

THE APPLICATION OF THE EUROPEAN CONVENTION ON
HUMAN RIGHTS TO TAX MATTERS IN THE UNITED KINGDOM

by Philip Baker

Discussion of the application of the ECHR to tax matters in the UK can be divided into two periods of time: prior to 2nd October 2000, and subsequent to that date. 2nd October 2000 is the date on which the Human Rights Act 1998 went into force and incorporated certain of the Articles of the ECHR into UK domestic law. This has meant that Articles of the Convention can now be raised directly by taxpayers in tax appeals, and has resulted in a flourishing of case law on the application of the Convention to tax matters.

The United Kingdom was the first country to ratify the ECHR on 8th March 1951.¹ However, at that time the decision was taken not to incorporate the Convention into UK domestic law. As a country which follows the dualist approach to international law, treaties do not create rights for persons or become justiciable in the UK courts unless the treaty is incorporated into

¹ The UK has also ratified the following Protocols on the following dates:

1 st Protocol	3 rd November 1952
2 nd Protocol	6 th May 1963
3 rd Protocol	6 th May 1963
4 th Protocol	Signed but not ratified
5 th Protocol	24 th October 1967
6 th Protocol	20 th May 1999
7 th Protocol	Neither signed nor ratified
8 th Protocol	21 st April 1986
9 th Protocol	Neither signed nor ratified
10 th Protocol	9 th March 1993
11 th Protocol	9 th December 1994
12 th Protocol	Neither signed nor ratified

domestic law by legislation. In 1951, the view seems to have been that the existing legal systems of the United Kingdom provided adequate protection for persons, and there was no need to incorporate the Convention into domestic law.

This policy was challenged subsequently, and in 1997 the Labour Party included as a manifesto commitment for the election of that year that they would incorporate the Convention into domestic law. Following their election, they did so by the Human Rights Act, which was enacted on 9th November 1998 and went into force on 2nd October 2000.²

The Period Before 2nd October 2000

Though the decision not to incorporate the Convention into domestic law meant that individuals could not rely on it directly before the UK courts, there were occasions when taxpayers (appearing in person) tried to rely upon the Convention. For example, in Oxhey (Collector of Taxes) v. Raynham³ the taxpayer said that he had withheld payment of tax as a matter of conscience, and relied on Article 9 of the ECHR. The judgment of the County Court judge merits quotation in full:

His Honour Judge Sir Ian Lewis: “Mr. Raynham submits that he is not bound to pay taxes because of Article 9 of the European

² The delay in implementation was due largely to the need to train the judiciary and others in the application of the ECHR.

³ (1983) 54 TC 779 (Weston Super-mare County Court, 27th July 1983).

Convention on Human Rights to which this country is a signatory. He says that his conscience does not allow him to give any support or assistance to the Crown. When I asked him he was bold enough to submit that if his conscience told him so, he would be entitled to rely on Article 9 to disobey any of the laws of this country. Mr. Raynham made those submissions but cited no authority and adduced no evidence in support of them.

Mr. Mehta appearing for the Collector of Taxes agreed that this country was a signatory to and had ratified the Convention which came into force on the 3rd September 1953. He relied, however, on R v. Chief Immigration Officer, ex parte Salamat Bibi [1976] 1 WLR 979 and in particular on the dicta of Lord Denning MR, Roskill and Geoffrey Lane LJJ. to submit that the Convention was not part of the law of this country. From those judgments, it is clear to me that the Convention is not part of the law of this country but it may be referred to when there is any ambiguity or uncertainty in domestic law. To my mind there is no ambiguity in the tax legislation. Section 4 of the Income and Corporation Taxes Act 1970 is quite explicit as to the circumstances in which tax is due and payable. Further, Mr. Raynham agrees that he has not appealed against the assessments. In my judgment, Mr. Raynham's case falls there. However, in deference to Mr. Mehta's researches, I would go on to say that in my view the Convention has to be read as one with the First Protocol thereto which this country ratified on the 3rd November 1952. Articles 1 and 5 of that Protocol make it clear that even under the Convention this country is entitled to levy taxes.

Finally, I would add, though having regard to my decision what I say is obiter, that even if Article 9 applied as law, it is clear to me that it is wholly inapplicable in its wording to the present case. Put simply, the position is as has been said 'Render unto Caesar the things which are Caesar's, and unto God the things that are God's'. Mr. Raynham's application fails."

In Sweeney v. Maidstone General Commissioners⁴ the taxpayer appealed against an award of penalties against him on the grounds that the refusal to grant him an adjournment or to grant him legal aid had infringed his rights under the ECHR. Peter Gibson J dismissed the appeal:

"This is an appeal by Mr. Kevin Sweeney (the taxpayer) ... He gives as his grounds for requesting an adjournment:

- (1) that he has not had adequate facilities for the preparation of his case – and he refers to Article 6(1)(b) of the European Convention on Human Rights (but I think he

⁴ [1984] STC 334.

means Article 6(3)(b) as ratified by the British Government in 1966 [sic] – and

- (2) that he has not been granted legal and financial assistance for the purpose of this case, pursuant to Article 6(1)(c) of the European Convention on Human Rights (and again I think he means Article 6(3)(c)).

...

So far as he seeks to rely on provisions of the European Convention, it is trite law that the effect of that Convention is not justiciable in the Courts. Further, the provisions that he relies on relate to criminal proceedings, and although these are proceedings in respect of penalties they are not criminal proceedings.”⁵

Leaving aside these attempts by litigants in person to rely upon the ECHR, there were two valid legal bases (prior to the incorporation of the Convention into domestic law by the Human Rights Act) on which reference could be made to the Convention.

The first basis – referred to in Oxhey v. Raynham – derived from the rule of statutory interpretation that, in enacting legislation, Parliament is presumed to intend to act consistently with the UK’s obligations under international law. Ratification of the ECHR imposed an international law obligation on the UK Government, and so legislation should be read consistently with the Convention. However, this principle would only apply if the legislation was unclear or ambiguous: if the legislation was clear – even if it was clearly contrary to the Convention – then it had to be applied. Thus, only if it was possible to show an ambiguity in tax legislation would it be possible to refer to

⁵ The penalties were fixed penalties for failing to comply with notices requiring the taxpayer to make returns. It is probably correct that they are not criminal for Convention purposes.

the Convention on the basis that an interpretation consistent with the Convention should be adopted.

One sees this strict approach being applied even at the beginning of 1999 (after the Human Rights Act had been enacted, but before it came into force). In the case of Commissioners of Customs & Excise v. Harris⁶ the Commissioners appealed against an award of costs to the respondent. He sought to rely upon the ECHR. The Divisional Court rejected the application of the Convention:

“On behalf of Mr. Harris, Mr. Clompus has repeated those submissions in this Court together with further argument relating to the applicability of the European Convention on Human Rights ...

Having drawn attention to those provisions in the European Convention on Human Rights upon which his submissions were based, Mr. Clompus very properly accepted that these would only come into play in his favour in the event that this Court came to the conclusion that there was an ambiguity or uncertainty in the relevant statutory provisions which made it appropriate to have regard to the Convention as a guide to interpreting the statutory provisions in question. He accepted that the Convention does not form part of the domestic law of this country at present and will not do so until the Human Rights Act 1998 is brought into force, presumably in the year 2000.

In my judgment, there is no ambiguity or uncertainty in the statutory provisions in question. Accordingly, this is not a matter in which this Court can have regard to the provisions of the Convention as an aid to construction. In those circumstances, it is not necessary to go into the merits of Mr. Clompus’ submission that the legislation in question should be construed by reference to the rights enshrined in Article 6 of the Convention.”

There does not appear to have been any reported case in which a UK Court found a provision of tax legislation to be uncertain or ambiguous and relied upon the European Convention as an aid to interpretation.

The second legal basis upon which reference might be made to the Convention was via the route of European Community law. On a number of occasions UK courts or tribunals dealing with VAT or excise duties referred to the European Convention as part of Community law.

In the case of Hodgson v. Commissioners of Customs & Excise⁷ the appellant challenged a penalty of £250. The penalty was imposed on him on grounds that an amount of hand-rolling tobacco, which he had imported into the UK, was imported for a commercial purpose. The appellant argued that he was entitled to the fair trial rights in Article 6(1) of the Convention. The VAT & Duties Tribunal approached the applicability of the Convention as follows:

“[18] So far as United Kingdom law is concerned it is well-established that the Convention is not part of our law and the courts have no power to enforce Convention rights directly; though the Convention may be deployed for the purpose of resolving an ambiguity in UK law. See R v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 per Lord Bridge at page 747g and Lord Ackner at page 760g. The Convention is nonetheless relevant to the present issue. If the Community law rights conferred on Mr. Hodgson by the Excise Directive⁸ include the right to a ‘fair trial’ conferred by Article 6.1 of the Convention, then on that ground also the Customs & Excise Commissioners v. Carrier⁹ construction of Article 5.3 will be incompatible with Mr. Hodgson’s Community law rights. In this connection we record that the ECJ has held that fundamental rights form part of the general principles of law the observance of which the ECJ ensures. The Convention has special significance in determining such rights, though it is not the only source from which such rights have derived. The Court has further held that ‘the Community cannot accept measures which are incompatible with the observance of human rights thus recognised and guaranteed’: see Elliniki Radiophonia Tileorassi Anonimi Etatria v. Dimotiki Etairia Pliroforissis [1991] ECR II-2925 at paragraph 41.”

⁶ Queen’s Bench Divisional Court, 29th January 1999 (CO/3875/98).

⁷ [1996] V&DR 200.

⁸ EC Council Directive 92/12/EEC.

⁹ [1995] 4 All ER 38.

The VAT & Duties Tribunal similarly applied the Convention as part of European Community law in Formix (London) Ltd. v. Commissioners of Customs & Excise¹⁰, in Edwards v. Commissioners of Customs & Excise¹¹ and in Yates v. Commissioners of Customs & Excise¹². In the litigation involving Marks & Spencers plc v. Commissioners of Customs & Excise¹³ issues of the Convention were run alongside arguments based upon general principles of Community law.

In a number of cases arguments based upon the European Convention were addressed to the VAT & Duties Tribunal, but the Tribunal found it unnecessary to apply the Convention since the matter could be resolved by application of Community law: see Widnell Group v. Commissioners of Customs & Excise¹⁴ and, especially, Coleman & Others v. Commissioners of Customs & Excise¹⁵.

The application of the Convention as part of Community law only arose in connection with VAT, customs duties and excise duties. In a few cases, the Convention was referred to in direct tax cases as well.

¹⁰ Case No. 15241 (LON/97/882), decision of 13th November, 1997.

¹¹ Case No. 16245 (LON/93/2423), decision of 24th August, 1999.

¹² Case No. 16760 (LON/00/455), decision of 27th July 2000.

¹³ See [1999] STC 205 and [2000] STC 16.

¹⁴ Case No.15170 (LON/97/1914), decision of 7th October, 1997.

¹⁵ [1999] V & DR 133. This was also the case with the litigation involving the Building Societies Ombudsman Company: see R. v. Customs & Excise Commissioners, ex parte Building Societies Ombudsman Company Limited [1999] STC 974.

In Hillsdown Holdings plc v. Inland Revenue Commissioners¹⁶ the taxpayer sought to rely upon Article 1 of the First Protocol to the Convention. In R. v. Inland Revenue Commissioners ex parte Banque Internationale à Luxembourg SA¹⁷ the question arose whether notices addressed to a third party bank to disclose information concerning the affairs of a number of its customers infringed their right to privacy under Article 8 of the Convention. Lightman J held that the notices impinged on confidentiality and the right of privacy but that there was ample justification for the notices under Article 8(2). He said:

“... the notices were issued according to law, in pursuit of a legitimate aim and necessary in a democratic society for protecting the taxation system and revenue. The size and sophistication of the tax avoidance schemes in question and what appears to the inspector to have been the dubious (if not dishonest) character of the devices employed required him to take the immediate remedial action, which the legislature in section 20 provided for in this situation. The decisions of the European Court of Human Rights in Funke v. France (1993) 16 EHRR 297 and in Chappell v. United Kingdom (1989) 12 EHRR 1 amply support the existence of the required justification in this case.”

Prior to 2nd October 2000 it was strictly the case that the Convention could only be referred to either under the principle of statutory interpretation or as part of Community law. However, as the implementation of the Human Rights Act approached, some courts and tribunals began to apply the Convention as if it was already part of UK law. The courts appreciated that it was only a matter of time before the Convention became part of domestic law,

¹⁶ [1999] STC 561.

and that if any appeal was made against their decision it would in all probability be heard after the Convention was part of domestic law. In Ellinas, Ellinas & Ellinas (trading as Hunts Cross Supper Bar) v. Commissioners of Customs & Excise¹⁸ the Commissioners applied to exclude evidence which might identify an informant on grounds of public interest immunity. The Tribunal concluded that the exclusion of the evidence would not infringe the right to a fair trial under Article 6 of the Convention. In Anchor Foods Limited v. Commissioners of Customs & Excise¹⁹ the VAT & Duties Tribunal considered Article 6(1) of the Convention in deciding whether it had jurisdiction to review a requirement to provide security as a substantial restriction on the right of access to the courts. The Tribunal added²⁰ that the same result could have been reached by reference to the Community law principles of effectiveness and proportionality.

Finally, one might note that in a number of cases, of which an example is Power v. Commissioners of Customs & Excise²¹, the VAT & Duties Tribunal decided that it should hold a hearing in public so as to comply with the provisions of Article 6 of the Convention.

Before turning to the period after the Human Rights Act came into force, one might mention that during this earlier period (before the Act came into

¹⁷ [2000] STC 708 at 723b to e.

¹⁸ Case No.15346 (MAN/90/692), decision of 11th February, 1998.

¹⁹ Case C00100 (LON/94/7043), decision of 16th July 1999 – there is further litigation in this matter reported in [1999] 3 All ER 268.

²⁰ At paragraph 142.

force) at least twenty-eight cases involving UK taxation were decided by the ECnHR or the ECtHR.²²

The Period Subsequent to 2nd October 2000

The entry into force of the Human Rights Act on 2nd October 2000 marked a new era for human rights protection in the UK. The Act meant that it was possible to introduce arguments based upon the European Convention directly in UK courts and tribunals in a way that had not previously been possible. Human rights arguments have subsequently been raised on a number of occasions in tax tribunals or courts dealing with tax matters. There have been at least twenty-six reported cases dealing with taxation and human rights since the Act went into force.

Because it had not been possible, by and large, to raise human rights points in UK courts before 2nd October 2000, a number of these recent cases had to deal with quite basic issues which might have been resolved earlier had the Convention been applicable in domestic law. Examples are the applicability of Article 6 to tax proceedings and, in particular, which (if any) of the tax penalties constitute criminal charges for the purposes of that Article.

²¹ Case No.16748 (LON/98/1155), decision of 20th July 2000.

²² These cases are all identified in Table 1 to the article on “Taxation and the European Convention on Human Rights” [2000] *BTR* 211 and (2000) 40 *European Taxation* 298.

The following sections examine the case law of the last year under the different Articles of the Convention and the First Protocol.

Article 1 of the First Protocol: the protection of property

The protection of property has been raised in a number of tax cases since 2nd October 2000. This includes a recent decision of the House of Lords.

Article 1 of the First Protocol was raised (together with extensive arguments based upon European Community law) in the case of R (on the application of Professional Contractors Group Limited & Others) v. Inland Revenue Commissioners²³. The issue in that case concerned new legislation introduced in the Finance Act 2000 which placed a number of self-employed individuals on a similar basis for tax purposes as employed individuals. (This legislation was preceded by a Press Release numbered “IR35” and the litigation is often referred to as “the IR35 case”.)

The argument based on the First Protocol was that the new legislation made it more expensive for the individuals to exercise their activities through a service company because its effect was to impose a higher charge to tax. It also made the tax position more uncertain since the question would need to be addressed whether or not the individual would have been an employee if he had

²³ [2001] EWHC Admin 236; [2001] STC 629: Queen’s Bench Division, Administrative Court.

provided services directly to his client. This in turn raised quite difficult issues of law as to whether an individual would be self-employed or an employee.

The arguments based on Article 1 of the First Protocol were rejected by Burton J.²⁴ The additional tax costs were not so severe as to amount to a de facto confiscation of property or to a fundamental interference with the financial position of the taxpayers, or an abuse of United Kingdom's right to levy taxes. On the issue of uncertainty, the UK law on the question whether an individual is employed or self-employed is the common law based upon precedents: Burton J did not consider that this created unacceptable uncertainty in the application of the tax law.

The argument based upon uncertainty in the law is particularly interesting. There is authority from the ECtHR that the rule of law requires that an individual should be able to know with certainty what his legal position is²⁵. This may be an area where there will be developments in future years: no-one would realistically deny that there are major areas of UK tax law where the legal position is far from certain and the taxpayer – even with the help of professional advice – may have difficulties in determining his liability.

²⁴ See paragraphs [38] to [51] of the judgment.

²⁵ See, especially, Sunday Times v. United Kingdom (1979 – 1980) 2 EHRR 245 at 271.

The House of Lords case which considered Article 1 of the First Protocol was R v. Dimsey²⁶. This was an appeal to the House of Lords arising out of a conviction in a criminal court for defrauding the Inland Revenue. One of the charges was that the defendant had failed to submit tax returns for certain companies which were resident in the UK (though incorporated abroad). An argument was raised on appeal against the convictions that anti-avoidance legislation in s.739 of the Income and Corporation Taxes Act 1988 deemed the income of such companies to be the income of the UK-residents who had established the companies. On the basis that the income was deemed to be the income of the individuals, the argument ran that the income could not also be that of the companies, so the companies had no corporation tax liability to be declared. This rather sophisticated argument did not appeal to the House of Lords.

The argument based upon Article 1 of the First Protocol was that, if the income was both deemed to be that of the individuals and also the income of the companies, there was double taxation. The House of Lords considered that an interpretation of s.739(2) to the effect that the income was both deemed to be the income of the individuals and remained the income of the companies was well within the margin of appreciation allowed to states in respect of tax legislation under Article 1 of the First Protocol. There was no reason to disturb the conviction on this ground.

²⁶ [2001] UK HL 46; [2001] STC 1520. See also the related decision in R v. Allen discussed under Article 6 below.

One area where Article 1 of the First Protocol has been raised in a number of cases has concerned the seizure of goods for non-payment of excise duties and the forfeiture of vehicles in which such goods had been imported.

An example is the decision of the VAT & Duties Tribunal in Edinburgh in Speyside Bonding Company Ltd v. Commissioners of Customs & Excise²⁷. In that case, the appellant supplied a quantity of goods subject to excise duty to a customer with whom there was an existing arrangement - approved by the Commissioners of Customs & Excise - to defer payment of excise duty until the goods were sold by the customer. However, the customer's approval was subsequently revoked by the Commissioners, the goods were seized from the customer, and the appellant was assessed to payment of the excise duty which should not have been deferred. The appellant argued that the seizure of the goods was a breach of their right to property. The Tribunal rejected this argument on the grounds that the goods were not in the possession of the appellant when they were seized so there could not be any infringement of their right to property. The Tribunal referred specifically to the second paragraph of Article 1 which permitted legitimate measures to secure the collection of tax.

The United Kingdom has a major problem of bootlegging: that is, individuals purchasing goods in other European countries – mainly France and Belgium – and then bringing these goods back to the UK and selling them. The levels of excise duties in Continental Europe are significantly lower than they

are in the UK; goods imported and sold in this way damage the UK Government's revenue from excise duties. Travellers to Continental Europe are entitled to bring back goods bought abroad provided they are not imported for commercial use: that is, in particular, they are not imported for sale. The Customs & Excise have indicative limits of the amount of alcohol and tobacco which a traveller might be expected to bring in for personal use. Where an individual imports more than that amount, the goods are liable to forfeiture and - particularly relevant to this point - any vehicle in which the goods were transported is liable to confiscation and will only be returned to the owner in exercise of the discretion of the Commissioners of Customs & Excise. The Commissioners have a policy of only returning vehicles in very exceptional circumstances.

This policy has been subject to challenge in a number of cases. In Whiting v. Commissioners of Customs & Excise²⁸ the Appellant challenged a substantial charge made to her for the return of a vehicle seized by the Commissioners. The question was raised whether Article 6(1) of the Convention applied and the VAT & Duties Tribunal, referring to the decision of the ECtHR in Air Canada v. United Kingdom,²⁹ noted that the proceedings concerning seizure of the vehicle were not criminal proceedings and that the opportunity of obtaining judicial review satisfied the requirements of Article 6(1).

²⁷ Case No.E00164 (EDN/00/8003), decision of 17th July 2001.

In a number of cases, owners of seized vehicles have argued that the refusal to return the vehicle infringed their right to property. The decisions of the VAT & Duties Tribunal are split on this point at the present moment. In Dereczenik v. Commissioners of Customs & Excise³⁰ and in Hopping v. Commissioners of Customs & Excise³¹ the Tribunal held that the refusal to return the vehicle was not a disproportionate response so as to constitute an infringement of the right to property. However, in the two recent cases of Williams v. Commissioners of Customs & Excise³² and in Lindsay v. Commissioners of Customs & Excise³³ the Tribunal held that it was disproportionate to refuse to return a car where its value was significantly in excess of the amount of excise duty avoided on the importation of the products. In Williams the vehicle was worth £6,000 and the excise duty was £2,932; in Lindsay the vehicle was worth £10,500 and the excise duty was approximately £3,500: in both cases the Tribunal held that the seizure and refusal to restore the vehicle did not achieve the fair balance required for the measure to be proportionate.

It is likely that this conflict between different tribunals will be resolved within the next few months by an appeal to the High Court or Court of Appeal.

²⁸ Case No.E00143 (LON/00/8002), decision of the 1st August 2000.

²⁹ (1995) 20 EHRR 150.

³⁰ Case No.C00138 (LON/01/7067), decision of the 7th June 2001.

³¹ Case No.E00170 (LON/01/8003), decision of the 9th October 2001.

³² Case No.E00171 (LON/01/8018), decision of the 10th October 2001.

³³ Case No.E00174 (LON/00/8053), decision of 1st November 2001.

Before leaving Article 1 of the First Protocol one might note that, with the exception of these last two cases concerning the refusal to restore confiscated vehicles, in none of the cases was the taxpayer successful.

Article 6: Right to a Fair Trial

Because the European Convention had not been directly applicable in UK domestic law prior to 2nd October 2000, a number of basic questions concerning the applicability of Article 6 have not previously been resolved. In a number of cases, the Court simply presumed either that Article 6 was or was not inapplicable.

Thus, in Cartz v. Commissioners of Customs & Excise³⁴ the VAT & Duties Tribunal heard an appeal against a disputed assessment for value added tax on 2nd October 2000 (the date the Human Rights Acts went into force). The taxpayer did not appear at the appeal and the Tribunal asked itself whether there might be any breach of his human rights by continuing with the appeal in his absence. The Tribunal noted that the appeal did not involve criminal proceedings (but merely a best estimate of the amount of VAT under-assessed) and so Article 6 was not applicable.

³⁴ Case No.16905 (MAN/99/509), decision of 24th October 2000.

Similarly, in Sher Ali (Trading as the Bengal Brasserie) v. Commissioners of Customs & Excise,³⁵ where the hearing commenced before the Act came into force but continued after 2nd October 2000, the Tribunal took the view that, based on current jurisprudence, Article 6 did not apply to an appeal against an assessment of a person's tax liability. It would have applied to cases involving dishonesty, though that was not involved in this case.

In one High Court case – Bennett v. Commissioners of Customs & Excise (No.2)³⁶ it was assumed that Article 6 applied to an appeal against failure to register for VAT, though the judge was doubtful whether this was correct. In any event, he concluded that there had been no breach of Article 6.

In a Court of Appeal case – Eagerpath Limited v. Edwards (Inspector of Taxes)³⁷ – it was conceded that an appeal against a corporation tax assessment did not involve the determination of civil rights and obligations so Article 6 was not applicable.

All of those cases preceded the decision of the ECtHR in Ferrazzini v. Italy³⁸ which confirms the existing jurisprudence of the ECnHR and ECtHR to the effect that the determination of tax liability in ordinary proceedings does not constitute the determination of civil rights and obligations. It remains open whether a court in the United Kingdom might take a different view to the

³⁵ Case No.16952 (MAN/96/699), decision of 20th November 2000.

³⁶ [2001] STC 137.

³⁷ [2001] STC 26.

ECtHR in Ferrazzini on the grounds that “civil rights and obligations” would clearly include tax liabilities under the common law, and the decision in Ferrazzini is either wrong or should not otherwise be applied in this country.

One of the major issues of applicability of Article 6 - which needed to be faced by the UK courts - was the question whether any of the penalties imposed for offences relating to taxation constituted criminal charges for Convention purposes. Both the direct tax system administered by the Inland Revenue and the indirect tax system administered by the Commissioners of Customs & Excise employ a range of penalties, the most serious of which allow a penalty up to a maximum of 100% of the tax or duty avoided. The starting point was to determine whether these offences constituted criminal charges.

In the case of Murrell v. Commissioners of Customs & Excise³⁹ the VAT & Duties Tribunal was sitting the day after the Human Rights Act came into force to hear an appeal against a substantial penalty for civil evasion of VAT. Off its own bat, the Tribunal raised the question of the European Convention, concluded that Article 6 applied to the civil evasion penalty on the grounds that it was a criminal charge for Convention purposes, and then went on to hold that evidence given by the taxpayer in an interview without a caution was to be excluded in deciding the appeal. The representative of the Commissioners of

³⁸ (Application No.44759/98) [2001] STC 1314, decision of 12th July 2001.

³⁹ Case No. 16878 (LON/99/121), decision of 13th October 2000.

Customs & Excise declined to argue the human rights point, and was penalised as to costs for not being prepared to argue the issue.

In the VAT and duties field the test case of Han & Yao (and others) v. Commissioners of Customs & Excise⁴⁰ was referred to the Court of Appeal to determine the applicability of Article 6. The case concerned the maximum 100% penalties for dishonest evasion of value added tax under s.60 of the Value Added Tax Act 1994 and for dishonest evasion of excise duty under s.8 of the Finance Act 1994. Having considered the Strasbourg case law on the subject, the Court of Appeal concluded (not particularly surprisingly) that these penalties involved the determination of criminal charges within the scope of Article 6.

On the direct tax side, the question of the maximum 100% penalty under s.95 of the Taxes Management Act 1970 for fraudulently or negligently making incorrect tax returns was raised on appeal in the case of King v. Walden (Inspector of Taxes).⁴¹ Jacob J confirmed that the penalty involved a criminal charge, but then went on to conclude that there had been no breach of any of the rights guaranteed by Article 6.

In a sense, these two cases resolve the easy question whether a maximum 100% penalty involves the determination of a criminal charge. In the VAT field, in particular, there are a range of penalties with their maximum below

⁴⁰ [2001] EWCA Civ 1040; [2001] STC 1188, decision of 3rd July 2001.

100%. Presumably, in the next couple of years, tribunals and courts will have to determine which if any of these constitute criminal charges for Convention purposes.

Article 6 – Rights Guaranteed

Having decided that Article 6 (criminal) applies to proceedings involving certain of the tax-geared penalties, the question that had then to be faced was whether the taxpayer's right to a fair trial had been infringed by the proceedings.

In Wing Lee Carry Out v. Commissioners of Customs & Excise⁴² the VAT & Duties Tribunal assumed that Article 6 applied to an appeal against assessment of unpaid VAT and the imposition of a civil penalty based upon dishonesty. The Tribunal noted that the provision of an interpreter was now required by the Convention, and that legal aid would also need to be provided. One might contrast this case with Ala Miah (Trading as Royal Balti) v. Commissioners of Customs & Excise⁴³ where, on an appeal against an assessment to VAT, the Tribunal concluded that Article 6 did not apply and that it was for the appellant to make provision for an interpreter.

⁴¹ [2001] STC 822.

⁴² Case No.17047 (EDN/99/219), decision of 24th January 2001.

⁴³ Case No.17216 (MAN/00/687), decision of 4th May 2001.

In Nene Packaging Limited & Others v. Commissioners of Customs & Excise⁴⁴ a challenge was mounted to the rules of the VAT & Duties Tribunal relating to disclosure of arguments and evidence by the appellants and by the Commissioners. The Tribunal concluded that the existing rules provided adequate protection for the taxpayer.

Undoubtedly the most difficult issue in cases where Article 6 applies to tax proceedings (on the grounds that they involve the determination of a criminal charge) has been the right of silence. Linked with this is the question whether existing investigation procedures used by the Inland Revenue and by Customs & Excise induce taxpayers to make disclosure of incriminating information which may subsequently be used against them.

The Inland Revenue has a long-standing practice in cases of alleged serious tax avoidance of interviewing the taxpayer (and sometimes his advisers) under the “Hansard” procedure. Under this procedure (which was originally announced in Parliament and recorded in the debates – hence the reference to Hansard) the taxpayer is told that the Revenue suspect that he has been engaged in serious tax avoidance which might lead to a criminal prosecution. However, it is the Revenue’s practice that, if the taxpayer cooperates, they will not prosecute but will instead seek to resolve the tax matter with administrative penalties. The question arises whether this constitutes an inducement to the taxpayer to make incriminating disclosures which may

⁴⁴ Case No.17365 (LON/00/355), decision of the 17th August 2001.

subsequently be used against him. Customs & Excise have a similar procedure under Notice 730.

In Murrell v. Commissioners of Customs & Excise⁴⁵ the VAT & Duties Tribunal excluded evidence given by the taxpayers at interview where they were not reminded of their right to silence. In Wing Lee Carry Out v. Commissioners of Customs & Excise⁴⁶, however, the Tribunal considered that an interview under the Notice 730 procedure did not constitute such an inducement as to vitiate any responses by the taxpayers. In Ajay Patel v. Commissioners of Customs & Excise⁴⁷ the Tribunal followed the decision in Murrell and decided to disregard any answers given by the taxpayers in interviews under the Notice 730 procedure. The same approach was adopted in Khan & Khan (trading as Bombay Tandoori Restaurant) v. Commissioners of Customs & Excise⁴⁸. By contrast, the Tribunal in W & B Sharland (trading as Sharlands Fir Tree Café) v. Commissioners of Customs & Excise⁴⁹ held that there was no hard and fast rule that evidence given in interviews under the procedure set out in Notice 730 had to be excluded: to exclude all interviews would be disproportionate. The Tribunal decided to admit evidence given at tape-recorded interviews on the grounds that the interviews were properly conducted in accordance with Notice 730, and that the appellants made no admissions at the interviews which damaged their case.

⁴⁵ Supra.

⁴⁶ Supra.

⁴⁷ Case No.17248 (LON/99/1144), decision of 16th May 2001.

⁴⁸ Case No.17379 (LON/00/0216), decision of 28th August 2001.

⁴⁹ Case No.17387 (LON/99/1361), decision of 13th September 2001.

All these decisions from the VAT & Duties Tribunals need to be seen now in the light of the judgment of the House of Lords in the case of R. v. Allen⁵⁰. In that case the defendant - who appealed against a criminal conviction for defrauding the Inland Revenue - had been interviewed under the “Hansard” procedure. The taxpayer had also been required by a notice issued under s.20(1) of the Taxes Management Act 1970 to supply certain information. The taxpayer answered certain questions put to him and, in compliance with the notice, delivered a schedule of assets which was subsequently used in connection with one of the criminal charges against him.

The taxpayer argued that in requiring him to supply a schedule of assets (upon which he was subsequently charged) his right to a fair trial had been infringed because he was compelled under threat of penalty to incriminate himself by providing the schedule. It was also argued that the taxpayer had been subjected to an inducement to provide the schedule.

The House of Lords noted that it was self-evident that to ensure the due payment of taxes a state must have the power to require citizens to inform it of the amount of their income and to have sanctions available to enforce the provision of information. More contentiously, the House concluded that the issue of a s.20(1) notice requiring the disclosure of information cannot constitute a violation of the right against self-incrimination.

⁵⁰ [2001] UKHL 45; [2001] STC 1537 – see also the related case of R. v. Dimsey discussed above.

With regard to the argument that the Hansard procedure had constituted an inducement, Lord Hutton noted that the inducement was to give true and accurate information but the taxpayer gave false information. Lord Hutton distinguished between giving true information and false information:

“[35] ... To the extent that there was an inducement contained in the Hansard statement, the inducement was to give true and accurate information to the revenue, but the accused in both cases did not respond to that inducement and instead of giving true and accurate information gave false information. Therefore, in my opinion, the appellant’s argument in this case that he was induced by hope of non-institution of criminal proceedings held out by the revenue to provide the schedule and that its provision was therefore involuntary is invalid. If, in response to the Hansard statement, the appellant had given true and accurate information which disclosed that he had earlier cheated the revenue and had then been prosecuted for that earlier dishonesty, he would have had a strong argument that the criminal proceedings were unfair and an even stronger argument that the Crown should not rely on evidence of his admission, but that is the reverse of what actually occurred.”
(emphasis added)

Lord Hutton appears to be saying that, if in response to the Hansard statement a taxpayer is induced to give accurate information, that information cannot subsequently be relied upon in a criminal prosecution. More interestingly, if a claim for substantial penalties involves a criminal charge for Convention purposes, it would seem to follow that truthful admissions made under the Hansard procedure equally cannot be used against the taxpayer.

Since in the Hansard procedure – and in the Notice 730 procedure for indirect taxes – there will almost always be a question of seeking substantial penalties, this decision leaves in doubt the future of these procedures as part of the investigation in tax matters.

Article 14: Discrimination

There have been no reported cases since the Human Rights Act went into force where discrimination has been raised in a tax context. There is, however, a pending case, R (on the application of Adrian John Wilkinson) v. Commissioners of Inland Revenue, which will be heard in December⁵¹.

Article 8: Protection of Privacy

There have been two tax cases where protection of privacy has been raised.

The first case was R (on the application of Morgan Grenfell & Co Limited) v. Special Commissioner of Income Tax⁵² which concerned the Inland Revenue's proposed issue of a notice under s.20(1) of the Taxes Management Act 1970 to require disclosure of documents. The issue of such a notice requires the consent of a Special Commissioner of Income Tax (that is, an independent member of the first-instance tax tribunal), but the proceedings before the Special Commissioners to obtain consent are only attended by representatives of the Revenue. Morgan Grenfell sought to challenge the procedure on the grounds that they should be entitled to attend the hearing before the Special Commissioner, and also on the grounds that the information

⁵¹ Since the author of this article is involved in that case, it would be inappropriate to comment further on it.

⁵² [2001] EWCA Civ 329; [2001] STC 497, decision of 2nd March 2001.

sought to be obtained was covered by legal professional privilege. The Court of Appeal concluded, however, that the issue of the information notice fell within the exception to the right of privacy in Article 8(2) of the Convention, that the UK legislation provided that legal professional privilege did not apply and the principle of legality required the courts to accept this. The Court also held that the Convention did not require that the taxpayer should be heard on an application to issue a s.20 notice.

In Guyer v. Walton (Inspector of Taxes)⁵³ a taxpayer appealed against a notice issued by the Inland Revenue under s.19A of the Taxes Management Act 1970 to require production of various documents. The taxpayer was a solicitor and he argued that the disclosure of the documents would infringe the right to privacy of his clients. The Special Commissioner concluded that there was ample justification in Article 8(2) for the issue of the notice since it was issued according to law, in pursuit of a legitimate aim, and was necessary in a democratic society for protecting the taxation system and the Revenue.

The positive side of this decision is the recognition that the seeking of information by revenue authorities might infringe the right to privacy in Article 8. On that basis, the interference with the right to privacy needs to be justified within the terms of Article 8(2) for it to be legitimate. It must not be disproportionate.

⁵³ [2001] STC (SCD) 75, decision of 19th March 2001.

Conclusions

It is fair to say that the UK tribunals and courts are still at the early stage of becoming accustomed to the application of the European Convention in tax matters. The fact that there was no basis in domestic law for a direct application of the Convention prior to 2nd October 2000 has meant that many issues were not resolved in the past. As a consequence, some basic issues are now being resolved, including, in particular, the applicability of Article 6 and the rights guaranteed by Article 6 where substantial penalties are involved.

In that respect, the United Kingdom is rather fortunate in having an existing body of case law from Strasbourg to which reference can be made. What this article shows is that the UK has begun making its own contribution to the case law on the application of the Convention in tax matters.