that tax disputes do not involve the determination of the Appellants' civil rights and obligations, see §93ff.

321. I agree, of course, that the FTT is required to comply with the HRA, but for the reasons set out above that Act does not require me to direct disclosure of Items 1, 3 or 4. The absence of those Items will not prevent the Tribunal from conducting "a fair trial" of the issues at the substantive hearing because those Items are irrelevant to the issues it has to decide.

322. It follows that there is no reason to refer the matter to the ECtHR for directions or to the Lord Chancellor's Office, as Mr Budhdeo has requested. The position is entirely clear and is compatible with the relevant statutory provisions, including the HRA.

Appeal rights and directions

323. This document contains full findings of fact and reasons for the decision.

324. To the extent that the decision decides preliminary issues relating to the Sch 36 Notices themselves, there is no right of appeal, see Sch 36, para 32(5).

325. To the extent that it decides preliminary issues relating to other matters, including the appeals against the Sch 36 penalties, any party dissatisfied with the decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules.

326. The normal time limit for making such an application is that it must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, because of the interlinking between these preliminary issues and the substantive hearing of the Appeals and Applications, I direct that **the 56 days within which a party may send or deliver an application for permission to appeal shall run from the date of the substantive decision**. This means that no appeal need be made until after the parties have received the Tribunal's decision on the outcome of the Appeals and Applications. This will follow the substantive hearing.

327. 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.

328. Directions for the substantive hearing are being issued at the same time as, or shortly after, this decision.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 8 FEBRUARY 2016