

# The “Determination of a Criminal Charge” and Tax Matters

## Introduction

On 23 November 2006, the Grand Chamber of the European Court of Human Rights (ECtHR) issued its judgment in *Jussila v. Finland*.<sup>1</sup> That case should now be regarded as the leading case on the issue of when administrative penalties imposed in a taxation context involve the “determination of a criminal charge” for the purposes of Art. 6 of the European Convention on Human Rights (ECHR).

## *Jussila v. Finland*

### The background

As readers will be aware, ordinary disputes over the liability or quantum of a tax assessment do not generally fall within the scope of the *right to a fair trial* in Art. 6 of the ECHR. This was confirmed in 2001 in the case of *Ferazzini v. Italy*<sup>2</sup> though that decision has been criticized. Since, however, at least the decision in *Bendenoun v. France*,<sup>3</sup> the ECtHR has accepted that administrative fines imposed in tax matters may involve the determination of a criminal charge so as to bring into play the guarantees of a fair trial in criminal cases in Art. 6 of the ECHR. This is extremely important, as those guarantees apply not simply to the hearing of the case, but to the whole process from the time that it becomes clear that the taxpayer faces a criminal charge in the form of an administrative penalty until the final determination of the liability to the penalty, on appeal if necessary. In particular, the right to a determination within a reasonable time applies in those circumstances, and many cases before the ECtHR have turned on the question of whether or not the liability to the criminal charge has been determined within a reasonable time.

Subsequent to *Bendenoun*, there has been a line of jurisprudence before the ECtHR in Strasbourg, as well as before national courts, determining whether or not particular administrative penalties fell within the scope of a “criminal charge”. These cases considered whether or not penalties imposed at a maximum of 100% or at various lower percentages constituted criminal charges. The latest of the cases prior to *Jussila* was *Västberga Taxi Aktiebolag v. Sweden*,<sup>4</sup> in which it was accepted that a 20% tax-gearred penalty constituted a criminal charge and also indicated that a 10% penalty might possibly constitute a criminal charge. *Jussila*, in effect, draws the line at the end of this development of jurisprudence.

### The case

In *Jussila*, the taxpayer was found to have made errors in his book-keeping and his VAT liability was reassessed. A

10% VAT “surcharge” was imposed amounting to just over EUR 300. The taxpayer challenged the liability to tax and surcharge and requested an oral hearing. The request was refused and the taxpayer subsequently challenged the refusal to hold an oral hearing as being contrary to Art. 6 of the ECHR. The ECtHR held by a majority that an oral hearing in criminal cases was not an absolute requirement. The most interesting issue, however, was the applicability of Art. 6 of the ECHR. The majority of the Grand Chamber emphasized that the minor nature of the penalty was not decisive in concluding whether or not the events were criminal in nature. They drew upon the jurisprudence surrounding the “*Engel*”<sup>5</sup> criteria for the determination of a criminal offence. If a penalty was classified as criminal under domestic law, then it was criminal for the purposes of Art. 6 of the ECHR. If, however, a penalty was classified as administrative, then it was necessary to consider the nature of the offence and the degree of severity of the penalty risk. In considering the nature of the offence, it was relevant to consider whether or not the penalty applied to all citizens in their capacity as taxpayers, whether or not the penalty was intended as a deterrent or was punitive, whether or not it was imposed as a general rule, and whether or not the penalty was substantial. Looking at the 10% VAT surcharge, the Grand Chamber concluded that it applied to all taxpayers and that it was intended as a deterrent and to encourage future compliance. Consequently, it involved the determination of a criminal charge, even though it was not of a substantial amount.

Following *Jussila*, it is likely that virtually all penalties computed as a percentage of the tax under-charged will be regarded as involving the determination of a criminal charge for the purposes of Art 6 of the ECHR. It is likely that only small, fixed penalties (for example, for delay in submitting a tax return) would not be regarded as involving the determination of a criminal charge. The consequence is, therefore, that virtually every tax case in which an administrative penalty is assessed will engage the criminal guarantees in Art 6 of the ECHR.

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1. Application number 73053/01, reported in (2006) 9 ITLR 662.  
 2. Application number 44759/98, reported in (2001) 3 ITLR 918, [2001] STC 1314, 34 EHRR 1068 and ECHR 2001-VII.  
 3. Application number 12547/86, reported in (1994) 18 EHRR 54.  
 4. Application number 36985/97, reported in (2002) 5 ITLR 65.  
 5. See *Engel v. Netherlands (No 1)* application numbers 5100/71, 5101/71 and 5102/71, reported in (1976) 1 EHRR 647.

### The implications

Two crucial issues arise from the decision in *Jussila*, which will need to be clarified over the coming years. First, the Grand Chamber, while recognizing that the 10% VAT surcharge involved the determination of the criminal charge, very reasonably concluded that there were “criminal charges” of differing weights. Tax surcharges “differ from the hard core of criminal law; consequently the criminal head guarantees will not necessarily apply with their full stringency...”<sup>6</sup> While this may be an entirely logical comment, what it means in practice will need to be clarified. The Grand Chamber seems to be saying that the criminal head guarantees will apply to tax penalties, but not with the full vigour. They give an example that, in the tax context, it may be appropriate for the criminal penalty to be imposed in the first instance by an administrative or non-judicial body, while that would not be appropriate in the “hard core of criminal law”.

The difficulty is in then understanding the way in which the criminal guarantees will apply in tax matters, if they do not apply with their full stringency. To take an example, an implicit guarantee in criminal cases is the “right to silence”: the right not to supply information, which may be used to subsequently convict the person who supplied that information. How far does this guarantee apply in tax matters? Clearly it cannot apply so that the taxpayer can refuse to complete his tax return on the basis that, if he made inaccurate entries in the return, he would face an administrative penalty. What if, however,

an investigation has been opened into the taxpayer’s affairs, and the probability of the imposition of a substantial administrative penalty is very high: may the taxpayer then refuse to supply information? *Jussila* has opened up a whole new line of enquiry, which will need to be clarified by jurisprudence.

Second, an issue which is left open by *Jussila* is the application of the criminal-head guarantees in “mixed cases”. Tax cases are likely to be almost unique in the spectrum of Art 6 of the ECHR, as those cases will usually involve both (1) a challenge to the underlying tax liability (which, as explained, falls outside Art. 6) and (2) a challenge to an administrative penalty, which, following *Jussila*, will engage the criminal head guarantees. How far should the criminal head guarantees flow over to the element of the appeal against the tax liability itself? Put another way (and probably more accurately), what guarantees need to be in place with regard to the challenge to the underlying tax assessment in order that the criminal head guarantees with regard to the administrative penalties are not infringed? This too is a matter that will need to be resolved by subsequent jurisprudence.

In some senses, *Jussila* is the end of the line of jurisprudence that began with *Bendenoun*. More significant, however, it is likely to be itself the start of a wholly new line of jurisprudence to resolve some of these outstanding issues.

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6. See Para. [43] of the judgment of the Grand Chamber.